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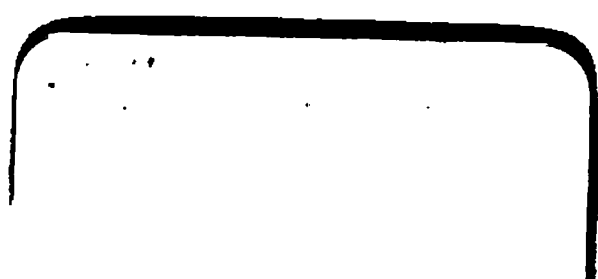
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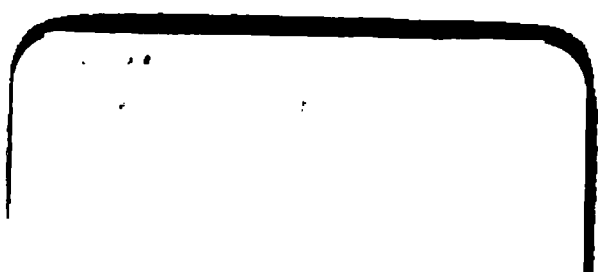
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AMERICAN NEGLIGENCE CASES

[CITED AM. NEG. CAS.]

**A COMPLETE COLLECTION OF ALL REPORTED NEGLIGENCE CASES
DECIDED IN THE UNITED STATES SUPREME COURT, THE UNITED
STATES CIRCUIT COURT OF APPEALS, ALL THE UNITED
STATES CIRCUIT AND DISTRICT COURTS, AND THE
COURTS OF LAST RESORT OF ALL THE STATES
AND TERRITORIES, FROM THE EARLIEST
TIMES, WITH SELECTIONS FROM
THE INTERMEDIATE COURTS.**

**TOPICALLY ARRANGED
WITH
NOTES OF ENGLISH CASES AND ANNOTATIONS**

**PREPARED AND EDITED
BY
WALTER J. EAGLE**

VOL. XVI

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PREFACE.

The subject of MASTER AND SERVANT, which is treated in Vols. 13, 14 and 15 AMERICAN NEGLIGENCE CASES, is continued in this volume (Vol. 16), following the plan adopted in the previous volumes devoted to the topic. The great mass of material on this important branch of the LAW OF NEGLIGENCE necessitates a continuance of the topic in this series of AMERICAN NEGLIGENCE CASES, but the whole will be completed and concluded in the next volume (Vol. 17).

Each State covered in this volume is, so far as the subject treated is concerned, complete. The cases reported, relating to the LIABILITY OF THE MASTER FOR INJURIES SUSTAINED BY EMPLOYEES, comprise all the decisions on the subject down to 1897, rendered in the courts of last resort in MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI (Supreme and Appellate), MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY (Supreme and Errors and Appeals) and NEW MEXICO, and the RAILROAD CASES in the NEW YORK COURT OF APPEALS and several leading NEW YORK cases on other branches of MASTER AND SERVANT LAW.

Especial attention is again called to the CLASSIFIED NOTES OF CASES which are given in this and the preceding volumes. These NOTES show the nature and cause of the injury, affirmance or reversal of judgment and the amount of the verdict in each case wherever the same is stated in the official report, together with a classification of the various branches of employment.

Numerous NOTES and ANNOTATIONS appear throughout the volume, together with an unusually large number of NOTES AND ABSTRACTS OF ENGLISH CASES. A complete list of NOTES is appended to the TABLE OF CASES REPORTED.

Attention is called to the INDEX and the TABLE OF CASES CLASSIFIED which precedes it, a reference to each of which will enable the practitioner to find, without difficulty, any particular case or point in his search for authority on a given topic arising out of the particular branch of the law of MASTER AND SERVANT covered in this volume.

The great number of cases herein is indicated by the list in the TABLE REPORTED, and the numerous NOTES throughout this volume.

MASTER AND SERVANT CASES which have not been reported in this or the preceding volumes will appear in the next volume and, as before stated, will conclude the topic in AMERICAN NEGLIGENCE CASES.

WALTER J. EAGLE.

NEW YORK, *September*, 1905.

TABLE OF CONTENTS.

MASTER AND SERVANT.

	PAGE.
PREFACE	iii
TABLE OF CONTENTS	v
TABLE OF CASES REPORTED	vii-xxxii
TABLE OF CASES CITED	xxxiii-xlii

CASES RELATING TO INJURIES TO EMPLOYEES, ARISING OUT OF VARIOUS CAUSES, SUCH AS COL- LISIONS, COUPLING CARS, DEFECTIVE APPLI- ANCES, ELEVATOR ACCIDENTS, EXPLOSIONS, FALLING OBJECTS, MACHINERY ACCIDENTS, MINING DISASTERS, RAILROAD ACCIDENTS, SCAFFOLDING AND STAGING DEFECTS, ETC., ETC.; DECIDED IN THE HIGHEST COURTS OF MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI (SUPREME AND APPELLATE), MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY (SUPREME AND ERRORS AND APPEALS) AND NEW MEXICO, AND NEW YORK RAIL- ROAD CASES IN THE COURT OF APPEALS AND SEVERAL LEADING NEW YORK CASES ON MACHINERY AND OTHER ACCIDENTS; ALSO ENGLISH CASES ON THE SAME TOPICS; FROM THE EARLIEST PERIOD TO 1897	1-850
TABLE OF CASES CLASSIFIED ACCORDING TO FACTS,	851-895
INDEX	897-999

五、

TABLE OF CASES REPORTED.

[Where a case is reported or referred to as a note in this volume the same is indicated by the letter n preceding the page on which it appears; as, for instance: *Abel v. Del. & H. Canal Co.*, 103 N. Y. 581...n807.

Notes of cases in this volume will be found, in the majority of cases, to contain the facts and extracts from the opinions rendered in the decisions reported herein.

Reference should also be made to the TABLE OF CASES CITED, which follows this TABLE, for leading cases frequently cited in the cases reported in this volume.]

A

<i>Abel v. Butler-Ryan Co.</i>	66 Minn. 16.....	206
<i>Abel v. Del. & H. Canal Co.</i>	103 N. Y. 581, 9 N. E. 325; see also 128 N. Y. 662, 28 N. E. 663.....	n807
<i>Abrahams v. Cal. Powder Works</i>	5 N. Mex. 479.....	n729
<i>Adams & West v. Iron Cliffs Co.</i>	78 Mich. 271, 44 N. W. 270.....	n74
<i>Albert v. Sweet</i>	116 N. Y. 363, 22 N. E. 762, aff'g 3 St. Rep. 738.....	n809
<i>Alcorn v. Chicago & A. R. Co.</i>	108 Mo. 81, 18 S. W. 188; 16 S. W. 229, 14 S. W. 943.....	n506
<i>Aldridge's Adm'r v. Midland Blast Fur- nace Co.</i>	78 Mo. 559.....	n431
<i>Alexander v. Tenn. & Los Carillos, etc., Mining Co.</i>	3 N. Mex. 255, 3 Pac. 735.....	n729
<i>Alexander Dye Works v. Roufosse</i>	57 N. J. L. 700.....	720
<i>Alford v. Metcalf Bros. & Co.</i>	74 Mich. 369, 42 N. W. 52.....	n52
<i>Althorf v. Wolfe</i>	22 N. Y. 355, aff'g 2 Hilt. 344.....	n749
<i>American Waterworks Co. v. Dough- erty</i>	37 Neb. 373, 55 N. W. 1051.....	n550
<i>Anderson v. Chicago, B. & Q. R. Co.</i>	35 Neb. 95, 52 N. W. 840.....	567
<i>Anderson v. H. C. Akeley Lumber Co.</i> ..	47 Minn. 178, 49 S. W. 664.....	n182
<i>Anderson v. L. T. Sowle Elev. Co.</i>	37 Minn. 539, 35 N. W. 382.....	n200
<i>Anderson v. Michigan Central R. Co.</i> ..	107 Mich. 591.....	98
<i>Anderson v. Minn. & N. W. R. Co.</i>	39 Minn. 523, 41 N. W. 104.....	353
<i>Anderson v. Morrison</i>	22 Minn. 274.....	192
<i>Anderson v. Nelson Lumber Co.</i>	67 Minn. 79.....	178
<i>Anderson v. Northern Mill Co.</i>	42 Minn. 424, 44 N. W. 315.....	199
<i>Appel v. Buffalo, N. Y. & Phila. R. Co.</i> ..	111 N. Y. 550, 19 N. E. 93.....	n813
<i>Arnold v. Del. & H. Canal Co.</i>	125 N. Y. 15, 25 N. E. 1064.....	n802
<i>Ashman v. Flint & P. M. R. Co.</i>	90 Mich. 567, 51 N. W. 645.....	n162
<i>Atchison, T. & S. F. R. Co. v. Martin</i> ..	7 N. Mex. 158.....	n729
<i>Atz v. Newark Lime & Cement Mfg. Co.</i>	59 N. J. L. 41.....	720

B

- Bahr v. Lombard, Ayres & Co.**..... 53 N. J. L. 265, 21 Atl. 190, 23 Atl. 167 689
- Bailey v. Rome, W. & O. R. Co.**..... 139 N. Y. 302, 34 N. E. 918, 54 N. Y. St. Rep. 550; rev'g 55 Hun, 509, 8 N. Y. Supp. 780, 29 N. Y. St. Rep. 775.....n787
- Bajus v. Syracuse, Bing. & N. Y. R. Co.** 103 N. Y. 312, 8 N. E. 529, rev'g 34 Hun, 153..... 817
- Balhoff v. Mich. Cent. R. Co.**..... 106 Mich. 606.....n101
- Balle v. Detroit Leather Co.**..... 73 Mich. 158, 41 N. W. 216..... 57
- Bancroft v. Boston & Maine R. R.**..... 67 N. H. 466.....n623
- Barbo v. Bassett**..... 35 Minn. 485, 29 N. W. 198..... 175
- Barnowsky v. Helson**..... 89 Mich. 523, 50 N. W. 989..... n53
- Baron v. Detroit & Cleveland Steam Nav. Co.**..... 91 Mich. 585, 52 N. W. 22..... n77
- Barry v. Hann. & St. J. R. Co.**..... 98 Mo. 62, 11 S. W. 308.....n500
- Batterson v. Chicago & G. T. R'y Co.** 53 Mich. 125, 18 N. W. 584..... 128
- Baulec v. N. Y. & Harlem R. Co.**..... 59 N. Y. 356, 48 How. Pr. 399, aff'g 62 Barb. 623, 5 Lans. 436, 12 Abb. Pr. N. S. 310.....n810
- Baylor v. Del., L. & W. R. Co.**..... 11 Vr. (40 N. J. L.) 23..... 652
- Beardsley v. Minn. St. R'y Co.**..... 54 Minn. 504, 56 N. W. 176.....n326
- Beesley v. F. W. Wheeler & Co.**..... 103 Mich. 196, 61 N. W. 658..... 75
- Benage v. Lake Shore & M. S. R'y Co.** 102 Mich. 72; id. 79; 60 N. W. 286n159
- Bengston v. Chicago, St. P., M. & O. R'y Co** 47 Minn. 486, 50 N. W. 531.....n354
- Bennett v. Syndicate Ins. Co.**..... 31 Minn. 254..... 214
- Berg v. Boston & M. Con. C. & S. Mining Co** 12 Mont. 212, 29 Pac. 545..... 519
- Berg v. Bousfield**..... 65 Minn. 355..... 188
- Berger v. St. Paul, M. & M. R'y Co.**..... 39 Minn. 78, 38 N. W. 814..... 251
- Bergquist v. Chandler Iron Co.**..... 49 Minn. 511, 52 N. W. 136..... 233
- Bergquist v. City of Minneapolis**..... 42 Minn. 471, 44 N. W. 530.....n221
- Bergstrom v. Staples**..... 82 Mich. 654, 46 N. W. 1035..... n11
- Berrigan v. N. Y., L. E. & W. R. Co.** 131 N. Y. 582, 30 N. E. 57.....n803
- Besel v. N. Y. Central & H. R. R. Co.** 70 N. Y. 171, rev'g 9 Hun, 457....n806
- Blair v. Grand Rapids & Ind. R. Co.**..... 60 Mich. 124, 26 N. W. 855..... 146
- Blanton v. Dold**..... 109 Mo. 64, 18 S. W. 1149..... 378
- Blessing v. St. Louis, K. C. & N. R'y Co.** 77 Mo. 410; 7 Mo. App. 594.....n498
- Blomquist v. Chicago, M. & St. P. R'y Co** 60 Minn. 426, 62 N. W. 818..... 261
- Blomquist v. Gt. N. R'y Co.**..... 65 Minn. 69.....n337
- Bluedorn v. Mo. Pac. R'y Co.**..... 108 Mo. 439; 121 Mo. 258; 18 S. W. 1103; 25 S. W. 943.....n506
- Boettger v. Scherpe & Koken Arch. Iron Co** 136 Mo. 531; 124 Mo. 87..... 421
- Bohn v. Chicago, R. I. & P. R'y Co.**..... 106 Mo. 429, 17 S. W. 580.....n502

TABLE OF CASES REPORTED.

ix

Bohn v. Havemeyer.....	114 N. Y. 296, 21 N. E. 402, aff'g 46 Hun, 557.....	846
Boldt v. N. Y. Central R. Co.....	18 N. Y. 432.....	n815
Booth v. Boston & Albany R. Co.....	73 N. Y. 38; 67 N. Y. 532, mem..	766
Borck v. Michigan Bolt & Nut Works..	111 Mich. 129.....	n28
Borden v. Del., L. & W. R. Co.....	131 N. Y. 671, 30 N. E. 586.....	n810
Botsford v. Mich. Cent. R. Co.....	33 Mich. 256.....	n127
Bowen v. Chicago, B. & K. C. R'y Co..	95 Mo. 268, 8 S. W. 230.....	n504
Bradley v. N. Y. Central R. Co.....	62 N. Y. 99, aff'g 3 Sup. (T. & C.) 288	n816
Breig v. Chicago & N. W. R'y Co....	98 Mich. 222, 57 N. W. 118.....	131
Brennan v. Mich. Cent. R. Co.....	93 Mich. 156, 53 N. W. 358.....	n155
Bresnahan v. Mich. Cent. R. Co.....	49 Mich. 410, 13 N. W. 797.....	146
Brewer v. Flint & P. M. R. Co.....	56 Mich. 620, 23 N. W. 440.....	n130
Brick v. Rochester, N. Y. & Penn. R. Co	98 N. Y. 211.....	n815
Brickner v. N. Y. Central R. Co.....	49 N. Y. 672, aff'g 2 Lans. 506....	n747
Britton v. Northern Pac. R. Co.....	47 Minn. 340, 50 N. W. 231.....	n353
Broderick v. Detroit Union, etc., Co....	56 Mich. 261, 22 N. W. 802.....	n54
Brooks v. Miss. Cotton Oil Co.....	76 Miss. 874.....	n359
Brothers v. Cartter.....	52 Mo. 372.....	428
Brown v. Concord & Montreal R. R....	68 N. H. 518.....	n625
Brown v. Gilchrist.....	80 Mich. 56, 45 N. W. 82.....	n76
Brown v. Minn. & St. L. R'y Co.....	31 Minn. 553, 18 N. W. 834.....	n351
Brown v. Winona & St. Peter R. Co..	27 Minn. 162, 6 N. W. 484.....	278
Brownell v. Pac. R. Co.....	47 Mo. 239.....	n498
Browning v. Wabash Western R'y Co..	124 Mo. 55, 27 S. W. 644.....	n499
Buckley v. Gutta Percha & Rubber Mfg. Co	113 N. Y. 540, 21 N. E. 717, rev'g 41 Hun, 450	842
Buckner v. Rich. & Dan. R. Co.....	72 Miss. 873, 18 So. 449.....	369
Buffington v. Atl. & Pac. R. Co.....	64 Mo. 246.....	n481
Bunnell v. St. Paul, M. & M. R'y Co....	29 Minn. 305, 13 N. W. 129.....	n354
Burdict v. Pac. R. Co.....	123 Mo. 221, 27 S. W. 453.....	484
Burke v. Parker, Webb & Co.....	107 Mich. 88.....	n44
Burlington & Missouri R. Co. v. Crock- ett	17 Neb. 570, 24 N. W. 219.....	n577
Burnes v. Kansas City, Ft. S. & M. R. Co	129 Mo. 41, 31 S. W. 347.....	n507
Burnham v. Concord & Montreal R. R..	68 N. H. 567.....	624
Bushby v. N. Y., L. E. & W. R. Co..	107 N. Y. 374, 14 N. E. 407, aff'g 37 Hun, 104.....	n805
Byrnes v. N. Y., L. E. & W. R. Co....	113 N. Y. 251, 21 N. E. 50, rev'g 14 N. Y. St. Rep. 554.....	n804

C

Cagney v. Hann. & St. J. R. Co.....	69 Mo. 416.....	n508
Campbell v. Northern Pac. R. Co.....	51 Minn. 193, 53 N. W. 768.....	n346
Caniff v. Blanchard Nav. Co.....	66 Mich. 638, 33 N. W. 744.....	n77

Capital City Oil Works v. Black.....	70	Miss. 8, 12 So. 26.....	375
Card v. Eddy (Receivers, etc.).....	129	Mo. 510; 24 S. W. 746; 28 S. W. 753; id. 979.....	479
Carlson v. N. W. Telep. Exch. Co....	63	Minn. 428.....	220
Carroll v. Minn. Valley R. Co.....	14	Minn. 57; 13 Minn. 30.....	343
Carroll v. Williston.....	44	Minn. 287, 46 N. W. 352.....	176
Catlin v. Mich. Cent. R. Co.....	66	Mich. 358, 33 N. W. 515.....	n161
Casey v. Grand Trunk R'y Co.....	68	N. H. 162.....	624
Chapman v. Erie R'y Co.....	55	N. Y. 579, rev'g 1 Sup. (T. & C.) 526	n808
Chicago, Burlington & Quincy R. Co. v. Barnard	32	Neb. 306, 49 N. W. 362.....	563
Chicago, Burlington & Quincy R. Co. v. Bell	44	Neb. 44, 62 N. W. 314.....	581
Chicago, Burlington & Quincy R. Co. v. Clark (also Henkle, Dunkel, Thomas, Jordan, and Stanley — six actions against the C., B. & Q. R. Co.)	26	Neb. 645, 42 N. W. 703.....	578
Chicago, Burlington & Quincy R. Co. v. Howard	45	Neb. 570, 63 N. W. 872.....	569
Chicago, Burlington & Quincy R. Co. v. Sullivan	27	Neb. 673, 43 N. W. 415.....	570
Chicago, Burlington & Quincy R. Co. v. Wymore	40	Neb. 645, 12 Am. Neg. Cas. 229n.	590
Chicago & N. W. R'y Co. v. Bayfield..	37	Mich. 205.....	87
Christianson v. Chicago, St. P., M. & O. R'y Co	67	Minn. 94; 61 Minn. 249.....	314
Church v. Chicago & A. R. Co.....	119	Mo. 203, 23 S. W. 1056.....	n510
Church v. Chicago, M. & St. P. R'y Co..	50	Minn. 218, 52 N. W. 647.....	n325
Clapp v. Minn. & St. L. R'y Co.....	30	Minn. 465, 16 N. W. 358; 33 Minn. 22, 21 N. W. 844; 36 Minn. 6, 29 N. W. 340.....	306, 307
Clark v. St. Paul & S. C. R. Co.....	28	Minn. 128, 9 N. W. 75.....	280
Clark Mile-End Spool Cotton Co. v. Shaffery	58	N. J. L. 229.....	716
Clark Thread Co. v. Bennett.....	58	N. J. L. 404.....	715
Cleghorn v. N. Y. Central & H. R. R. Co.	56	N. Y. 44.....	n814
Cleveland v. Newsom.....	45	Mich. 62, 7 N. W. 222.....	n83
Collins v. Laconia Car Co.....	68	N. H. 196.....	n630
Collins v. St. Paul & S. C. R. Co.....	30	Minn. 31, 14 N. W. 60.....	n352
Collyer v. Penn. R. Co.....	49	N. J. L. 59, 6 Atl. 437.....	665
Comben v. Belleville Stone Co.....	59	N. J. L. 296.....	719
Condon v. Mo. Pac. R'y Co.....	78	Mo. 567.....	n469
Cone v. Del., L. & W. R. Co.....	81	N. Y. 206, aff'g 15 Hun, 172.....	n807
Conger v. Flint & P. M. R. Co.....	86	Mich. 76, 48 N. W. 695.....	n160
Connelly v. Minn. Eastern R'y Co.....	38	Minn. 80, 35 N. W. 582.....	354
Connolly v. Davidson.....	15	Minn 519.....	237
Connor v. Chicago, R. I. & P. R. Co....	59	Mo. 285.....	461

TABLE OF CASES REPORTED.

xi

Conroy v. Vulcan Iron Works.....	62 Mo. 35; 6 Mo. App. 102; 75 Mo. 651	377
Conway v. Furst.....	57 N. J. L. 645.....	n698
Cook v. Hann. & St. J. R. Co.....	63 Mo. 398.....	n512
Cook v. St. Paul, M. & M. R'y Co.....	34 Minn. 45, 24 N. W. 311.....	247
Coon v. Syracuse & U. R. Co.....	5 N. Y. 492, aff'g 6 Barb. 231.....	n737
Coontz v. Mo. Pac. R'y Co.....	116 Mo. 669; 121 Mo. 653; 22 S. W. 572; 26 S. W. 661.....	n497
Coops v. Lake Shore & M. S. R'y Co...	66 Mich. 448, 33 N. W. 541.....	n147
Coots v. City of Detroit.....	75 Mich. 628, 43 N. W. 17.....	n83
Coppins v. N. Y. Central & H. R. R. Co.	122 N. Y. 557, 25 N. E. 915.....	n804
Corcoran v. Holbrook.....	59 N. Y. 517.....	n793
Corcoran v. Del., L. & W. R. Co.....	126 N. Y. 673, 27 N. E. 1022.....	n808
Cornelson v. Eastern R'y Co.....	50 Minn. 23, 52 N. W. 224.....	n344
Covey v. Hann. & St. J. R. Co.....	86 Mo. 635.....	n508
Cracker Co. v. Palmer.....	28 Neb. 307, 44 N. W. 463.....	n602
Crandall v. McIlrath (Receiver, etc.)...	24 Minn. 127.....	n358
Crane v. Mo. Pac. R'y Co.....	87 Mo. 588.....	n507
Craver v. Christian.....	36 Minn. 413, 31 N. W. 457; 34 Minn. 397, 26 N. W. 8.....	n175
Cregg v. Chicago & W. M. R'y Co.....	91 Mich. 624, 52 N. W. 62.....	n155
Crispin v. Babbitt.....	81 N. Y. 516, 37 Am. Rep. 521.....	820
Criswell v. Mont. Cent. R'y Co.....	17 Mont. 189; 18 Mont. 167.....	527
Crown v. Orr.....	140 N. Y. 450, 35 N. E. 648, 55 N. Y. St. Rep. 834; rev'g 54 N. Y. St. Rep. 308, 71 Hun, 613, 24 N. Y. Supp. 620.....	844
Crystal Ice Co. v. Sherlock.....	37 Neb. 19, 55 N. W. 294.....	601
Cuff v. Newark & N. Y. R. Co.'.....	35 N. J. L. 17.....	668
Cullen v. National Sheet Metal Roofing Co.	114 N. Y. 45, 20 N. E. 831.....	845
Cummings v. Collins.....	61 Mo. 520.....	432
Current v. Mo. Pac. R'y Co.....	86 Mo. 62.....	n469

D

Dale v. St. Louis, K. C. & N. R'y Co..	63 Mo. 455.....	455
Dana v. N. Y. Central & H. R. R. Co..	92 N. Y. 639.....	n789
Davis v. Detroit & Mil. R. Co.....	20 Mich. 105.....	n130
Davis v. Houghtellin.....	33 Neb. 582, 50 N. W. 765.....	n603
Davis v. N. Y., L. E. & W. R. Co.....	110 N. Y. 646, 17 N. E. 133.....	n731
Day v. Toledo, C. S. & D. R'y Co.....	42 Mich. 523, 4 N. W. 203.....	n154
Dayharsh v. Hann. & St. J. R. Co.....	103 Mo. 570, 15 S. W. 554.....	n511
De Bolt v. Kansas City, Ft. S. & M. R'y Co.	123 Mo. 496, 27 S. W. 575.....	n509
De Forest v. Jewett (Receiver).....	88 N. Y. 264, aff'g 23 Hun, 490; see, also, 19 Hun, 509.....	772
De Graaf v. N. Y. Central & H. R. R. Co.	76 N. Y. 125; 3 Sup. (T. & C.) 255.....	n803

- Deisen v. Chicago, St. P., M. & O. R'y
Co. 43 Minn. 454, 45 N. W. 864. 346
- Delaware, Lackawanna & Western R.
Co. v. Hardy. 59 N. J. L. 35; 58 id. 205; 57 id.
505 658, 659
- Delude v. St. Paul City R'y Co. 55 Minn. 63, 56 N. W. 461. n328
- Demarest v. Little, Rec'r, etc. 47 N. J. L. 28. 643, n668
- Demars v. Glen Mfg. Co. 67 N. H. 404. 629
- Deremer v. Del., L. & W. R. Co. 54 N. J. L. 407, 24 Atl. 481. n660
- Derrenbacher v. Lehigh Valley R. Co. . . . 87 N. Y. 636. n819
- De Vau v. Penn. & N. Y. Canal & R.
Co. 130 N. Y. 632, 28 N. E. 532, rev'g 7
N. Y. Supp. 692. n816
- Devitt v. Pac. R. Co. 50 Mo. 302. 451
- Devlin v. Wabash, St. L. & P. R'y Co. . . 87 Mo. 545. n499
- Deweese v. Meramee Iron Mining Co. . . 128 Mo. 423, aff'g 54 Mo. App. 476. n399
- Dewey v. Detroit, G. H. & Mil. R'y Co. . 97 Mich. 329, 52 N. W. 942; 56 N.
W. 756 n101
- Dewey v. Parke, Davis & Co. 76 Mich. 631, 43 N. W. 644. n82
- Dickson v. Omaha & St. L. R. Co. 124 Mo. 140, 27 S. W. 476. n499
- Diebold v. Penn. R. Co. 50 N. J. L. 478, 14 Atl. 576. n672
- Dingley v. Star Knitting Co. 134 N. Y. 526, 32 N. E. 35, aff'g 12
N. Y. Supp. 31. n846
- Disher v. N. Y. Central & H. R. R. Co. . 94 N. Y. 622, mem.; aff'g 2 N. Y.
St. Rep. 276. n804
- Dixon v. Chicago & A. R. Co. 109 Mo. 413, 19 S. W. 412. n510
- Donnegan v. Erhardt (Receiver) 119 N. Y. 468, 23 N. E. 1051. n774
- Donovan v. Gay. 97 Mo. 440, 11 S. W. 44. 402
- Dowell v. Vicksburg & M. R. Co. 61 Miss. 519. n363
- Dowling v. Allen & Co. 74 Mo. 13; 88 Mo. 293, rev'g 14 Mo.
App. 594; 102 Mo. 213; 14 S. W.
751 383, 384
- Doyle v. Detroit Omnibus Line Co. . . . 105 Mich. 195. n85
- Doyle v. St. Paul, M. & M. R'y Co. . . . 42 Minn. 79, 43 N. W. 787. 321
- Drymala v. Thompson. 26 Minn. 40, 1 N. W. 255. 243
- Dunkman v. Wabash, St. L. & P. R'y
Co. 95 Mo. 232, rev'g 16 Mo. App. 547. 489
- Durkin v. Sharp (Receiver) 88 N. Y. 225. n774
- Durant v. Lexington Coal Mining Co. . 97 Mo. 63, 10 S. W. 484. 397
- Dye v. Del., L. & W. R. Co. 130 N. Y. 671, 29 N. E. 320. n814
- Dysinger v. Cin. S. & M. R'y Co. 93 Mich. 646, 53 N. W. 825. n157

E

- Eastman v. Lake Shore & M. S. R'y Co. . 101 Mich. 597, 60 N. W. 309. n162
- Eddy v. Aurora Iron Mining Co. 81 Mich. 548, 46 N. W. 17. n65
- Ehmcke v. Porter. 45 Minn. 338, 47 N. W. 1066. 197
- Eicheler v. Hanggi. 40 Minn. 263, 41 N. W. 975. n182
- Electric Co. v. Laughlin. 45 Neb. 390, 63 N. W. 941. 596
- Elliott v. St. Louis & I. M. R. Co. 67 Mo. 272. n493

TABLE OF CASES REPORTED.

xiii

Ellis v. N. Y., L. E. & W. R. Co.....	95 N. Y. 546.....	n805
Ellison v. Truesdale (Rec'r).....	49 Minn. 240, 51 N. W. 918.....	n313
Enright v. Toledo, A. A. & N. M. R'y Co.	93 Mich. 409, 53 N. W. 536.....	n165
Erb (Receiver, etc.) v. Eggleston.....	41 Neb. 860, 60 N. W. 98.....	568
Erickson v. Mil., L. S. & W. R'y Co....	93 Mich. 414, 53 N. W. 393; 83 Mich. 281, 47 N. W. 237.....	163
Erickson v. St. Paul & Duluth R. Co...	41 Minn. 500, 43 N. W. 332....	n199, 344
Essex County Electric Light Co. v. Kelly.	57 N. J. L. 100.....	700
Evarts v. St. Paul, M. & M. R'y Co....	56 Minn. 141, 57 N. W. 459.....	322
Evens v. Louis., N. O. & T. R'y Co....	70 Miss. 527, 12 So. 581.....	n366
Ewan v. Lippincott.....	47 N. J. L. 192.....	706

F

Fay v. Davidson.....	13 Minn. 528.....	n237
Fay v. Minn. & St. L. R'y Co.....	30 Minn. 231, 15 N. W. 241.....	288
Fenderson v. Atlantic City R. Co.....	56 N. J. L. 708, 31 Atl. 767.....	659
Fenton v. Duluth, S. S. & A. R'y Co...	108 Mich. 284.....	n157
Fifield v. Northern R. R.....	42 N. H. 225.....	607
Filbert v. Del. & H. Canal Co.....	121 N. Y. 207, 23 N. E. 1104, rev'g 24 J. & S. 170, 2 N. Y. Supp. 623..	n806
Findlay v. Russel Wheel & Foundry Co.	108 Mich. 286.....	n18
Finnell v. Del., L. & W. R. Co.....	129 N. Y. 669, 29 N. E. 825.....	n803
Finnerty v. Prentice.....	75 N. Y. 615.....	n842
Fisher v. Chicago & G. T. R'y Co....	77 Mich. 546, 43 N. W. 926.....	n76
Flanders v. Chicago, St. P., M. & O. R'y Co.	51 Minn. 193, 53 N. W. 544.....	n282
Fleming v. St. Paul & D. R. Co.....	27 Minn. 111, 6 N. W. 448.....	286
Flike v. Boston & Albany R. Co.....	53 N. Y. 549, 13 Am. Rep. 545.....	765
Flynn v. Central R. Co. of N. J.....	142 N. Y. 439, 37 N. E. 514, 59 N. Y. St. Rep. 814, rev'g 51 N. Y. St. Rep. 84; 22 N. Y. Supp. 383; 2 Misc. Rep. 508.....	800
Flynn v. Kansas City, St. J. & C. B. R. Co.	78 Mo. 195.....	n499
Foley v. Chicago & N. W. R'y Co.....	48 Mich. 622, 12 N. W. 879.....	n171
Foley v. Jersey City Electric Light Co..	54 N. J. L. 411, 24 Atl. 487.....	699
Ford v. L. S. & M. S. R. Co.....	117 N. Y. 638, 22 N. E. 946; 124 N. Y. 493, 26 N. E. 1101.....	n814
Fort Wayne, J. & S. R. Co. v. Gilder- sleeve	33 Mich. 133.....	n127
Foss v. Baker.....	62 N. H. 247.....	n632
Foster v. Minn. Cent. R'y Co.....	14 Minn. 360.....	245
Fox v. Peninsular White Lead & Color Works	92 Mich. 243, 52 N. W. 623; 84 Mich. 676, 48 N. W. 203.....	66
Fox v. Spring Lake Iron Co.....	89 Mich. 387, 50 N. W. 872.....	31

Fraker v. St. P., M. & M. R'y Co.....	32 Minn. 54, 19 N. W. 349.....	n349
Francis v. Kansas City, St. J. & C. B. R. Co.	127 Mo. 658; 110 Mo. 387; 30 S. W. 129; 28 S. W. 842; 19 S. W. 935...	n474
Franklin v. Winona & St. P. R. Co.....	37 Minn. 409, 34 N. W. 898.....	n349
Fraser v. Red River Lumber Co.....	45 Minn. 235, 47 N. W. 785; 42 Minn. 520, 44 N. W. 878.....	205
Fredenburg v. Northern Central R. Co..	114 N. Y. 582, 21 N. E. 1049.....	n813
Freeberg v. St. Paul Plow Works.....	48 Minn. 99, 50 N. W. 1026.....	176
Fremont, Elkhorn & Missouri Valley R. Co. v. Leslie.....	41 Neb. 159, 59 N. W. 559.....	577
Friel v. Citizens' R'y.....	115 Mo. 503, 22 S. W. 498.....	513
Fugler v. Bothe.....	117 Mo. 475; 43 Mo. App. 44.....	426
Fuller v. Jewett (Receiver).....	80 N. Y. 46.....	n774
Fuller v. Lake Shore & M. S. R'y Co...	108 Mich. 690.....	n158
Funk v. St. Paul City R'y Co.....	61 Minn. 435.....	326

G

Gardner v. Mich. Cent. R. Co.....	58 Mich. 584, 26 N. W. 301.....	n130
Gardner v. St. Louis & S. F. R'y Co....	135 Mo. 90.....	n501
Garneau Cracker Co. v. Palmer.....	28 Neb. 307, 44 N. W. 463.....	n602
Garretzen v. Duenckel.....	50 Mo. 104.....	436
Gates v. So. Minn. R'y Co.....	28 Minn. 110, 9 N. W. 579.....	302
Gavigan v. Lake Shore & M. S. R'y Co..	110 Mich. 71.....	136
George H. Hammond Co. v. Johnson...	38 Neb. 244, 56 N. W. 967.....	594
Gibson v. Erie R'y Co.....	63 N. Y. 449, 20 Am. Rep. 206, rev'g 5 Hun, 3.....	735
Gibson v. Pac. R. Co.....	46 Mo. 163.....	442
Gilmore v. Oxford Iron & Nail Co.....	55 N. J. L. 39, 25 Atl. 707.....	687
Girard v. St. Louis Car Wheel Co.....	123 Mo. 358, 27 S. W. 648.....	379
Gleeson v. Excelsior Mfg. Co.....	94 Mo. 201, 7 S. W. 188.....	n421
Glover v. Meinrath.....	133 Mo. 292.....	390
Glover v. Scotten.....	82 Mich. 369, 46 N. W. 936.....	n159
Goltz v. Winona & St. P. R. Co.....	22 Minn. 55.....	n349
Gonsior v. Minn. & St. L. R'y Co.....	36 Minn. 385, 31 N. W. 515.....	n276
Goodrich v. N. Y. Central & Hudson River R. Co.....	116 N. Y. 398, 22 N. E. 397, aff'g 3 N. Y. St. Rep. 774.....	n802
Goodwell v. Mont. Cent. R'y Co.....	18 Mont. 293.....	n529
Gormly v. Vulcan Iron Works.....	61 Mo. 492.....	388
Gottlieb v. N. Y., L. E. & W. R. Co....	100 N. Y. 462, 3 N. E. 344.....	n802
Grand v. Mich. Cent. R. Co.....	83 Mich. 564, 47 N. W. 837.....	n157
Grant v. Penn. & N. Y. Canal & R. Co..	133 N. Y. 657, 31 N. E. 220.....	n816
Greene v. Minn. & St. L. R'y Co.....	31 Minn. 248, 17 N. W. 378.....	n352
Greenwald v. Marquette, H. & O. R. Co.	49 Mich. 197, 13 N. W. 513.....	n172
Griffin v. Glen Mfg. Co.....	67 N. H. 287.....	630
Griffiths v. Wolfram.....	22 Minn. 185.....	219
Groff v. Duluth Imperial Mill Co.....	58 Minn. 333, 59 N. W. 1049....	181

TABLE OF CASES REPORTED.

xv

Grube v. Mo. Pac. R'y Co.....	98 Mo. 330, 11 S. W. 736.....	n506
Gutridge v. Mo. Pac. R'y Co.....	94 Mo. 468; 105 Mo. 520; 7 S. W. 476; 16 S. W. 943.....	467, 469

H

Haggerty v. Central R. Co.....	31 N. J. L. 349.....	633
Hall v. Chicago, B. & N. R. Co.....	46 Minn. 439, 49 N. W. 239.....	300
Hall v. Mo. Pac. R'y Co.....	74 Mo. 298.....	n505
Hallihan v. Hamm. & St. J. R. Co.....	71 Mo. 113.....	n496
Hamilton v. Rich Hill Coal Mining Co..	108 Mo. 364, 18 S. W. 977.....	398
Hammond v. Chicago & G. T. R'y Co..	83 Mich. 334, 47 N. W. 965.....	n169
Hammond Co. v. Johnson.....	38 Neb. 244, 56 N. W. 967.....	594
Hankins v. N. Y., L. E. & W. R. Co...	142 N. Y. 416, 37 N. E. 466, 59 N. Y. St. Rep. 802; rev'g 50 N. Y. St. Rep. 937.....	783
Hanley v. Grand Trunk R'y Co.....	62 N. H. 274.....	615
Hardy v. Boston & Maine R. R.....	68 N. H. 523.....	617
Hardy v. Del., L. & W. R. Co.....	57 N. J. L. 505; 58 id. 205; 59 id. 35.....	658, 659
Harper v. Ind. & St. L. R. Co.....	47 Mo. 367; 44 Mo. 488.....	497
Harriman v. Stowe.....	57 Mo. 93.....	n435
Harris v. Hewitt (Rec'r).....	64 Minn. 54.....	n326, 327
Harrison v. Central R. Co.....	31 N. J. L. 293.....	633
Harrison v. Detroit, L. & N. R. Co.....	79 Mich. 409, 44 N. W. 1034..	n119, n168
Harvey v. N. Y. Central & H. R. R. Co.	88 N. Y. 481, 11 Abb. N. C. 322, 15 Weekly Dig. 316.....	n810
Hastings v. Mont. Union R'y Co.....	18 Mont. 493.....	n529
Hathaway v. Mich. Cent. R. Co.....	51 Mich. 253, 16 N. W. 634.....	129
Hatter v. Ill. Cent. R. Co.....	69 Miss. 642, 13 So. 827.....	370
Hawley v. Northern Central R. Co....	82 N. Y. 370, aff'g 17 Hun, 115....	n809
Hayes v. Bush & Denslow Mfg. Co....	102 N. Y. 648, 5 N. E. 784, rev'g 19 Weekly Dig. 436; see, also, 41 Hun, 407.....	n842
Hayes v. Western R. Corp.....	3 Cush. (Mass.) 270, 15 Am. Neg. Cas. 505n.....	n771
Hefferen v. Northern Pac. R. Co.....	45 Minn. 471, 48 N. W. 1; id. 526...	254
Helfenstein v. Medart.....	136 Mo. 595.....	390
Henderson v. Williams.....	66 N. H. 405, 23 Atl. 365.....	625
Henry v. Lake Shore & M. S. R'y Co..	49 Mich. 495, 13 N. W. 832.....	n117
Henry v. Staten Island R. Co.....	81 N. Y. 373.....	n811
Henry v. Wabash Western R'y Co....	109 Mo. 488, 19 S. W. 239.....	n501
Herdler v. Buck's Stove & Range Co...	136 Mo. 3.....	412
Herrick v. Minn. & St. L. R'y Co.....	31 Minn. 11, 16 N. W. 413.....	292
Hess v. Adamant Mfg. Co.....	66 Minn. 79.....	190
Hewitt v. Flint & P. M. R. Co.....	67 Mich. 61, 34 N. W. 659.....	122
Hickey v. Taaffe.....	99 N. Y. 204, 1 N. E. 685, rev'g 32 Hun, 7; see, also, 105 N. Y. 26, 12 N. E. 286.....	842, 843

Higgins v. Hann. & St. J. R. Co.....	36 Mo. 418.....	n495
Higgins v. Mo. Pac. R'y Co.....	104 Mo. 413, 16 S. W. 409.....	n511
Hill v. Caverly.....	7 N. H. 215.....	n633
Hilts v. Chicago & G. T. R'y Co.....	55 Mich. 437, 21 N. W. 878.....	n171
Hoar v. Merritt.....	62 Mich. 386, 29 N. W. 15.....	82
Hoffman v. Adams.....	106 Mich. 111.....	n30
Hoffman v. Mich. Cent. R. Co.....	109 Mich. 251.....	n163
Hognagle v. N. Y. Central & H. R. R. Co.	55 N. Y. 608, rev'g 1 Sup. (T. & C.) 346	n813
Hoke v. St. Louis, K. & N. R'y Co.....	88 Mo. 360, rev'g 11 Mo. App. 574..	n496
Holloran v. Union Iron & Foundry Co..	133 Mo. 470.....	405
Holmes v. Hann. & St. J. R. Co.....	69 Mo. 536.....	n509
Horner v. Nicholson.....	56 Mo. 220.....	n419
Howd v. Miss. Cent. R. Co.....	50 Miss. 178.....	n363
Huffman v. Chicago, R. I. & P. R'y Co..	78 Mo. 50.....	n493
Hughes v. Fagin.....	46 Mo. App. 37.....	516
Hughes v. Winona & St. Peter R. Co..	27 Minn. 137, 6 N. W. 553.....	243
Huhn v. Mo. Pac. R'y Co.....	92 Mo. 440, 4 S. W. 937.....	473
Huizega v. Cutler & Savidge Lumber Co.	51 Mich. 272, 16 N. W. 643.....	4
Hulett v. St. Louis, K. C. & N. R'y Co..	67 Mo. 239.....	n492
Hungerford v. Chicago, M. & St. P. R'y Co.	41 Minn. 444, 43 N. W. 324.....	n250
Hunn v. Mich. Cent. R. Co.....	78 Mich. 513, 44 N. W. 502....	n119, 134
Hunter v. N. Y., Ont. & W. R. Co.....	116 N. Y. 615, 23 N. E. 9, rev'g 5 N. Y. St. Rep. 64.....	n736
Hurlbut v. Wabash R. Co.....	130 Mo. 659.....	n495
Hutchins v. St. Paul, M. & M. R'y Co..	44 Minn. 5, 46 N. W. 79.....	294

I

Ice Co. v. Sherlock.....	37 Neb. 19, 55 N. W. 294.....	601
Illick v. Flint & P. M. R. Co.....	67 Mich. 632, 35 N. W. 708.....	126
Ill. Cent. R. Co. v. Bowles.....	71 Miss. 994; id. 1003; 16 So. 235; 15 So. 138.....	n367
Ill. Cent. R. Co. v. Cathey.....	70 Miss. 332, 12 So. 253.....	371
Ill. Cent. R. Co. v. Daniels.....	73 Miss. 258.....	n367
Ill. Cent. R. Co. v. Pendergrass.....	69 Miss. 425, 12 So. 954.....	n367
Ill. Cent. R. Co. v. Price.....	72 Miss. 862, 18 So. 415.....	368
Iltis v. Chicago, M. & St. P. R'y Co....	40 Minn. 273, 41 N. W. 1040.....	n345
Ingebregsten v. Nord Deutscher Lloyd S. S. Co.....	57 N. J. L. 400.....	673
Irvine v. Flint & P. M. R. Co.....	89 Mich. 416, 50 N. W. 1008.....	n160
Ischer v. St. Louis Bridge Co.....	95 Mo. 261, 8 S. W. 367.....	n377

J

Jackson v. Mo. Pac. R'y Co.....	104 Mo. 448, 16 S. W. 413.....	n494
Jacobs v. Lake Shore & M. S. R'y Co..	84 Mich. 299, 47 N. W. 669.....	n158
Jacobson v. St. Paul & D. R. Co.....	41 Minn. 206, 42 N. W. 932.....	n345

James v. Emmet Mining Co.....	55 Mich. 335, 21 N. W. 361.....	n65
Jaques v. Great Falls Mfg. Co.....	66 N. H. 482, 22 Atl. 552.....	628
Jarman v. Chicago & G. T. R'y Co.....	98 Mich. 135, 57 N. W. 32.....	n167
Jayne v. Sebewaing Coal Co.....	108 Mich. 242.....	n66
Jennings v. Iron Bay Co.....	47 Minn. 111, 49 N. W. 685.....	n227
Jensen v. Barbour.....	15 Mont. 582, 39 Pac. 906.....	n530
Jewell v. Grand Trunk R'y Co.....	55 N. H. 84.....	n625
Johnson v. Boston & M. Can. C. & S. Mining Co.	16 Mont. 164.....	525
Johnson v. Hovey.....	98 Mich. 343, 57 N. W. 172.....	n17
Johnson v. St. Paul & D. R. Co.....	43 Minn. 222, 45 N. W. 156.....	n339
Johnson v. St. Paul, M. & M. R'y Co..	43 Minn. 53, 44 N. W. 884.....	282
Johnson v. Speer.....	76 Mich. 139, 42 N. W. 1092; 82 Mich. 453, 46 N. W. 733.....	n76
Jolly v. Detroit, L. & N. R. Co.....	93 Mich. 370, 53 N. W. 526.....	n169
Jones v. Lake Shore & M. S. R'y Co...	49 Mich. 573, 14 N. W. 551.....	139
Jones v. St. Louis S. W. R'y Co.....	125 Mo. 666, 28 S. W. 883.....	n512
Jordan v. Chicago, St. P., M. & O. R'y Co.	58 Minn. 8, 59 N. W. 633.....	342
Jorgenson v. Smith.....	32 Minn. 79, 19 N. W. 388.....	239
Jorgenson v. Butte & Mont. Com. Co..	13 Mont. 288, 34 Pac. 37.....	526
Joseph Garneau Cracker Co. v. Palmer..	28 Neb. 307, 44 N. W. 463.....	n602
Joslin v. Grand Rapids Ice Co.....	50 Mich. 516, 15 N. W. 887.....	n84
Jungnitsch v. Michigan Malleable Iron Co.	105 Mich. 270.....	29

K

Kaillen v. N. W. Bedding Co.....	46 Minn. 187, 48 N. W. 779....	n26; 191
Kain v. Smith (Director, etc.).....	80 N. Y. 458, rev'g 11 Hun, 458; 89 N. Y. 376, aff'g 23 Hun, 146.....	n813
Karrer v. Detroit, G. H. & M. R'y Co...	76 Mich. 400, 43 N. W. 370.....	n155
Kean v. Detroit Copper & Brass Rolling Mills	66 Mich. 277, 33 N. W. 395.....	n10
Kearney Electric Co. v. Laughlin.....	45 Neb. 390, 63 N. W. 941.....	596
Keegan v. Kavanaugh.....	62 Mo. 230.....	n431
Keegan v. Western R. Co.....	8 N. Y. 175, 59 Am. Dec. 476, aff'g 6 Barb. 231.....	730
Kehoe v. Allen.....	92 Mich. 465, 52 N. W. 740.....	n44
Kelley (Kelly) v. Cable Co.....	13 Mont. 411, 34 Pac. 611; 7 Mont. 70, 14 Pac. 633; 8 Mont. 440, 20 Pac. 669	519
Kelley v. Chicago, St. P., M. & O. R'y Co.	35 Minn. 490, 29 N. W. 173.....	n348
Kelley v. Fourth of July Mining Co....	16 Mont. 484.....	524
Kelly (Kelley) v. Cable Co.....	13 Mont. 411, 34 Pac. 611; 7 Mont. 70, 14 Pac. 633; 8 Mont. 440, 20 Pac. 669	519
Kelly v. Duluth, S. S. & A. R'y Co.....	92 Mich. 19, 52 N. W. 81.....	n166
Kelly v. Erie Teleg. & Telep. Co.....	34 Minn. 321, 25 N. W. 706.....	n208

Kennedy v. Chicago, M. & St. P. R'y Co.	57 Minn. 227, 58 N. W. 878.....	n356
Kersey v. Kansas City, St. J. & C. B. R. Co.	79 Mo. 362.....	n493
Kilroy v. Del. & H. Canal Co.....	122 N. Y. 22, aff'g 24 J. & S. 138, 1 N. Y. Supp. 779.....	n819
King v. Ford River Lumber Co.....	93 Mich. 172, 53 N. W. 10.....	n27
King v. N. Y. Central & H. R. R. Co..	66 N. Y. 181, 21 Am. Rep. 573, rev'g 4 Hun, 769; see, also, 72 N. Y. 607	n819
Kinney v. Folkerts.....	78 Mich. 687, 44 N. W. 152; 84 Mich. 616, 48 N. W. 283.....	n12
Kirkpatrick v. N. Y. Cent. & H. R. R. Co.	79 N. Y. 240.....	n730
Koslowski v. Thayer.....	66 Minn. 150.....	184
Kranz v. Long Island R. Co.....	123 N. Y. 1, 25 N. E. 206.....	795
Kulas v. Libera.....	65 Minn. 337.....	210

L

Lacroy v. N. Y., L. E. & W. R. Co....	132 N. Y. 570, 30 N. E. 391, rev'g 57 Hun, 67.....	n804
Lagrone v. Mobile & O. R. Co.....	67 Miss. 592, 7 So. 432.....	n366
Lake Superior Iron Co. v. Erickson....	39 Mich. 492.....	n64
Lamotte v. Boyce.....	105 Mich. 545.....	56
Laning v. N. Y. Central R. Co.....	49 N. Y. 521, 10 Am. Rep. 417.....	747
La Pierre v. Chicago & G. T. R'y Co...	99 Mich. 212, 58 N. W. 60.....	n160
Larson v. St. Paul, M. & M. R'y Co....	43 Minn. 423, 45 N. W. 722.....	n277
Lau v. Fletcher.....	104 Mich. 295.....	n17
Lavallee v. St. Paul, M. & M. R'y Co..	40 Minn. 249, 41 N. W. 974.....	n339
Lawson v. Truesdale (Rec'r).....	60 Minn. 410, 62 N. W. 546.....	283
Lebargé v. Berlin Mills Co.....	68 N. H. 373.....	n632
Lechman v. Hooper.....	52 N. J. L. 253, 19 Atl. 215.....	721
Le Clair v. St. Paul & Pac. R. Co. (1st Div.)	20 Minn. 9.....	n351
Lee v. Detroit Bridge & Iron Works...	62 Mo. 565.....	426
Lee v. Mich. Cent. R. Co.....	87 Mich. 574, 49 N. W. 909.....	n162
Lee v. Smart.....	45 Neb. 318, 63 N. W. 940.....	600
Leier v. Minn. Belt Line, etc., Co.....	63 Minn. 203.....	n338
Leigh v. Omaha St. R'y Co.....	36 Neb. 131, 54 N. W. 134.....	592
Lendberg v. Brotherton Iron Mining Co.	75 Mich. 84, 42 N. W. 675; 97 Mich. 443, 56 N. W. 846.....	n65
Leslie v. Rich Hill Mining Co.....	110 Mo. 31, 19 S. W. 308.....	399
Lewis v. Emery.....	108 Mich. 641.....	n18
Lewis v. St. Louis & I. M. R. Co.....	59 Mo. 495.....	n491
Lilly v. N. Y. Central & H. R. R. Co...	107 N. Y. 566, 14 N. E. 503.....	n802
Lincoln St. R'y Co. v. Cox.....	48 Neb. 807.....	593
Lindstrand v. Delta Lumber Co.....	65 Mich. 254, 32 N. W. 427; 68 Mich. 261, 36 N. W. 67.....	7
Lindvall v. Woods.....	41 Minn. 212, 42 N. W. 1020.....	200

TABLE OF CASES REPORTED.

xix

Ling v. St. Paul, M. & M. R'y Co.....	50 Minn. 160, 52 N. W. 378.....	n355
Little (Rec'r) v. Dusenberry.....	46 N. J. L. 614.....	667
Loeffler v. Mo. Pac. R'y Co.....	96 Mo. 267, 9 S. W. 580.....	n511
Long v. Pac. R. Co.....	65 Mo. 225.....	n492
Loranger v. Lake Shore & M. S. R'y Co.	104 Mich. 80.....	n103
Lorimer v. St. Paul City R'y Co.....	48 Minn. 391, 51 N. W. 125.....	329
Loring v. Kansas City, Ft. S. & M. R. Co.	128 Mo. 349, 31 S. W. 6.....	n503
Lottman v. Barnett.....	62 Mo. 159.....	419
Louisville, New Orleans & Texas R'y Co. v. Conroy.....	63 Miss. 562.....	n367
Louisville, New Orleans & Texas R'y Co. v. Petty.....	67 Miss. 255, 7 So. 351.....	n366
Louisville, N. O. & T. R'y Co. v. Thompson	64 Miss. 584, 1 So. 840.....	n367
Lucey v. Hannibal Oil Co.....	129 Mo. 32, 31 S. W. 340.....	415
Ludwig v. Pillsbury.....	35 Minn. 256, 28 N. W. 505.....	197
Luke v. Wheat Mining Co.....	71 Mich. 364, 39 N. W. 11.....	n65
Lundquist v. Duluth St. R'y Co.....	65 Minn. 387.....	n327
Lutz v. Atl. & Pac. R. Co.....	6 N. Mex. 496.....	n728
Lyberg v. No. Pac. R. Co.....	39 Minn. 15, 38 N. W. 632.....	n355
Lyon v. Detroit, L. & L. M. R. Co.....	31 Mich. 429.....	n166
Lytle v. Chicago & W. M. R'y Co.....	84 Mich. 289, 47 N. W. 571.....	n161

M

McAndrews v. Burns.....	39 N. J. L. 117.....	680
McAndrews v. Collerd.....	42 N. J. L. 189.....	670
McAndrews v. Montana Union R'y Co..	15 Mont. 290, 39 Pac. 85.....	525
McCallum v. Davidson.....	95 Mich. 382, 54 N. W. 952.....	n86
McCallum v. McCallum.....	58 Minn. 288, 59 N. W. 1019.....	236
McCarragher v. Rogers.....	120 N. Y. 526, 24 N. E. 812.....	n845
McCarthy v. Lehigh Valley Transp. Co..	48 Minn. 553, 51 N. W. 480.....	n230
McCosker v. Long Island R. Co.....	84 N. Y. 77, rev'g 21 Hun, 500, 69 How. Pr. 258.....	798
McCoy v. McKowen.....	26 Miss. 487.....	n374
McDermott v. Hann. & St. J. R. Co....	73 Mo. 516.....	n503
McDermott v. Hann. & St. J. R. Co....	87 Mo. 286.....	n503
McDermott v. Pac. R. Co.....	30 Mo. 115.....	444
McDonald v. Chicago, St. P., M. & O. R'y Co.	41 Minn. 439, 43 N. W. 380.....	n357
McDonald v. Mich. Cent. R. Co.....	108 Mich. 7.....	n112
McDonough v. Lanpher.....	55 Minn. 507, 57 N. W. 152.....	196
McGinnis v. Canada So. Bridge Co.....	49 Mich. 466, 13 N. W. 819.....	127
McGowan v. St. Louis & I. M. R. Co....	61 Mo. 528.....	n509
McGowan v. St. Louis Ore & Steel Co..	109 Mo. 518, 19 S. W. 199.....	404
McKnight v. Chicago, M. & St. P. R'y Co.	44 Minn. 141, 46 N. W. 294.....	n348
McLaren v. Williston.....	48 Minn. 299, 51 N. W. 373.....	199

McMahon v. Davidson.....	12	Minn. 357.....	n237
McMahon v. O'Donnell	32	Neb. 27, 48 N. W. 824.....	n599
McMaster v. Ill. Cent. R. Co.....	65	Miss. 264, 4 So. 59.....	n366
McPherson v. St. Louis, I. M. & S. R'y Co.	97	Mo. 253, 10 S. W. 846.....	n500, n501
McQuigan v. Del., L. & W. R. Co.....	122	N. Y. 618, 26 N. E. 13.....	n805
McVey v. Ill. Cent. R. Co.....	73	Miss. 487.....	367
Mackin v. Alaska Refrigerator Co.....	100	Mich. 276.....	n28
Macy v. St. Paul & D. R. Co.....	35	Minn. 200, 28 N. W. 249.....	n289
Madden v. Minn. & St. L. R'y Co.....	32	Minn. 203, 20 N. W. 317.....	n350
Mahan v. Clee.....	87	Mich. 161, 49 N. W. 556.....	73
Mahaney v. St. Louis & Hann. R. Co..	108	Mo. 191, 18 S. W. 895.....	n511
Maher v. McGrath.....	58	N. J. L. 469.....	717
Malone v. Hathaway.....	64	N. Y. 5, 21 Am. Rep. 573, rev'g 3 Hun, 553, 6 Sup. (T. & C.) 1...n824	
Malone v. Morton.....	84	Mo. 436.....	n377
Malm v. Thelin.....	47	Neb. 686.....	599
Mann v. Del. & H. Canal Co.....	91	N. Y. 495, 12 Weekly Dig. 7....	797
Manning v. Chicago & W. M. R'y Co...	105	Mich. 260.....	n158
Mark v. St. Paul, M. & M. R'y Co.....	30	Minn. 493, 16 N. W. 367.....	n345
Marsh v. Herman.....	47	Minn. 537, 50 N. W. 611.....	n227
Marshall v. Schricker.....	63	Mo. 308.....	426
Marshall v. Widdicomb Furniture Co..	67	Mich. 167, 34 N. W. 541.....	n27
Mateer v. Mo. Pac. R'y Co.....	105	Mo. 320, 16 S. W. 839.....	460
Mathews v. Bensel.....	51	N. J. L. 30, 16 Atl. 195.....	n714
Matthews v. St. Louis Grain Elevator Co.	59	Mo. 474; 50 Mo. 149.....	433
Martin v. Atch., T. & S. F. R. Co....	7	N. Mex. 158.....	n729
Martin v. N. Y., N. H. & H. R. Co.....	103	N. Y. 626, 9 N. E. 505.....	816
Maxwell v. Hann. & St. J. R. Co.....	85	Mo. 95.....	n510
Mehan v. Syracuse, Bing. & N. Y. R. Co.	73	N. Y. 585.....	n808
Melzer v. Peninsular Car Co.....	76	Mich. 94, 42 N. W. 1078.....	n10
Meyer v. Tromanhauser.....	64	Minn. 541.....	224
Michigan Central R. Co. v. Austin.....	40	Mich. 247.....	n102
Michigan Central R. Co. v. Dolan.....	32	Mich. 510.....	n166
Michigan Central R. Co. v. Gilbert.....	46	Mich. 176, 9 N. W. 243.....	n166
Michigan Central R. Co. v. Leahey.....	10	Mich. 193.....	n114
Michigan Central R. Co. v. Smithson...	45	Mich. 212, 7 N. W. 791.....	n129
Mikkelson v. Truesdale (Rec'r).....	63	Minn. 137.....	336
Millar v. Madison Car Co.....	130	Mo. 517.....	384
Miller v. Chicago & G. T. R'y Co.....	90	Mich. 230, 51 N. W. 370.....	n120
Miller v. Mo. Pac. R'y Co.....	109	Mo. 350, 19 S. W. 58.....	n504
Mills v. Maine Ice Co.....	51	N. J. L. 342, 17 Atl. 695.....	674
Millsaps v. Louis., N. O. & T. R'y Co...	69	Miss. 423, 13 So. 696.....	n366
Miss. Cotton Oil Co. v. Ellis.....	72	Miss. 191, 17 So. 214.....	n375
Missouri Pacific R'y Co. v. Baxter.....	42	Neb. 793, 60 N. W. 1044.....	555
Missouri Pacific R'y Co. v. Lewis.....	24	Neb. 848, 40 N. W. 401.....	562
Moore v. Sanborne.....	2	Mich. 519.....	n86
Moore v. Wabash, St. L. & P. R'y Co..	85	Mo. 588.....	n496

TABLE OF CASES REPORTED.

xxi

Moran v. Brown.....	27 Mo. App. 487.....	517
Moran v. Eastern R'y Co.....	48 Minn. 46, 50 N. W. 930.....	259
Morier v. St. Paul, M. & M. R'y Co....	31 Minn. 351, 17 N. W. 952.....	346
Morse v. Minn. & St. L. R'y Co.....	30 Minn. 465, 16 N. W. 358; 36 Minn. 6; 29 N. W. 340; 33 Minn. 22; 21 N. W. 844.....	306, 307
Morton v. Detroit, Bay City, etc., R. Co.	81 Mich. 423, 46 N. W. 111.....	n121
Mound City Paint & Color Co. v. Con- lon	92 Mo. 221; 15 Mo. App. 601.....	435
Mouso v. A. N. Kellogg Newspaper Co..	58 Minn. 406, 59 N. W. 941.....	n241
Mueller v. Lake Shore & M. S. R'y Co..	105 Mich. 487.....	n156
Muirhead v. Hann. & St. J. R. Co.....	103 Mo. 251; 31 Mo. App. 578; 19 Mo. App. 634.....	477
Mullin v. Northern Mill Co.....	53 Minn. 29, 55 N. W. 1115.....	n182
Mulvehill v. Bates.....	31 Minn. 364, 17 N. W. 959.....	n241
Murphy v. Boston & Albany R. Co....	88 N. Y. 146, aff'g 24 Hun, 142, which affirmed 8 Abb. N. C. 41, 59 How. Pr. 197.....	n730
Murphy v. N. Y. Central & H. R. R. Co.	118 N. Y. 527, 23 N. E. 812, aff'g 44 Hun, 242	n818
Murphy v. St. Louis & I. M. R. Co....	71 Mo. 202, 4 Mo. App. 565.....	n498
Myhre v. Tromanhauser.....	64 Minn. 541.....	224

N

Nash v. Nashua Iron & Steel Co.....	62 N. H. 406.....	n626
Neal v. Northern Pac. R. Co.....	57 Minn. 365, 59 N. W. 312.....	n267
Neilon v. Kansas City, St. J. & C. B. R. Co.	85 Mo. 599.....	n493
Nelson v. Lumberman's Mining Co....	65 Mich. 288, 32 N. W. 438.....	n65
Nelson v. St. Paul Plow Works.....	57 Minn. 43, 58 N. W. 868.....	n183
Neubauer v. N. Y., L. E. & W. R. Co..	101 N. Y. 607, 4 N. E. 125, aff'g 18 Weekly Dig. 402.....	n813
Neubauer v. No. Pac. R. Co.....	60 Minn. 130, 61 N. W. 912.....	n356
Newhart v. St. Paul City R'y Co.....	51 Minn. 42, 52 N. Y. 983.....	328
Newman v. Fowler.....	37 N. J. L. 89.....	722
New Orleans, Jackson & Gt. Nor. R'y Co. v. Harrison.....	48 Miss. 112.....	373
New Orleans, Jackson & Great North- ern R'y Co. v. Hughes.....	49 Miss. 258.....	358
N. Y. & N. J. Telephone Co. v. Spei- cher	59 N. J. L. 23.....	701
New York, Susquehanna & Western R. Co. v. Marion.....	57 N. J. L. 94.....	652
Nicholds v. Crystal Plate Glass Co....	126 Mo. 55, 28 S. W. 991.....	415
Nichols v. Chicago, M. & St. P. R'y Co..	60 Minn. 319, 62 N. W. 386.....	n340
Njus v. Chicago, M. & St. P. R'y Co....	47 Minn. 92, 49 N. W. 527.....	n293

Nord Deutscher Lloyd S. S. Co. v.

Ingebregsten	57 N. J. L. 400.....	673
Norton v. Ittner.....	56 Mo. 351.....	n419
Nourie v. Theobald.....	68 N. H. 564.....	n632
Novock v. Mich. Cent. R. Co.....	63 Mich. 121, 29 N. W. 525.....	n168
Nugent v. Kauffman Milling Co.....	131 Mo. 241.....	n384

O

Oates v. Union Pac. R'y Co.....	104 Mo. 514, 16 S. W. 487.....	n487
Oberfelder v. Doran.....	26 Neb. 118, 41 N. W. 1094.....	602
O'Brien v. American Dredging Co.....	53 N. J. L. 291, 21 Atl. 324.....	683
O'Brien v. Western Steel Co.....	100 Mo. 182, 13 S. W. 402.....	404
Odell v. N. Y. Central & H. R. R. Co...	120 N. Y. 323, 24 N. E. 478, rev'g 6 N. Y. St. Rep. 99.....	812
O'Donnell v. Duluth, S. S. & Atl. R'y Co.	89 Mich. 174, 50 N. W. 801.....	164
Ogley v. Miles.....	139 N. Y. 458, 54 N. Y. St. Rep. 711, 34 N. E. 1059.....	843
O'Hare v. Chicago & A. R. Co.....	95 Mo. 662, 9 S. W. 23.....	n508
Oleson v. Chicago, B. & N. R'y Co.....	38 Minn. 412, 38 N. W. 353.....	n350
Olmscheid v. Nelson-Tenney Lumber Co.	66 Minn. 61.....	n189
Olson v. McMullen.....	34 Minn. 94, 24 N. W. 318.....	220
Olson v. St. Paul, M. & M. R'y Co.....	38 Minn. 117, 35 N. W. 866; 34 Minn. 477, 26 N. W. 605.....	276, 277
Omaha & Republican Valley R'y Co. v. Hall	33 Neb. 229, 50 N. W. 10.....	n570
Omaha & Republican Valley R'y Co. v. Krayenbuhl	48 Neb. 553.....	571
Omaha & Republican Valley R'y Co. v. Morgan	40 Neb. 604, 59 N. W. 81.....	542
O'Mellia v. Kansas City, St. J. & C. B. R. Co.....	115 Mo. 205, 21 S. W. 503.....	482
O'Neil v. Lake Superior Iron Co.....	63 Mich. 690, 30 N. W. 688.....	80
Orth v. St. Paul, M. & M. R'y Co.....	47 Minn. 384, 50 N. W. 363; 43 Minn. 208, 45 N. W. 151.....	308

P

Painton v. Northern Central R. Co.....	83 N. Y. 7.....	n803
Palmer v. Harrison.....	57 Mich. 182, 23 N. W. 624.....	n26
Palmer v. Mich. Cent. R. Co.....	93 Mich. 363, 53 N. W. 397; 87 Mich. 281, 49 N. W. 613.....	170
Pantzar v. Tilly Foster Iron Mining Co.	99 N. Y. 368, 2 N. E. 24, aff'g 16 Weekly Dig. 341.....	832
Parker v. Hann. & St. J. R. Co.....	109 Mo. 362, 19 S. W. 1119.....	478
Parkhurst v. Johnson.....	50 Mich. 70, 15 N. W. 107.....	5
Parsons v. Mo. Pac. R'y Co.....	94 Mo. 286, 6 S. W. 464.....	n458
Patnode v. Harter.....	20 Nev. 303, 21 Pac. 679.....	604

TABLE OF CASES REPORTED.

xxiii

Paulmier v. Erie R. Co.....	34 N. J. L. 151.....	643
Pearson v. Chicago, M. & St. P. R'y Co.	47 Minn. 9, 49 N. W. 302.....	n338
Pederson v. City of Rushford.....	41 Minn. 289, 42 N. W. 1063.....	n221
Pennington v. Detroit, G. H. & M. R'y Co.	90 Mich. 505, 51 N. W. 634.....	n162
Perry v. Mich. Cent. R. Co.....	108 Mich. 130.....	n113
Petaja v. Aurora Iron Mining Co.....	106 Mich. 463.....	63
Peterson v. Chicago & N. W. R'y Co....	67 Mich. 102, 34 N. W. 260.....	n165
Pierce v. Camden, G. & W. R'y Co....	58 N. J. L. 400.....	672
Piette v. Bavarian Brewing Co.....	91 Mich. 605, 52 N. W. 152.....	n53
Piper v. N. Y. Central & Hudson River R. Co.	56 N. Y. 630, aff'g 1 Sup. (T. & C.) 290	n808
Piquegno v. Chicago & G. T. R'y Co... 52	Mich. 40, 17 N. W. 232.....	n104
Phillips v. Library Co.....	55 N. J. L. 307, 27 Atl. 478.....	701
Plank v. N. Y. Central & H. R. R. Co.. 60	N. Y. 607, aff'g 1 Sup. (T. & C.) 319	n802
Porter v. Hann. & St. J. R. Co.....	60 Mo. 160; 71 Mo. 66.....	455
Potter v. N. Y. Central & H. R. R. Co.. 136	N. Y. 77, 32 N. E. 603, 48 N. Y. St. Rep. 843; rev'g 46 N. Y. St. Rep. 895, 19 N. Y. Supp. 862....	n806
Powers v. N. Y., L. E. & W. R. Co.....	98 N. Y. 274, rev'g 32 Hun, 415....	n815
Powers v. Thayer Lumber Co.....	92 Mich. 533, 52 N. W. 937.....	n74
Pratt v. Davis.....	105 Mich. 499.....	n75
Prentiss v. Kent Furniture Mfg. Co....	63 Mich. 478, 30 N. W. 109.....	n26
Preston v. Chicago & W. M. R'y Co....	98 Mich. 128, 57 N. W. 31.....	n167
Price v. Hann. & St. J. R. Co.....	77 Mo. 508.....	n500
Proctor v. Hann. & St. J. R. Co.....	64 Mo. 112.....	464
Prosser v. Mont. Cent. R'y Co.....	17 Mont. 372.....	n528
Purdy v. Rome, W. & O. R. Co.....	125 N. Y. 209, 26 N. E. 255, aff'g 52 Hun, 267	n801

Q

Quick v. Minnesota Iron Co.....	47 Minn. 361, 50 N. W. 244.....	231
Quincy Mining Co. v. Kitts.....	42 Mich. 34, 3 N. W. 240.....	58

R

Ragon v. Toledo, A. A. & N. M. R'y Co.	91 Mich. 379, 51 N. W. 1004; 97 Mich. 265, 56 N. W. 612.....	n157
Rahman v. Minn. & N. W. R. Co.....	43 Minn. 42, 44 N. W. 522.....	n336
R. R. Co. v. Austin.....	40 Mich. 247.....	n102
R. R. Co. v. Barnard.....	32 Neb. 306, 49 N. W. 362.....	563
R. R. Co. v. Bell.....	44 Neb. 44, 62 N. W. 314.....	581
R. R. Co. v. Billiter.....	28 Neb. 422, 44 N. W. 483.....	580
R. R. Co. v. Bowles.....	71 Miss. 994; id. 1003; 16 So. 235; 15 So. 138.....	n367

R. R. Co. v. Broderick.....	30	Neb. 735, 46 N. W. 1121.....	576
R. R. Co. v. Cathey.....	70	Miss. 332, 12 So. 253.....	371
R. R. Co. v. Clark (also Henkle, Dun- kee, Thomas, Jordan and Stanley — six actions against the C. B. & Q. R. Co.	26	Neb. 645, 42 N. W. 703.....	578
R. R. Co. v. Conroy.....	63	Miss. 562.....	n367
R. R. Co. v. Crockett.....	17	Neb. 570, 24 N. W. 219.....	n577
R. R. Co. v. Daniels.....	73	Miss. 258.....	n367
R. R. Co. v. Dolan.....	32	Mich. 510.....	n166
R. R. Co. v. Doyle.....	60	Miss. 977.....	n367
R. R. Co. (Rec'r of) v. Dusenberry.....	46	N. J. L. 614.....	667
R. R. Co. v. Erickson.....	41	Neb. 1, 59 N. W. 347.....	574
R. R. Co. v. Finlayson.....	16	Neb. 578, 20 N. W. 860.....	530
R. R. Co. v. Gilbert.....	46	Mich. 176, 9 N. W. 243.....	n166
R. R. Co. v. Gildersleeve.....	33	Mich. 133.....	n127
R. R. Co. v. Hardy.....	59	N. J. L. 35; 58 id. 205; 57 id. 505.	658, 659
R. R. Co. v. Howard.....	45	Neb. 570, 63 N. W. 872.....	569
R. R. Co. v. Leahey.....	10	Mich. 193.....	n114
R. R. Co. v. Marion.....	57	N. J. L. 94.....	652
R. R. Co. v. Martin.....	7	N. Mex. 158.....	n729
R. R. Co. v. O'Hern.....	24	Neb. 775, 40 N. W. 293.....	575
R. R. Co. v. Pendergrass.....	69	Miss. 425, 12 So. 954.....	n367
R. R. Co. v. Price.....	72	Miss. 862, 18 So. 415.....	368
R. R. Co. v. Reese.....	61	Miss. 581.....	n367
R. R. Co. v. Rush.....	71	Miss. 987, 15 So. 133.....	373
R. R. Co. v. Smithson.....	45	Mich. 212, 7 N. W. 791.....	n129
R. R. Co. v. Sullivan.....	27	Neb. 673, 43 N. W. 415.....	570
R. R. Co. v. Thomas.....	51	Miss. 637.....	n367
R. R. Co. v. Wilkins.....	47	Miss. 494.....	n367
R. R. Co. v. Wymore.....	40	Neb. 645, 12 Am. Neg. Cas. 229.....	n590
R'y Co. v. Bayfield.....	37	Mich. 205.....	87
R'y Co. v. Baxter.....	42	Neb. 793, 60 N. W. 1044.....	555
R'y Co. v. Cox.....	48	Neb. 807.....	593
R'y Co. v. Hall.....	33	Neb. 229, 50 N. W. 10.....	n570
R'y Co. v. Harrison.....	48	Miss. 112.....	373
R'y Co. v. Hughes.....	49	Miss. 258.....	358
R'y Co. v. Krayenbuhl.....	48	Neb. 553.....	571
R'y Co. v. Leslie.....	41	Neb. 159, 59 N. W. 559.....	577
R'y Co. v. Lewis.....	24	Neb. 848, 40 N. W. 401.....	562
R'y Co. v. Morgan.....	40	Neb. 604, 59 N. W. 81.....	542
R'y Co. v. Petty.....	67	Miss. 255, 7 So. 351.....	n366
R'y Co. v. Thompson.....	64	Miss. 584, 1 So. 840.....	n367
Rains v. St. Louis, I. M. & S. R'y Co....	71	Mo. 164.....	452
kait v. New England Furniture Co....	66	Minn. 76.....	242
Ransier v. Minn. & St. L. R'y Co.....	32	Minn. 331, 20 N. W. 332.....	n351
Rawley v. Colliau.....	90	Mich. 31, 51 N. W. 350.....	57
Reagan v. St. Louis, K. & N. W. R'y Co.	93	Mo. 348, 6 S. W. 371.....	n458

TABLE OF CASES REPORTED.

xxv

Reardon v. Mo. Pac. R'y Co.....	114 Mo. 384, 21 S. W. 731.....	n492
Redmond v. Delta Lumber Co.....	96 Mich. 545, 55 N. W. 1004.....	n17
Redstrake (State) v. Swayze.....	52 N. J. L. 129, 18 Atl. 697.....	669
Reichel v. N. Y. Central & Hudson River R. Co.	130 N. Y. 682, 29 N. E. 763.....	n816
Reier v. Detroit Steel & Spring Works..	109 Mich. 244.....	30
Reilly v. Hann. & St. J. R. Co.....	94 Mo. 600, 7 S. W. 407.....	437
Relyea v. Kansas City, Ft. S. & G. R. Co.	112 Mo. 86, 20 S. W. 480.....	n501
Renfro v. Chicago, R. I. & P. R'y Co..	86 Mo. 302.....	n497
Ribble v. Starratt.....	83 Mich. 140, 47 N. W. 244; 79 Mich. 204, 44 N. W. 594.....	n11
Richards v. Rough.....	53 Mich. 212, 18 N. W. 785.....	n29
Richberger v. American Express Co....	73 Miss. 161.....	375
Richmond & Danville R. Co. v. Rush...	71 Miss. 987, 15 So. 133.....	373
Riedel v. Moran, Fitzsimons Co., Ltd....	103 Mich. 262, 61 N. W. 509.....	n85
Rima v. Rossie Iron Works.....	120 N. Y. 433, 24 N. E. 940, aff'g 47 Hun, 153	839
Rine v. Chicago & A. R. Co.....	88 Mo. 392, 100 Mo. 228, 12 S. W. 640	n490, n491
Ring v. Mo. Pac. R'y Co.....	112 Mo. 220, 20 S. W. 436.....	n505
Robel v. Chicago, M. & St. P. R'y Co..	35 Minn. 84, 27 N. W. 305.....	280
Roberts v. Chicago, St. P., M. & O. R'y Co.	33 Minn. 218, 22 N. W. 389.....	n352
Robinson v. Chas. Wright & Co.....	94 Mich. 283, 53 N. W. 938.....	n34
Roblin v. Kansas City, St. J. & C. B. R. Co.	119 Mo. 476, 24 S. W. Rep. 1011.....	n498
Roddy v. Mo. Pac. R'y Co.....	104 Mo. 234, 15 S. W. 1112.....	n512
Rodman v. Mich. Cent. R. Co.....	55 Mich. 57, 20 N. W. 788.....	n155
Rodney v. St. Louis S. W. R'y Co....	127 Mo. 676, 28 S. W. 887, 30 S. W. 150	485
Roepcke v. Mich. Cent. R. Co.....	100 Mich. 541, 59 N. W. 243.....	n172
Rogers v. Chicago Gt. W. R'y Co.....	65 Minn. 308	n352
Rogers v. Truesdale (Receiver).....	57 Minn. 126, 58 N. W. 688.....	n350
Rogers Locomotive & Machine Works v. Hand	50 N. J. L. 464, 14 Atl. 766.....	707
Rohback v. Pac. R. Co.....	43 Mo. 187.....	445
Rose v. Boston & Albany R. Co.....	58 N. Y. 217.....	n779
Rosenbaum v. St. Paul & D. R. Co....	38 Minn. 173, 36 N. W. 447.....	n357
Rothenberger v. N. W. Consol. Milling Co.	57 Minn. 461, 59 N. W. 531.....	n177
Roux v. Blodgett & Davis Lumber Co..	94 Mich. 607, 54 N. W. 492; 85 Mich. 519, 48 N. W. 1092.....	16
Russ v. Wabash Western R'y Co.....	112 Mo. 45, 20 S. W. 472.....	n502
Russell v. Hudson River R. Co.....	17 N. Y. 134, rev'g 5 Duer, 39....	n815
Russell v. Minn. & St. L. R'y Co.....	32 Minn. 230, 20 N. W. 147.....	249
Rutherford v. Chicago, M. & St. P. R'y Co.	57 Minn. 237, 59 N. W. 302.....	n357
Rutledge v. Mo. Pac. R'y Co.....	123 Mo. 121; 110 Mo. 312; 19 S. W. 38; 24 S. W. 1053; 27 S. W. 327..	483

Ryan v. Bagaley	50 Mich. 179, 15 N. W. 72.....	n62
Ryan v. Fowler.....	24 N. Y. 410.....	n744
Ryan v. McCully	123 Mo. 636, 27 S. W. 553.....	425

S

Sadowski v. Michigan Car Co.....	84 Mich. 100, 47 N. W. 598.....	n23
Salters v. Del. & H. Canal Co.....	3 Hun, 338	n809
Sammon v. N. Y. & Harlem R. Co....	62 N. Y. 251, 49 How. Pr. 348, aff'g 38 Super. (J. & S.) 414.....	n811
Samuelson v. Cleveland Iron Mining Co	49 Mich. 164, 13 N. W. 499.....	n64
Saner v. Lake Shore & M. S. R'y Co..	108 Mich. 31	n172
Sather v. Ness	42 Minn. 379, 44 N. W. 128; 44 Minn. 443, 46 N. W. 909....	n208, 209
Sawyer v. Minn. & St. L. R'y Co....	38 Minn. 103, 35 N. W. 671.....	n342
Schaible v. Lake Shore & M. S. R'y Co.	97 Mich. 318, 56 N. W. 565.....	n104
Scharenbroich v. St. Cloud Fiber-Ware Co	59 Minn. 116, 60 N. W. 1093.....	n178
Schaub v. Hann. & St. J. R. Co.....	106 Mo. 74, 16 S. W. 924.....	n494
Schlacker v. Ashland Iron Mining Co..	89 Mich. 253, 50 N. W. 839.....	n65
Schlereth v. Mo. Pac. R'y Co.....	115 Mo. 87; 96 Mo. 509; 10 S. W. 66; 21 S. W. 1110.....	505
Schlitz v. Pabst Brewing Co.....	57 Minn. 303, 59 N. W. 188.....	n239
Schmidt v. Mont. Cent. R'y Co.....	15 Mont. 106, 38 Pac. 226.....	n529
Schneider v. Chicago, B. & N. R. Co..	42 Minn. 68, 43 N. W. 783.....	260
Schroeder v. Chicago & A. R. Co.....	108 Mo. 322, 18 S. W. 1094.....	n502
Schroeder v. Flint & P. M. R. Co.....	103 Mich. 213, 61 N. W. 663.....	n111
Schroeder v. Michigan Car Co.....	56 Mich. 132, 22 N. W. 220.....	n7
Schulte v. Holliday	54 Mich. 73, 19 N. W. 752.....	n85
Schultz v. Pac. R. Co.....	36 Mo. 13.....	461, 462
Schulz v. Chicago, M. & St. P. R'y Co.	57 Minn. 271, 59 N. W. 192.....	n354
Seckinger v. Philibert & Johanning Mfg. Co	129 Mo. 590, 31 S. W. 957.....	387
Secord v. Chicago & Mich. L. S. R. Co.	107 Mich. 540	n155
Sell v. Chas. Rietz & Bros. Lumber Co.	70 Mich. 479, 38 N. W. 451.....	n51
Settle v. St. Louis & S. F. R. Co....	127 Mo. 336, 30 S. W. 125.....	467
Shackelton v. Manistee & N. E. R. Co..	107 Mich. 16.....	n165
Sheehan v. N. Y. Central & H. R. R. Co	91 N. Y. 332	788
Sheedy v. Chicago, M. & St. P. R'y Co.	55 Minn. 357, 57 N. W. 60.....	290
Sheridan v. Foley	58 N. J. L. 230.....	689
Sherman v. Chicago, M. & St. P. R'y Co	34 Minn. 259, 25 N. W. 593.....	n349
Sherman v. Hann. & St. J. R. Co.....	72 Mo. 62.....	456
Sherman v. Rochester & Syr. R. Co..	17 N. Y. 153, aff'g 15 Barb. 574..	n806
Sherrin v. St. Jos. & St. L. R'y Co....	103 Mo. 378, 15 S. W. 442.....	n502
Shields v. N. Y. Central & H. R. R. Co.	133 N. Y. 557, 30 N. E. 596.....	n805
Short v. New Orleans & N. E. R. Co..	69 Miss. 848, 13 So. 826.....	n364
Shortel v. City of St. Joseph.....	104 Mo. 114, 16 S. W. 397.....	n432

TABLE OF CASES REPORTED.

xxvii

Shumworth v. Walworth & Neville

Mfg. Co	98	Mich. 411, 57 N. W. 251.....	10
Siegrist v. Arnot	86	Mo. 200; 10 Mo. App. 197..	436, 437
Siela v. Hann. & St. J. R. Co.....	82	Mo. 430.....	n503
Silsby v. Michigan Car Co.....	95	Mich. 204, 54 N. W. 761.....	n84
Sims v. American Steel Barge Co....	56	Minn. 68, 57 N. W. 322.....	230
Sioux City & Pac. R. Co. v. Finlayson..	16	Neb. 578, 20 N. W. 860.....	530
Sjogren v. Hall	53	Mich. 275, 18 N. W. 812.....	25
Slater v. Chapman	67	Mich. 523, 35 N. W. 106.....	n51
Slater v. Jewett (Receiver).....	85	N. Y. 61.....	772
Slette v. Gt. Nor. R'y Co.....	53	Minn. 341, 55 N. W. 137.....	353
Smith v. Backus Lumber Co.....	64	Minn. 447.....	183
Smith v. Dunham.....	74	Mich. 310, 41 N. W. 933.....	n8
Smith v. Irwin.....	51	N. J. L. 507, 18 Atl. 852.....	714
Smith v. Mo. Pac. R'y Co.....	113	Mo. 70, 20 S. W. 896.....	n499
Smith v. N. Y. Central & H. R. R. Co.	118	N. Y. 645, 23 N. E. 990.....	817
Smith v. N. Y. & Harlem R. Co.....	19	N. Y. 127, aff'g 6 Duer, 225....	n819
Smith v. Oxford Iron Co.....	42	N. J. L. 467.....	683
Smith v. Pac. R. Co.....	61	Mo. 17.....	466
Smith v. Peninsular Car Works.....	60	Mich. 501, 27 N. W. 662.....	42
Smith v. Potter (Receiver, etc.).....	46	Mich. 258, 9 N. W. 273.....	n115
Smith v. R. R. Co.....	69	Mo. 32.....	474
Smith v. St. Paul & D. R. Co.....	51	Minn. 86, 52 N. W. 1068; 44	
		Minn. 17, 46 N. W. 149.....	n353
Smith v. Sioux City & Pac. R. Co....	15	Neb. 583, 19 N. W. 638.....	n571
Smith v. Tromanhauser	63	Minn. 98.....	223
Smith v. Van Sciver.....	58	N. J. L. 190.....	n699
Smith v. Wabash, St. L. & P. R'y Co..	92	Mo. 359, 4 S. W. 129.....	n500
Smith v. Webster.....	23	Mich. 298.....	n86
Smith v. Winona & St. Peter R. Co..	42	Minn. 87, 43 N. W. 968.....	281
Snedda v. Libera.....	65	Minn. 337.....	210
Snowberg v. Nelson-Spencer Paper Co.	43	Minn. 532, 45 N. W. 1131.....	182
Sobieski v. St. Paul & D. R. Co.....	41	Minn. 169, 42 N. W. 863.....	319
Soeder v. St. Louis, I. M. & S. R'y Co..	100	Mo. 673, 13 S. W. 714.....	475
Soyer v. Great Falls Water Co.....	15	Mont. 1, 37 Pac. 838.....	524
Speed v. Atl. & Pac. R. Co.....	71	Mo. 303	488
Spiva v. Osage Coal & Mining Co....	88	Mo. 68.....	n397
Sprong v. Boston & Albany R. Co.....	58	N. Y. 56, aff'g 3 T. & C. 54....	765
Stanley v. Chicago & W. M. R'y Co....	101	Mich. 202, 59 N. W. 393.....	n158
State (Redstrake) v. Swayze.....	52	N. J. L. 129, 18 Atl. 697.....	669
Steamship Co. v. Ingebregsten.....	57	N. J. L. 400.....	673
Steffen v. Mayer.....	96	Mo. 420, 9 S. W. 630.....	n420
Steffenson v. Chicago, M. & St. P. R'y			
Co	45	Minn. 355, 47 N. W. 1068; 48	
		Minn. 285, 51 N. W. 610.....	337
Steen v. St. Paul & D. R. Co.....	37	Minn. 310, 34 N. W. 113.....	n355
Steiler v. Hart.....	65	Mich. 644, 32 N. W. 875.....	n26
Steinhauser v. Spraul.....	127	Mo. 541; 114 Mo. 551; 21 S. W.	
		515, 859; 28 S. W. 620; 30 S. W.	
		102	433, 435

Stephens v. Hann. & St. J. R. Co.....	86 Mo. 221; 96 Mo. 207; 9 S. W.	
	589	n504
Stephenson v. Ravenscroft.....	25 Neb. 678, 41 N. W. 652.....	n506
Stewart v. St. Paul, M. & M. R'y Co..	43 Minn. 268, 45 N. W. 431.....	n348
Stock Yards Co. v. Conoyer.....	38 Neb. 488; 41 Neb. 617; 56 N. W.	
	, 1081; 59 N. W. 950.....	595
Stock Yards Co. v. Larsen.....	38 Neb. 492, 56 N. W. 1079.....	595
Stoddard v. St. Louis, K. C. & N. R.		
Co	65 Mo. 514.....	n507
Stoher v. St. Louis, I. M. & S. R'y Co..	105 Mo. 192; 91 Mo. 511; 16 S. W.	
	591; 4 S. W. 839.....	n500, n501
Street R'y Co. v. Cox.....	48 Neb. 807.....	593
Stringer v. Mo. Pac. R'y Co.....	96 Mo. 299, 9 S. W. 905.....	438
Sullivan v. Hann. & St. J. R. Co.....	88 Mo. 169; 107 Mo. 66, 17 S. W.	
	748	508
Sullivan v. Mo. Pac. R'y Co.....	97 Mo. 113, 10 S. W. 852.....	n504
Sullivan v. Tioga R. Co.....	112 N. Y. 643, 20 N. E. 569.....	n820
Sutherland v. Troy & Boston R. Co..	125 N. Y. 737, 26 N. E. 609, 35 N.	
	Y. St. Rep. 853; see 46 Hun,	
	372	n789
Swadley v. Mo. Pac. R'y Co.....	118 Mo. 268, 24 S. W. 140.....	n505
Sweeney v. Minn. & St. L. R'y Co....	33 Minn. 153, 22 N. W. 289.....	302
Sweet v. Mich. Cent. R. Co.....	87 Mich. 559, 49 N. W. 882.....	n171
Swoboda v. Ward.....	40 Mich. 420.....	I

T

Tabler v. Hann. & St. J. R. Co.....	93 Mo. 79, 5 S. W. 810.....	476
Tangney v. J. B. Wilson & Co.....	87 Mich. 453, 49 N. W. 666.....	n52
Telegraph Co. v. Mullins.....	44 Neb. 732, 62 N. W. 880.....	603
Theisen v. Porter.....	56 Minn. 555, 58 N. W. 265.....	234
Thomas v. Mo. Pac. R'y Co.....	109 Mo. 187, 18 S. W. 980.....	n507
Thompson v. Lake Shore & M. S. R'y		
Co	84 Mich. 281, 47 N. W. 584.....	n161
Thompson v. Mont. Cent. R'y Co.....	17 Mont. 426.....	n528
Thorpe v. Mo. Pac. R'y Co.....	89 Mo. 650, 2 S. W. 3.....	n506
Tierney v. Minn. & St. L. R'y Co.....	33 Minn. 311, 23 N. W. 229; 31	
	Minn. 234, 17 N. W. 377.....	288
Timm v. Mich. Cent. R. Co.....	98 Mich. 226, 57 N. W. 116.....	n169
Tinney v. Boston & Albany R. Co.....	52 N. Y. 632, aff'g 62 Barb. 218....	n809
Toomey v. Eureka Iron & Steel Works.	89 Mich. 249, 50 N. W. 850.....	n52
Torongo v. Salliotte.....	99 Mich. 41, 57 N. W. 1042.....	n11
Town v. Mich. Cent. R. Co.....	84 Mich. 214, 47 N. W. 665.....	n167
Troth v. Norcross.....	111 Mo. 630, 20 S. W. 297.....	n403
Truntle v. North Star Woolen-Mill Co.	57 Minn. 52, 58 N. W. 832.....	n189
Turner v. Haar.....	114 Mo. 335, 21 S. W. 737.....	416

U

Union Pac. R. Co. v. Billiter.....	28 Neb. 422, 44 N. W. 483.....	580
Union Pac. R. Co. v. Broderick.....	30 Neb. 735, 46 N. W. 1121.....	576
Union Pac. R. Co. v. Erickson.....	41 Neb. 1, 59 N. W. 347.....	574

TABLE OF CASES REPORTED.

xxix

Union Pac. R. Co. v. O'Hern.....	24 Neb. 775, 40 N. W. 293.....	575
Union Stock Yards Co. v. Conoyer....	38 Neb. 488; 41 Neb. 617; 56 N. W. 1081; 59 N. W. 950.....	595
Union Stock Yards Co. v. Larsen.....	38 Neb. 492, 56 N. W. 1079.....	595

V

Van Brunt v. Cin., J. & M. R. Co.....	78 Mich. 530, 44 N. W. 321.....	n156
Vanderbeck v. Hendry.....	5 Vr. (34 N. J. L.) 467.....	n665
Van Dusen v. Letellier.....	78 Mich. 493, 44 N. W. 572.....	50
Van Steenburgh v. Thompson.....	58 N. J. L. 160.....	n681
Van Winkle v. American Steam Boiler Co	52 N. J. L. 240, 19 Atl. 472.....	721
Vautrain v. St. Louis, I. M. & S. R'y Co	78 Mo. 44, aff'g 8 Mo. App. 538....	n492
Vawter v. Mo. Pac. R'y Co.....	84 Mo. 679.....	486
Vernon v. Cornwell.....	104 Mich. 62.....	n83
Vick v. N. Y. Central & H. R. R. Co..	95 N. Y. 267, rev'g 17 Weekly Dig. 267; see 22 Weekly Dig. 474....	n815
Vicksburg & M. R. Co. v. Wilkins.....	47 Miss. 494.....	n367
Viets v. Toledo, A. A. & G. T. R'y Co..	55 Mich. 120, 20 N. W. 818.....	n172
Vosburgh v. L. S. & M. S. R'y Co.....	94 N. Y. 374, aff'g 14 Weekly Dig. 514	n734
Voyer v. Dispatch Printing Co.....	62 Minn. 393.....	186

W

Waldele v. N. Y. Central & H. R. R. Co	95 N. Y. 374.....	n816
Waldhier v. Hann. & St. J. R. Co.....	71 Mo. 514; 87 Mo. 37.....	480, 481
Walker v. Lake Shore & M. S. R'y Co.	104 Mich. 606.....	143
Wallace v. Cent. Vt. R. Co.....	138 N. Y. 302, 33 N. E. 1069, 52 N. Y. St. Rep. 351, rev'g 43 N. Y. St. Rep. 639.....	n734
Walsh v. St. Paul & D. R. Co.....	27 Minn. 367, 8 N. W. 145.....	n357
Warmington v. Atch., T. & S. F. R. Co.	46 Mo. App. 159.....	517
Warner v. Erie R'y Co.....	39 N. Y. 468, rev'g 49 Barb. 558....	734
Waters v. Pioneer Fuel Co.....	52 Minn. 474, 55 N. W. 52.....	n241
Weiden v. Brush Electric Light Co..	73 Mich. 268, 41 N. W. 269.....	n34
Welch v. Brainard.....	108 Mich. 38.....	n74
Welsh v. Ala. & Vicks. R'y Co.....	70 Miss. 20, 11 So. 723.....	369
Wendell v. Penn. R. Co.....	57 N. J. L. 467.....	n672
Western Union Tel Co. v. McMullen..	58 N. J. L. 155.....	700
Western Union Tel. Co. v. Mullins....	44 Neb. 732, 62 N. W. 880.....	603
Whalen v. Centenary Church.....	62 Mo. 326.....	424
Wheeler v. Berry.....	95 Mich. 250, 54 N. W. 876.....	n16
White v. Louis, N., O. & T. R'y Co....	72 Miss. 12, 16 So. 248.....	372
White v. Wittemann Lithographic Co..	131 N. Y. 631, 30 N. E. 236, aff'g 58 Hun, 381	843
Whitehead v. St. Louis, I. M. & S. R'y Co	99 Mo. 263; 22 Mo. App. 60.....	n438

Whittaker v. Del. & H. Canal Co.....	126 N. Y. 544, 27 N. E. 1042, aff'g 49 Hun, 400.....	n810
Williams v. Del., L. & W. R. Co.....	116 N. Y. 628, 22 N. E. 1117, rev'g 39 Hun, 430.....	734
Williams v. Edmunds.....	75 Mich. 92, 42 N. W. 534.....	n83
Williams v. Mo. Pac. R'y Co.....	109 Mo. 475, 18 S. W. 1098.....	n494
Williams v. St. Louis & S. F. R'y Co..	119 Mo. 316, 24 S. W. 782.....	n507
Wilson v. Mich. Cent. R. Co.....	94 Mich. 20, 53 N. W. 797.....	n159
Wilson v. Winona & St. P. R. Co.....	37 Minn. 326, 33 N. W. 908.....	n351
Wood v. Chicago, St. P., M. & O. R'y Co	66 Minn. 49.....	n348
Wood v. N. Y. Central & H. R. R. Co.	70 N. Y. 195.....	n819
Wooden v. Western N. Y. & Penn. R. Co	147 N. Y. 503, 42 N. E. 199, <u>rev'g</u> 25 N. Y. Supp. 977; see 126 N. Y. 10, 26 N. E. 1050.....	n806
Woodruff's Adm'r v. Little (Receiver).	17 Vr. (46 N. J. L.) 614.....	n668
Woods v. Chicago & G. T. R'y Co....	108 Mich. 396.....	n167
Woods v. St. Paul & D. R. Co.....	39 Minn. 435, 40 N. W. 510.....	n350
Wright v. Cooper.....	127 Mo. 377, 30 S. W. 153.....	n426
Wright v. N. Y. Central R. Co.....	25 N. Y. 562, rev'g 28 Barb. 80....	752
Wuotilla v. Duluth Lumber Co.....	37 Minn. 153, 33 N. W. 551.....	173

Y

York v. Kansas City, C. & S. R. Co....	117 Mo. 405, 22 S. W. 1081.....	n503
Young v. Schickle, Harrison & Howard Iron Co	103 Mo. 324, 15 S. W. 771.....	411

NOTES.

Jurisdiction of the Appellate Division of the Supreme Court and also of the Court of Appeals of New York.....	838-834
Liability of Receivers of Railroads; New Jersey rule..	667-668
Actions against Receivers of Railroads; notes of New York cases.....	772-774
Relief Department for railroad employees; Nebraska ruling ...	590
Release; Acceptance of benefit from Railroad Relief Department; Nebraska ruling.....	590
Liability of master for tort of servant resulting in injury to third person :	
MICHIGAN CASES	83-87
MINNESOTA CASES	241-243
MISSISSIPPI CASES.....	373-375
MISSOURI CASES.....	436-438
NEBRASKA CASES	603-604
NEW HAMPSHIRE CASES	623

Statutory liability in actions for injuries to, and death of employees, and the damages recoverable therefor :

MISSOURI " DAMAGE ACT "	451
NEBRASKA " DEATH STATUTE "	597
NEW YORK " DEATH STATUTE "	833
ENGLISH " DEATH STATUTE;" LORD CAMPBELL'S ACT	649

"Fellow-servant" Statutes :

MINNESOTA	325; 337-340
MISSISSIPPI	358-359

Fellow-servant rule in the English leading case of Priestley v.

Fowler	271, 614, 687, 657, 787
English cases on the "Fellow-servant" rule.....	687-688; 756-759
Missouri "Coal Mines Act"	897-898; 400
Missouri "Railroad Corporation Law"	468; 466
Damages in actions for death; English rule..	96; 649-650
Measure of damages in the Baxendale case; English rule...	817
Assumption of risk; ignorance and knowledge of danger or de-	
fect; English cases.....	91-94
Unfenced and unguarded machinery; English ruling.....	761-762
Respondeat superior; English rule.....	687-688; 756-759

Classified list and notes of Michigan cases relating to injuries to

Railroad employees	154-178
--------------------------	---------

Classified list and notes of Minnesota cases relating to injuries to

Railroad employees.....	347-358
-------------------------	---------

Classified list and notes of Missouri cases relating to injuries to

Railroad employees	491-518
--------------------------	---------

Classified list and notes of New York cases relating to injuries to

Railroad employees.....	801-820
-------------------------	---------

Notes of Missouri Courts of Appeals "Master and Servant"

cases.....	516-518
------------	---------

Notes of Missouri Courts of Appeals "Railroad" cases.....

	517-518
--	---------

Railroad employees injured :

MISSISSIPPI CASES	366-367
MONTANA CASES	528-530
NEW HAMPSHIRE CASES	623-625
NEW MEXICO CASES.....	728-729

Minor employees injured by machinery and appliances; notes of cases :

MICHIGAN ...	26-28
MINNESOTA	189-192
NEW YORK	842-846

Minor employees injured in railway service; notes of Missouri

cases.....	455-458; 461-462; 465-466
------------	---------------------------

Machinery accidents; notes of cases :

MICHIGAN	7-8; 10-12; 16-18; 26-28
MINNESOTA	175-179; 182-185; 189-192
MISSOURI	377-380
NEW YORK	842-846

Accidents caused by defective appliances; notes of cases :

MICHIGAN	34-35
MISSOURI.....	377-380

Accidents from uncovered or unguarded machinery ; notes of Minnesota cases.....	175-179
Clothing caught by machinery ; notes of Michigan cases.....	7-8
Cave-in accidents ; notes of Minnesota cases.....	220-221
Defective "foreign cars ;" notes of Missouri cases.....	467-469
Falling objects ; notes of cases :	
MICHIGAN	51-54
MINNESOTA	208-209
Inspection of cars ; notes of Minnesota cases.....	288-290
Locomotive explosions ; notes of New York cases.....	780-781
Mining accidents ; notes of cases :	
MICHIGAN	64-66
MISSOURI	397-399
Projecting objects near track ; Railroad employees injured ; notes of Minnesota cases.....	280-285
Railroad bridge accidents ; notes of New York cases.....	784-786
Street-railway employees injured ; notes of Minnesota cases....	826-829
Notes of, and references to, English cases :	
9, 91, 92, 93, 94, 96, 203, 242, 248, 271, 287, 318, 364, 381, 389, 410, 414, 446, 447, 448, 606, 614, 637, 638, 640, 642, 649, 650, 657, 684, 686, 687, 690, 691, 705, 706, 709, 711, 737, 743, 745, 746, 755, 756, 757, 758, 759, 761, 762, 767, 821, 822.	
Cross-references :	
AM. NEG. CAS. AND AM. NEG. REP.....	1-4
MASTER AND SERVANT CASES.....	1-4
FEDERAL RULE OF FELLOW-SERVANT.....	270
RES IPSA LOQUITUR.....	691
NEW YORK MASTER AND SERVANT CASES.....	832
EMPLOYERS' LIABILITY ACT, NEW YORK.....	833
JURISDICTION OF NEW YORK APPELLATE DIVISION.....	834
FOR COMPLETE LIST OF MINOR NOTES, see TITLE "NOTES" IN INDEX.	

TABLE OF CASES CITED.

[Where a case is cited in a note, the page on which it appears in this volume is preceded by the letter n; as, for instance: Adams v. Iron Cliffs Co., 78 Mich. 272....n121

The importance of a reference to the Table Cited is indicated by numerous cases which are frequently cited throughout this volume abstracts of many which are given in the opinions rendered in the cases reported herein.]

A

Abbett v. Chicago, M. & St. P. R'y Co., 30 Minn. 482..... 303
Ackert v. Lansing, 59 N. Y. 646.. 801
Adams v. Iron Cliffs Co., 78 Mich. 272n121
Agawam Bank v. Strever, 18 N. Y. 502 776
Albro v. Agawam Canal Co., 6 Cush. 75.....62, 737, 822
Alcorn v. R. R. Co., 108 Mo. 81.... 511
Aldridge v. Midland Blast Furnace Co., 78 Mo. 558..... 426
Aldridge v. Williams, 3 How. 924.. 331
Althorf v. Wolfe, 22 N. Y. 355.. 749, n749
American Water Works Co. v. Dougherty, 37 Neb. 373..542, 550, n550
Anderson v. R. R. Co., 107 Mich. 591n113
Appel v. Buffalo, etc., R. Co., 111 N. Y. 550..... 558
Ardesco Oil Co. v. Gilson, 63 Pa. St. 146 685
Ashman v. R. R. Co., 90 Mich. 567. 24
Ashworth v. Stanwix, 3 El. & E. 701 389
Assop v. Yates, 2 H. & N. 768.. 606, 614, 705, 759, n759
Aultman v. Reams, 9 Neb. 487....n570

B

Bahr v. Lombard, 53 N. J. L. 233.. 664, n689, n691, 728
Bailey v. Rome, etc., R. Co., 139 N. Y. 302676, 787, n787
Baker v. Allegheny Valley R. Co., 95 Pa. St. 211.....n7, 45
Balch v. Grand Rapids, etc., R. Co., 67 Mich. 394..... 298
Balhoff v. R. R. Co., 106 Mich. 606. 101, 102

Balle v. Leather Co., 73 Mich. 158.. n76
Balt. & O. R. Co. v. Baugh, 149 U. S. 368.....102, 270, n270
Bancroft v. R. R. Co., 67 N. H. 466. 621, 625, n630
Barley v. Chicago, etc., R'y Co., 4 Biss. 430 96
Barton v. Barbour, 104 U. S. 126..n668
Bartonshill Coal Co. v. McGuire, 3 Macq. 300.....93, n93, n94
Bartonshill Coal Co. v. Reid, 3 Macq. H. L. 266.....n94, 834
Barry v. R. R. Co., 98 Mo. 62..... 480
Batterson v. R'y Co., 53 Mich. 129, 49 Mich. 184.....56, 128, 131
Baylor v. D., L. & W. R. Co., 11 Vr. 23287, 652, 653, 654, 705
Beesley v. F. W. Wheeler & Co., 103 Mich. 196101, 111
Bemis v. Central Vt. R. Co., 58 Vt. 636 218
Benzing v. Steinway, 101 N. Y. 547. 796
Berea Stone C. v. Kraft, 31 Ohio St. 287686, 827
Berger v. R. R. Co., 39 Minn. 78.. 605
Bergman v. R. R. Co., 88 Mo. 678..n490
Bergquist v. City, 42 Minn. 471.... 266, 274
Besel v. N. Y. Cent. R. Co., 70 N. Y. 171712, 824
Bessex v. Chicago & N. W. R'y Co., 45 Wis. 477..... 246
Billings v. Breinig, 45 Mich. 71.... 49
Birge v. Gardner, 19 Conn. 511.... 606
Blair v. R. R. Co., 89 Mo. 392..... 461
Blake v. Midland R'y Co., 18 Q. B. 93649, n649
Blanton v. Dold, 109 Mo. 75..... 473
Booth v. B. & A. R. Co., 73 N. Y. 38n788, 797, 834, 835, 838
Blumenthal v. Brainard, 38 Vt. 402..n668
Bogenschutz v. Smith, 84 Ky. 330.. 600
Bolinger v. St. Paul & D. R. Co., 36 Minn. 418 298

- Borgman v. Omaha & St. L. R'y Co., 41 Fed. 667..... 279
 Bouwmeester v. R. R. Co., 63 Mich. 557 164
 Brackett v. Lubke, 4 Allen, 138.... 242
 Bradley v. Reppell, 133 Mo. 545.... 414
 Brennan v. R. R. Co., 93 Mich. 156. 159
 Brennan v. St. Louis, 92 Mo. 482.. 511
 Brewer v. R'y Co., 56 Mich. 620.... 131
 Brezee v. Powers, 80 Mich. 172.... 22
 Brickner v. N. Y. Cent. R. Co., 49 N. Y. 521.....686, 767, 827
 Bridge Proprietors v. Hoboken Co., 1 Wall. 116..... 331
 Britton v. G. W. Cotton Co., 7 Exch. 130.....762, n762
 Brooks v. Miss. Cotton Oil Co., 76 Miss. 874n359
 Brothers v. Cartter, 52 Mo. 372.. 389, n462
 Brown v. Fagan, 71 Mo. 563..... 461
 Brown v. Gilchrist, 80 Mich. 56....n121
 Brown v. Maxwell, 6 Hill, 592..256, 272
 Brown v. Minn. & St. L. R'y Co., 31 Minn. 553204, 352
 Brown v. Winona & St. P. R. Co., 27 Minn. 162.....203, n276, 277
 Brownell v. Pac. R. Co., 47 Mo. 242n462
 Bryden v. Stewart, 2 Macq. 30..447, 834
 Buckley v. Gutta Percha, etc., Co., 113 N. Y. 540.....n844
 Buel v. Transier Co., 45 Mo. 562.. 420
 Buffalo County v. Van Sickle, 16 Neb. 363..... 573
 Bunt v. Mining Co., 11 Sawy. 178.. 606
 Bunting v. Cent. Pac. R. Co., 14 Nev. 356 606
 Burdick v. Mo. Pac. R'y Co., 123 Mo. 221 415
 Burghart v. Angerstein, 6 Car. & P. 690 69
 Burlington & M. R. Co. v. Schluntz, 14 Neb. 421..... 533
 Burlington & M. R. Co. v. Wendt, 12 Neb. 76..... 573
 Burnes v. R. R. Co., 129 Mo. 56.... 414
 Burnett v. Crandall, 73 Mo. 22.... 461
 Buzzell v. Laconia Mfg. Co., 43 Me. 113 454
 Byrne v. Boadle, 2 H. & C. 722....n690
- C**
- Cahill v. Hilton, 106 N. Y. 512.... 607
 Cardot v. Barney, 63 N. Y. 281....n668
 Carle v. Bangor, etc., R. Co., 43 Me. 269 365
 Cayzer v. Taylor, 10 Gray, 274.... 446
 Cent. R. Co. v. Kenney, 58 Ga. 490.. 606
 Central R. Co. v. Welch, 52 Ill. 183. 286
 Charlebois v. R. R. Co., 91 Mich. 59. 145
 Charles v. Taylor, 3 C. P. Div. 492.. 684
 Charles v. Walker, 38 L. T. N. S. 773 684
 Chicago v. Powers, 42 Ill. 169..... 96
 Chicago, B. & Q. R. Co. v. Grablin, 38 Neb. 90.....554, 573
 Chicago, B. & Q. R. Co. v. Hazzard, 26 Ill. 373..... 152
 Chicago, B. & Q. R. Co. v. Landauer, 36 Neb. 642..... 550
 Chicago, B. & Q. R. Co. v. Metcalf, 44 Neb. 849..... 572
 Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645..... 590
 Chicago & E. R'y Co. v. Branyan, 10 Ind. App. 570..... 678
 Chicago & G. E. R'y Co. v. Harney, 28 Ind. 28..... 256
 Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377.....270, n270
 Chicago & N. W. R. Co. v. Bayfield, 37 Mich. 205..... 46, 138, 140, 144, 208, 686
 Chicago & N. W. R'y Co. v. Swett, 45 Ill. 197..... 92
 Chicago, R. I. & P. R. Co. v. Lonergan, 118 Ill. 41..... 559
 Christman v. Phila., etc., R. Co., 141 Pa. St. 604..... 551
 Church v. Chicago, M. & St. P. R'y Co., 50 Minn. 218..... 325
 Clark v. St. Paul, P. & S. C. R. Co., 28 Minn. 128.....n250, n281
 Clarke v. Holmes, 7 H. & N. 937.. 287, n287, 381, n381, 410, 706, 758, n758, 761, n761, 762
 Clarke v. Barrington, 41 N. H. 44.. 606
 Claxton v. Lex. & B. S. R. Co., 13 Bush, 636 218
 Cleveland, etc., R. Co. v. Keary, 3 Ohio St. 201.....610, 686
 Coal & Car Co. v. Norman, 49 Ohio St. 598 601
 Coal Co. v. McEnery, 91 Pa. St. 195 606
 Cole v. R'y Co., 71 Wis. 114....140, 141
 Collyer v. Penn. R. Co., 20 Vr. 59.. 676
 Colo. Cent. R. Co. v. Ogden, 3 Colo. 499 536
 Colton v. Richards, 123 Mass. 484.. 203
 Conant v. Griffin, 48 Ill. 410..... 97
 Condon v. Mo. Pac. R. Co., 78 Mo. 567n469
 Cone v. Del., L. & W. R. Co., 15 Hun, 172, 81 N. Y. 206..... 771, n771, 788, 804
 Conley v. McDonald, 40 Mich. 150. 9
 Conroy v. Vulcan Iron Works, 62 Mo. 35.....408, 410, 511
 Conway v. Belfast, etc., R'y Co., 11 Ir. C. L. 353.....821, n821, 822
 Cook v. Hann. & St. J. R. Co., 63 Mo. 397 686

Cook v. N. Y. Cent. R. Co., 119 N. Y. 653 796
 Cook v. St. Paul, M. & M. R'y Co., 34 Minn. 45.....179, 206, n281
 Cooley v. Freeholders, 3 Dutcher, 415n668
 Coombs v. New Bedford Cordage Co., 102 Mass. 572.....
 6, n7, 10, 45, 46, 93, 128, 383
 Coon v. Utica & Syr. R. Co., 5 N. Y. 492.....365, 737, n737, 767, 768, 828
 Coontz v. R. R. Co., 121 Mo. 652.. 480
 Cooper v. Ins. Co., 7 Nev. 121..... 605
 Corcoran v. Holbrook, 59 N. Y. 51749, 793, n793, 835
 Couch v. Steel, 3 El. & Bl. 402, 637, n637
 Crater v. Binniger, 4 Vr. 513.....n716
 Crispin v. Babbitt, 81 N. Y. 516....
 779, 782, 784, 798, 813
 Crisswell v. Mont. Cent. R'y Co., 18 Mont. 167 529
 Crue v. Caldwell, 23 Vr. 215..... 716
 Cuff v. Newark & N. Y. R. Co., 35 N. J. L. 17.....n669, n670
 Cullen v. Norton, 126 N. Y. 1..... 785
 Cummings v. Collins, 61 Mo. 522.. 458
 Curran v. Merchants' Mfg. Co., 130 Mass. 374 256

D

Daley v. Boston & A. R. Co., 147 Mass. 101 676
 Dalton v. South Eastern R'y Co., 4 C. B. N. S. 206....96, n96, 649, n650
 Damont v. R. R. Co., 9 La. Ann. 441 152
 Dana v. N. Y. Cent. R. Co., 92 N. Y. 639 787
 Davis v. Detroit, etc., R. Co., 20 Mich. 105, 126.....63, 131, 135
 Day v. R'y Co., 42 Mich. 523..... 135
 Dayharsh v. R. R. Co., 103 Mo. 570. 511
 De Forest v. Jewett, 88 N. Y. 264.. 813
 De Forest v. Wright, 2 Mich. 368.. 86
 Dehning v. Detroit Bridge Works, 46 Neb. 556.....599, 600
 Del., L. & W. R. Co. v. Shelton, 26 Vr. 342..... 728
 Denman v. Johnston, 85 Mich. 387.. 170
 Dennick v. R. R. Co., 103 U. S. 11.. 487, 563
 Deville v. R. R. Co., 50 Cal. 385.. 606, 607
 Devitt v. Pac. R'y Co., 50 Mo. 302.. 287, 380, 426, n453, 457, n462
 Dewey v. R'y Co., 97 Mich. 329.... 101, 112, 168
 Dillon v. Union Pac. R. Co., 3 Dill. 319 286
 Dixon v. R. R. Co., 109 Mo. 419.. 480
 Dixon v. Rankin, 14 Ct. Sess. Cas. 420 447

Dowell v. Vicks, etc., R. Co., 61 Miss. 519n364
 Dowling v. Allen, 74 Mo. 13, 88 Mo. 29345, 384
 Drain v. R. R. Co., 86 Mo. 574....n490
 Dublin, etc., R'y Co. v. Slattery, L. R. 3 App. Cas 1155.....9, n9
 Drymala v. Thompson, 26 Minn. 40. n244, 282, 291

E

East Saginaw City R'y Co. v. Bohn, 27 Mich. 503..... 46
 East Tennessee R. Co. v. Swaney, 5 Lea, 119..... 153
 Eckert v. L. I. R. Co., 43 N. Y. 502. 151
 Eldridge v. L. I. R. Co., 1 Sandf. 89. 153
 Elliott v. St. L., etc., R. Co., 67 Mo. 272 509
 Ellis v. N. Y., L. E. & W. R. Co., 95 N. Y. 546..... 804
 Erickson v. R'y Co., 83 Mich. 281.. 13
 Essex County Elect. Co. v. Kelly, 28 Vr. 100 726
 Estes v. Reynolds, 75 Mo. 563..... 461
 Evarts v. Town of Middlebury, 53 Vt. 626 218
 Ewan v. Lippincott, 18 Vr. 192.... 658, n684, n707
 Ewen v. Chicago, etc., R'y Co., 38 Wis. 613..... 96

F

Farwell v. B. & W. R. Corp., 4 Metc. 49..78, n120, 272, 365, 611, 636, 656, 757, 767, 828
 Fay v. Davidson, 13 Minn. 528....n237
 Fay v. Minn. & St. L. R'y Co., 30 Minn. 231n289, n290
 Fellows v. Niver, 18 Wend. 563.... 840
 Feltham v. England, 2 Q. B. 33.684, 687
 Fifield v. Northern R. R., 42 N. H. 225.....449, 621, 625, 626
 Fisk v. Central Pac. R. Co., 72 Cal. 38 256
 Fleming v. St. Paul & D. R. Co., 27 Minn. 111.....n281, 286
 Fleming v. Western Pac. R. Co., 49 Cal. 257 605
 Flike v. B. & A. R. Co., 53 N. Y. 549...37, 113, 246, 686, n765, n766, 779, 780, 784, 786, n788, 797, 807, 822, 824, 828
 Flynn v. R. R. Co., 78 Mo. 195.... 410
 Foley v. Chicago, R. I. & P. R'y Co., 64 Iowa, 644.....n365
 Ford v. Fitchburg R. Co., 110 Mass. 24024, 48, 246, 686
 Fort Wayne, etc., R. Co. v. Gilder-sleeve, 33 Mich. 133.....n127, 128
 Fosburg v. Philips Fuel Co., 93 Iowa, 54..... 108

Foss v. Baker, 62 N. H. 247..... 625
 Foster v. Minn. Cent. R'y Co., 14 Minn. 360 245
 Fox v. Iron Co., 89 Mich. 387..... 24
 Fraker v. St. Paul, M. & M. R'y Co., 32 Minn. 54..... 204, 348
 Franklin v. South Eastern R'y Co., 3 H. & N. 211..... 96, n96, 649, n649
 Franklin v. Winona & St. P. R. Co., 37 Minn. 409..... 566
 Fraser v. Red River Lumber Co., 45 Minn. 235 266, 274
 Frazier v. Penn. R. Co., 38 Pa. St. 104 685, 756, 810
 Freeholders v. Strader, 3 Harr. 108. n668
 Freyberg v. Pelerin, 24 How. Pr. 202 840
 Frick v. R. R. Co., 75 Mo. 595..... n490
 Frost v. Union Pac. R. Co., 11 Am. L. Reg. N. S. 101..... 95
 Fuller v. B. & O. Emp., etc., 67 Md. 433 n591
 Fuller v. Jewett, 80 N. Y. 46..... 48, 779, 780, 798

G

Gallagher v. Piper, 16 C. B. N. S. 669 203, n203, 755, n757
 Gardner v. R. R. Co., 58 Mich. 584, 590, 591 131, 135, 158
 Garretzen v. Duenckel, 50 Mo. 104.. 441
 Gartland v. Toledo, etc., R'y Co., 67 Ill. 498 256
 Gates v. Boom Co., 70 Mich. 309.. 55
 Gavett v. R. R. Co., 16 Gray, 501.... 152
 Gay v. Winter, 34 Cal. 163..... 606
 Gibson v. Erie R'y Co., 63 N. Y. 449 n735, n772, n774, 812
 Gibson v. Pac. R. Co., 46 Mo. 163, 167.... 131, 248, 249, 286, 429, 457, 458, 462, 473, 480
 Gillshannon v. Stony Brook R'y, 10 Cush. 228 712
 Gilman v. Eastern R. Co., 13 Allen, 433 756, 760
 Gilmore v. Northern Pac. R'y Co., 9 Sawy. 558..... 48
 Glascock v. Cent. Pac. R. Co., 73 Cal. 141 606
 Glover v. Scotten, 82 Mich. 369.... 159
 Goetz v. Ambs, 27 Mo. 34..... 460
 Gonsior v. Minn. & St. L. R'y Co., 36 Minn. 385..... 204, 275
 Gonzales v. R. R. Co., 38 N. Y. 440. 606
 Goodfellow v. Boston, etc., R. Co., 106 Mass. 461..... 551
 Goodrich v. N. Y. Cent. R. Co., 116 N. Y. 398..... 802
 Goodwell v. Mont. Cent. R'y Co., 18 Mont. 293..... 529

Gordon v. M. & L. R. Co., 52 N. H. 596 779
 Gothard v. Ala. Gt. S. R. Co., 67 Ala. 118 606
 Graft v. B. & O. R. Co. (Pa.) 8 Atl. 206 n591
 Grand v. R. R. Co., 83 Mich. 571.. 158
 Grand Trunk R'y Co. v. Ives, 144 U. S. 408..... 526
 Gt. W. R'y Co. v. Blake, 7 H. & N. 986 n668
 Greene v. Minn. & St. L. R'y Co., 31 Minn. 248 48, n281, n327
 Greenwald v. R'y Co., 49 Mich. 197. 135
 Griffith v. Hanks, 91 Mo. 109..... 402
 Griffiths v. Gidlow, 3 H. & N. 655.. 606, 706
 Griffiths v. Wolfram, 22 Minn. 185. 435
 Grizzle v. Frost, 3 Fost. & F. 622.. 92, n93
 Gutridge v. R. R. Co., 94 Mo. 468.. 424, n468

H

Hadley v. Baxendale, 9 Exch. 341.. 317, n317
 Hall v. R. R. Co., 74 Mo. 298.... 480
 Hamilton v. Rich Hill Mining Co., 108 Mo. 364..... 408
 Hammond v. Johnson, 38 Neb. 244. 594
 Hankins v. N. Y., L. E. & W. R. Co., 142 N. Y. 416..... 676
 Hanley v. Grand Trunk R'y, 62 N. H. 274 625
 Hard v. Vt., etc., R. Co., 32 Vt. 473 62, 744, 756
 Hardy v. D., L. & W. R. Co., 57 N. J. L. 505, 59 id. 35..... 658
 Harlan v. R. R. Co., 65 Mo. 22.... n490
 Harper v. Erie R. Co., 32 N. J. L. 88 605, 606
 Harper v. Ind. & St. L. R. Co., 47 Mo. 567..... 389, 431, n462
 Harriman v. Stowe, 57 Mo. 93.. 420, 435
 Harrison v. Cent. R. R., 2 Vr. 293.. 645, 656, 657, 682, n707
 Harrison v. R. R. Co., 79 Mich. 409. 13, 119, n120, n121, 164, 170
 Hart v. Grennell, 122 N. Y. 374.. 801
 Hartford, etc., R. Co. v. Andrews, 36 Conn. 213..... 296
 Hathaway v. Mich. Cent. R. Co., 51 Mich. 253 45, 46, 129
 Hawley v. Northern Cent. R. Co., 82 N. Y. 370..... 703
 Hayden v. Smithville Mfg. Co., 29 Conn. 548.... 249, 286, 383, 450, 454, 600, 606, 657, 705, 759
 Hayes v. Western R. Co., 3 Cush. 270 365, 771, n771
 Henderson v. Williams, 66 N. H. 405 621, n630

TABLE OF CASES CITED.

xxxvii

Henry v. R'y Co., 49 Mich. 498....
 117, 131, 135
 Henry v. R. R. Co., 109 Mo. 488.. 480
 Hepfel v. St. Paul, M. & M. R'y Co.
 49 Minn. 263..... 324
 Hewitt v. Eisenbart, 36 Neb. 794.. 570
 Hewitt v. R. R. Co., 67 Mich. 61..
 129, 131
 Hickey v. Taaffe, 99 N. Y. 204, 105
 N. Y. 26.....n842, n843, n844, 850
 Hill v. Boston, 122 Mass. 344.....n668
 Hill v. Winsor, 118 Mass. 251..... 318
 Hilliard v. Richardson, 3 Gray, 349. 710
 Hinds v. Harbou, 58 Ind. 121..... 435
 Hinds v. Overacker, 66 Ind. 547.. 435
 Hipsley v. R. R. Co., 88 Mo. 348 511
 Hoar v. Merritt, 62 Mich. 386..... n82
 Hoey v. Dublin & Belfast R'y Co.,
 18 Weekly R. 930.....762, n762
 Hofnagle v. N. Y. Cent. R. Co., 55
 N. Y. 608..... 824
 Hoke v. R. R. Co., 88 Mo. 360..... 477
 Holmes v. Clarke, 6 H. & N. 349..
 287, n287, 381, n381, 410, 758,
 n758, 761, n761, 762
 Homan v. Steele, 18 Neb. 652..... 588
 Hough v. T. & P. R'y Co., 100 U. S.
 21448, 49
 Howell v. Landore Steel Co., 10 Q.
 B. 63.....684, 686
 Hubener v. R. R. Co., 23 La. Ann.
 492 152
 Huddleston v. Lowell Machine Co.,
 106 Mass. 282.....248, 762
 Hudson v. D. & H. Canal Co., 40
 Fed. 195 298
 Huhn v. R. R. Co., 92 Mo. 440....
 408, 473, 475
 Hughes v. Winona & St. P. R. Co.,
 27 Minn. 137.....n281, 322
 Huizega v. Cutler & Savidge Co., 51
 Mich. 272.....45, 55, 107, 108
 Hunn v. R. R. Co., 78 Mich. 513..
 119, n121
 Hunt v. Chicago & N. W. R'y Co.,
 26 Iowa, 370.....n365
 Huntington, etc., R. Co. v. Decker,
 84 Pa. St. 419..... 685
 Hurl v. Handlin, 43 Mo. 171..... 461
 Hurst v. R'y Co., 84 Mich. 539.... 145
 Hutchinson v. Y., N. & B. R'y Co., 5
 Exch. 343.....248, n248, 637, n638

I

Illick v. Flinf & P. M. R. Co., 67
 Mich. 632 565
 Ill. Cent. R. Co. v. Able, 59 Ill. 131. 152
 Ill. Cent. R. Co. v. Frelka, 110 Ill.
 498 548
 Ill. Cent. R. Co. v. Hunter, 70 Miss.
 471 372

Ill. Cent. R. Co. v. Pendergrass, 69
 Miss. 425367, n367
 Ill. Cent. R. Co. v. Slatton, 54 Ill.
 133 152
 Imhoff v. Wurtz, 9 Civ. Pro. Rep.
 48 840
 Internat. & G. N. R. Co. v. Doyle,
 49 Tex. 190..... 600

J

James v. Mining Co., 55 Mich. 335. 108
 Jarrett v. Morton, 44 Mo. 275..... 461
 Jeffersonville R. Co. v. Hendricks,
 26 Ind. 228, 41 Ind. 48..... 152
 Jeffersonville R. Co. v. Swift, 26
 Ind. 459 152
 John v. Bacon, L. R. 5 C. P. 437..n668
 Johnson v. City of Boston, 118
 Mass. 114 710
 Johnson v. Phila., etc., R. Co. (Pa.),
 29 Atl. 854..... 589
 Johnson v. Spear, 76 Mich. 139..
 n52, n121
 Jones v. R'y Co., 49 Mich. 573..
 139, 140, 144

K

Kaillen v. N. W. Bedding Co., 46
 Minn. 187 191
 Kain v. Smith, 80 N. Y. 458, 89 N.
 Y. 375n668, 703
 Karle v. R. R. Co., 55 Mo. 476....n490
 Kean v. Rolling Mills, 66 Mich. 277..
 n76, 132
 Kearney v. London, etc., R'y Co., 5
 Q. B. 411, 6 id. 759.....n690
 Keegan v. Kavanaugh, 62 Mo. 230.. 410
 Keegan v. Western R. Co., 4 Seld.
 175449, 536, 743, n743
 Keenan v. R. R. Co., 145 N. Y. 190. 141
 Kelley v. Norcross, 121 Mass. 508.. 203
 Kelley v. R. R. Co., 75 Mo. 140....n490
 Kelly v. So. Minn. R'y Co., 28 Minn.
 98 322
 Kennon v. Gilmer, 5 Mont. 257.... 526
 Kibele v. Philadelphia, 105 Pa. St.
 41 48
 Killea v. Faxon, 125 Mass. 485.... 203
 Kimball v. Cushman, 103 Mass. 194. 710
 King v. B. & W. R. Co., 9 Cush.
 112256, 610
 King v. N. Y. C. & H. R. Co., 72 N.
 Y. 607..... 218
 King v. Ohio, etc., R. Co., 14 Fed.
 277 291
 Klein v. Jewett, 11 C. E. Green,
 474n668
 Knight v. R. R. Co., 23 La. Ann.
 462 152
 Kolsti v. Minn. & St. L. R. Co., 32
 Minn. 133 322

Koontz v. Chicago, etc., R. Co., 65
Iowa, 224..... 565
Kroy v. R. R. Co., 32 Iowa, 357.... 607

L

Ladd v. New Bedford R. Co., 119
Mass. 412..... 131, 657
Lake Shore & M. S. R'y Co. v. Mc-
Cormick, 74 Ind. 440..... 560
Lalor v. Chicago, etc., R. Co., 52
Ill. 401 95
Lambeth v. No. Car. R. Co., 66 N.
C. 494 152
Laning v. N. Y. Cent. R. Co., 49 N.
Y. 521.... 606, 686, 706, n747, 767,
769, n788, 793, 797, 807, 812, 824, 834
Larkin v. O'Neill, 119 N. Y. 225.... 801
Lavallee v. St. Paul, M. & M. R'y
Co., 40 Minn. 249..... n339
Leary v. R. R. Co., 139 Mass. 587... 141
Leas v. Penn. R. Co. (Ind.) 37 N.
E. 423 592
Lee v. Smart, 45 Neb. 318.... 600, n601
Lehigh Valley Coal Co. v. Jones, 86
Pa. St. 432..... 63, 684
Leigh v. Omaha St. R. Co., 36 Neb.
131 594
Leonard v. Collins, 70 N. Y. 90.... 837
Leonard v. Columbia Steam Nav.
Co., 84 N. Y. 48..... 487
Leslie v. R. R. Co., 88 Mo. 50..... 477
Lewis v. R. R. Co., 38 Md. 588.... 153
Lewis v. St. Louis & I. M. R'y Co.,
59 Mo. 495..... 246, 389, 480
Lindstrand v. Delta Lumber Co., 65
Mich. 261 108
Lindvall v. Woods, 41 Minn. 212..
n205, 222, 265, 266, 273
Litchfield Coal Co. v. Taylor, 81 Ill.
590 402
Livermore v. Freeholders, 5 Dutcher,
245 n668
Long v. R. R. Co., 65 Mo. 225..... 480
Lopez v. Cent. Ariz. Mining Co., 1
Ariz. 481 606
Loranger v. R'y Co., 104 Mich. 80..
102, 112, n121
Louis., etc., R. Co. v. Bowler, 9
Heisk. 866..... 686
Louisville, etc., R. Co. v. Collins, 2
Duv. 114..... 95
Louis., N., A. & C. R'y Co. v. Sand-
ford, 117 Ind. 265..... 600
Louis. & N. R. Co. v. Ward, 10 C.
A. 166..... 102
Louis. & N. R. Co. v. Louis. City R.
Co., 2 Duv. 175..... 330
Lovejoy v. R. R. Co., 125 Mass. 79.. 131
Lovell v. Howell, 1 C. P. 161.. 711, n711
Lucas v. R. R. Co., 6 Gray, 72..... 606
Lyman v. R. R., 66 N. H. 200..... 621

M

Mabley v. Kittleberger, 37 Mich.
360 55
McAndrews v. Burns, 10 Vr. 117..
62, 63, 676, 684, 685, n707, 711
McAndrews v. Montana Union R'y
Co., 15 Mont. 290..... 525
McCosker v. L. I. R. Co., 84 N. Y.
77 712
McCoy v. McKowen, 26 Miss. 487..
n374, 375
McDermott v. Pac. R. Co., 30 Mo.
115..... 430, 442, 444, n462, 480
McDonald v. R. R. Co., 108 Mich. 7.
112, 116, 117
McGatrick v. Wason, 4 Ohio St.
566 448
McGinnis v. Bridge Co., 49 Mich.
466 128, 138, 559
McGlynn v. Brodie, 31 Cal 381..... 606
McGowan v. La Plata Mining Co.,
3 McCrary, 397 45, 48
McGowan v. R. R. Co., 61 Mo. 528. 383
McMahon v. Davidson, 12 Minn.
357 n237
McManus v. Crickett, 1 East, 106.. n374
McQuigan v. D., L. & W. R. Co.,
126 N. Y. 618..... 705
Maddock v. Hammet, 7 Term Rep.
55 420
Mad River, etc., R. Co. v. Barber,
5 Ohio St. 541..... 448, 454, 759
Malone v. Hathaway, 64 N. Y. 5..
62, 686, 824, n824
Mann v. Del. & H. C. Co., 91 N.
Y. 500 835
Mantel v. Chicago, M. & St. P. R'y
Co., 33 Minn. 62..... 305
Marsh v. Bristol, 65 Mich. 383.... 55
Marsh v. Chickering, 101 N. Y. 396.
607, 657, 818
Marsh v. Herman, 47 Minn. 537...
266, 275
Marshall v. Furniture Co., 67 Mich.
167 55
Marshall v. Shricker, 63 Mo. 309...
383, 426
Marshall v. Stewart, 2 Macq. H. L.
20 91, n91, 446
Martin v. B. & O. R. Co., 41 Fed.
125 n591
Marvin Safe Co. v. Ward, 17 Vr. 19. n668
Mastin v. Grimes, 88 Mo. 490..... 461
Mawich v. Elsey, 47 Mich. 10..... 21
Mayes v. Chicago, etc., R. Co., 63
Iowa, 562 558
Meara v. Holbrook, 20 Ohio St.
137 n668
Mellors v. Shaw, 1 B. & S. 437.. 91, n92
Melzer v. Rolling Mills, 76 Mich.
94 n76, 132
Merz v. R. R. Co., 88 Mo. 677..... n490

TABLE OF CASES CITED.

xxxix

Meyer v. King, 72 Miss. 1.....	372
Meyer v. M. P. R. Co., 2 Neb. 342..	n570
Mich. Cent. R. Co. v. Austin, 40 Mich. 250	102, 117, 120, 130, 135
Mich. Cent. R. Co. v. Dolan, 32 Mich. 513	6
Mich. Cent. R. Co. v. Leahey, 10 Mich. 193	114, 120. n120
Mich. Cent. R. Co. v. Smithson, 45 Mich. 212	46, 129, 133, 135
Millar v. Madison Car Co., 130 Mo. 142	414
Miller v. B. & M. R. Co., 8 Neb. 219	603
Miller v. R'y Co., 90 Mich. 230.....	120
Miller v. R. R. Co., 109 Mo. 350.....	480
Mills v. Maine Ice Co., 22 Vr. 342..	719
Mo. Pac. R'y Co. v. Baier, 37 Neb. 235	542, 555
Mo. Pac. R. Co. v. Baxter, 42 Neb. 793	598, 599, 600
Mo. Pac. R'y Co. v. Hansen, 48 Neb. 232	573
Mo. Pac. R. Co. v. Lewis, 24 Neb. 848	594
Mobile, etc., R. Co. v. Blakely, 59 Ala. 471	153
Monaghan v. N. Y. Cent. R. Co., 45 Hun, 113	812
Money v. Lower Vein Coal Co., 55 Iowa, 671	606
Moore v. Cent. R. Co., 24 N. J. L. 368	606
Moore v. Wabash, etc., R. Co., 85 Mo. 588	477, 496, 503
Morgan v. Vale of Neath R'y Co., 1 Q. B. 149	684, 711, n711
Morrison v. Phillips, etc., Co., 44 Wis. 405	565
Morse v. Minn. & St. L. R'y Co., 30 Minn. 465	308, 322
Morton v. R. R. Co., 81 Mich. 423..	24, n52, 121
Moss v. Pac. R. Co., 49 Mo. 167.....	n462
Moynihan v. Hills Co., 146 Mass. 586	676
Mulchey v. Meth. R. Soc., 125 Mass. 487	719
Mullan v. Phila., etc., S. S. Co., 78 Pa. St. 25	685, 824
Murphy v. B. & A. R. Co., 88 N. Y. 152	796
Murphy v. Smith, 19 C. B. N. S. 361	687
Murray v. R. R. Co., 98 Mo. 574.....	480
Murray v. So. Car. R. Co., 1 McM. 385	272, 364, 767

N

Nash v. Nashua Steel, etc., Co., 62 N. H. 406.....	621, 625, 626, n630
Nashville R. Co. v. Jones, 9 Heisk. 27	686

Neal v. Northern Pac. R. Co., 57 Minn. 365	267, 279
Needham v. R. R. Co., 37 Cal. 419..	606
Newell v. Bartlett, 114 N. Y. 399...	801
New England R. Co. v. Conroy, 175 U. S. 323	n270
New Orleans, J. & G. N. R. Co. v. Harrison, 48 Miss. 112.....	375
New Orleans, J. & G. N. R. Co. v. Hughes, 49 Miss. 258.....	n364
Nichols v. Chicago, M. & St. P. R. Co., 60 Minn. 319.....	340
Nord Deutscher Lloyd S. S. Co. v. Ingebregsten, 28 Vr. 400.....	726
Northern Pac. R. Co. v. Hambly, 154 U. S. 349.....	n270
No. Pac. R. Co. v. Herbert, 116 U. S. 642	676
Northern Pac. R. Co. v. Peterson, 162 U. S. 346.....	n270
Norton v. Ittner, 56 Mo. 351.....	477
Noyes v. Smith, 28 Vt. 59.....	248, 249, 450, 641, 756

O

Oakes v. Hill, 14 Pick. 442.....	69
O'Brien v. American Dredging Co., 24 Vr. 291	n687
O'Byrne v. Burn, 16 Ct. of Sess. Cas. 1025	n94
O'Connor v. Adams, 120 Mass. 427.	45, 46
Odell v. N. Y. Cent. R. Co., 120 N. Y. 325	705
Ohio & M. R. Co. v. Hammersley, 28 Ind. 371	256
O'Leary v. City of Mankato, 21 Minn. 65	307
Olson v. St. Paul, M. & M. R'y Co., 38 Minn. 117	204, 276
Omaha St. R. Co. v. Craig, 39 Neb. 601	550, 555
O'Mellia v. R. R. Co., 115 Mo. 205..	408
Owen v. N. Y. Cent. R. Co., 1 Lans. 108	131, 286
Owens v. B. & O. R. Co., 35 Fed. 715	589, n591

P

Packard v. Bergen Neck R. Co., 25 Vr. 229	n716
Paine v. R. R., 58 N. H. 611.....	621
Palys v. Jewett, 5 Stew. Eq. 302...	n668
Pakalinsky v. R. R. Co., 82 N. Y. 424	153
Palmer v. R. R. Co., 93 Mich. 363..	13
Pantzar v. Tilly Foster I. M. Co., 99 N. Y. 376	793, 796
Parker v. R. R. Co., 109 Mo. 362...	480
Parkhurst v. Johnson, 50 Mich. 70..	48, 55, 108
Parks v. Parks, 19 Abb. Pr. 161....	840

- Patterson v. Pitts., etc., R. Co., 76
 Pa. St. 389 93, 248, 381, 474, 536, 685, 703
 Patterson v. R'y Co., 54 Mich. 92... 55
 Patterson v. Wallace, 1 Macq. 748.. 414, 446, 606
 Paulmier v. Erie R. Co., 34 N. J. L. 151 n643, 683
 Penn. R. Co. v. Aspell, 23 Pa. St. 147 152, 606
 Penn. R. Co. v. Gallagher, 40 Ohio St. 637 547
 Penn. R. Co. v. Roy, 102 U. S. 451.. n668
 Penn. R. Co. v. Zebe, 33 Pa. St. 318 97
 Perry v. Marsh, 25 Ala. 659..... 92
 Perry v. Mich. Cent. R. Co., 108 Mich. 130 112, 115, 116, 118
 Pescher v. Chicago, M. & St. P. R'y Co., 62 Wis. 338 203
 Phelps v. City, 23 Minn. 276..... 322
 Phila. & R. R. Co. v. Spearen, 47 Pa. St. 300 153
 Phillips v. Library Co., 26 Vr. 307.. n701
 Phillips v. R. R. Co., 49 N. Y. 177.. 152
 Piquegno v. R'y Co., 52 Mich. 40.. 102
 Plank v. N. Y. Cent. R. Co., 60 N. Y. 607 n773
 Ponton v. Wilm., etc., R. Co., 4 Jones, 247 365
 Pope v. Filley, 9 Fed. 65..... 219
 Porter v. Hann. & St. J. R. Co., 71 Mo. 66 383, 477
 Potter v. Chicago, etc., R'y Co., 21 Wis. 372 96
 Powers v. N. Y., L. E. & W. R. Co., 98 N. Y. 274 812
 Pratt v. Hull, 13 Johns. 335..... 605
 Pray v. Jersey City, 3 Vr. 394..... n668
 Prentiss v. Mfg. Co., 63 Mich. 478.. 132
 Preston v. Browder, 1 Wheat. 115.. 331
 Priestley v. Fowler, 3 M. & W. 1.. n120, 271, n271, 364, 446, 606, 614, 637 n637, 657, n657, 737, n737, 743, n743, 767
 Proctor v. Hann. & St. J. R. Co., 61 Mo. 112 493
 Prosser v. Mont. Cent. R. Co., 17 Mont. 372 529
 Pryor v. Hunter, 31 Neb. 678..... 588
 Pym v. Gt. N. R'y Co., 4 B. & S. 396 650, n650
- Q**
- Quincy Mining Co. v. Kitts, 42 Mich. 34 55, n62, 135, 136
- R**
- Ragon v. R'y Co., 97 Mich. 274.... 56
 R. R. Co. v. Bailey, 40 Miss. 395... n376
 R. R. Co. v. Barron, 5 Wall. 90.... n668
 R. R. Co. v. Coleman, 28 Mich. 440. 55
 R. R. Co. v. Cook, 63 Miss. 38.....
 R. R. Co. v. Cutter, 16 Kan. 568....
 R. R. Co. v. Dolan, 32 Mich. 510...
 R. R. Co. v. Drew, 59 Tex. 11.....
 R. R. Co. v. Fort, 17 Wall. 553....
 R. R. Co. v. Gilbert, 46 Mich. 176..
 R. R. Co. v. Herbert, 116 U. S. 653..
 R. R. Co. v. Huntley, 38 Mich. 537..
 R. R. Co. v. Leahey, 10 Mich. 193..
 R. R. Co. v. Lyons, 119 Pa. St. 336..
 R. R. Co. v. Smithson, 45 Mich. 212
 R. R. Co. v. Still, 19 Ill. 509.....
 R'y Co. v. Fowler, 56 Tex. 457.. 605,
 Rauch v. Lloyd, 31 Pa. St. 358.....
 Reagan v. R. R. Co., 98 Mo. 348...
 Reed v. Northfield, 13 Pick. 94....
 Relyea v. R. R. Co., 112 Mo. 86....
 Richards v. Rough, 53 Mich. 212...
 Richardson v. N. Y. C. R. Co., 98 Mass. 85
 Richberger v. Am. Exp. Co., 73 Miss. 161
 Rich. & D. R. Co. v. Rush, 71 Miss. 987
 Rine v. R. R. Co., 88 Mo. 392..... 490, n490, n491,
 Ripley v. Seligman, 88 Mich. 177..
 Roberts v. Pepple, 5 Mich. 367.....
 Roberts v. Smith, 2 H. & N. 213....
 Robinson v. Western Pac. R. Co. 48 Cal. 421
 Roesner v. Hermann, 8 Fed. 782...
 Rogers v. Overton, 87 Ind. 410.... Vr. 464
 Rogers v. Overton, 87 Ind. 410....
 Rohback v. Pac. R. Co., 43 Mo. 187. 430, 442, 444, n462, 463,
 Rose v. B. & A. R. Co., 58 N. Y. 217 779,
 Rose v. Des Moines Valley R. Co. 39 Iowa, 246
 Ross v. N. Y. Cent. R. Co., 5 Hun. 488, 74 N. Y. 617.....
 Ross v. Walker, 139 Pa. St. 42....
 Rounsavell v. Pease, 45 Wis. 506..
 Roux v. Lumber Co., 94 Mich. 607..
 Ruggles v. Fay, 31 Mich. 141.....
 Runyon v. Cent. R. Co., 25 N. J. L. 556
 Rush v. Mo. Pac. R'y Co., 36 Kan. 129 559,
 Russ v. R. R. Co., 112 Mo. 45.....
 Russell v. Minn. & St. L. R'y Co., 32 Minn. 230 179, 247, 249,
 Rutter v. Puckhofer, 9 Bosw. 638..
 Ryan v. Bagaley, 50 Mich. 179.... 13, 14, 55, 119,
 Ryan v. Cumberland Valley R. Co., 23 Pa. St. 384.....
 Ryan v. Fowler, 24 N. Y. 410.... 91, 248, 450, 744,

TABLE OF CASES CITED.

xli

S

Sadler v. Henlock, 4 El. & Bl. 570... 242
 Sadowski v. Mich. Car Co., 84 Mich. 100... 16, 23, n23
 St. Louis & S. E. R'y Co. v. Valerius, 56 Ind. 511... 46
 Schaible v. R'y Co., 97 Mich. 318... 102
 Schlereth v. R. R. Co., 115 Mo. 87... 480
 Schneider v. Chicago, B. & N. R. Co., 42 Minn. 68... 260
 Schooner Norway v. Jensen, 52 Ill. 373... 92
 Schroeder v. Chicago, etc., R'y Co., 47 Iowa, 375... 540
 Schroeder v. R. R. Co., 103 Mich. 213... 111
 Schultz v. Chicago, etc., R. Co. (Wis.) 28 Am. & Eng. R. Cas. 407... 565
 Schultz v. Pac. R. Co., 36 Mo. 18... 461, n461, 462, n462, n463, 465
 Scoville v. R. R. Co., 81 Mo. 440... n490
 Scudder v. R. R. Co., 1 Ind. Sup. Ct. 481... 153
 Searle v. Lindsay, 11 C. B. N. S. 429... 684
 Sears v. Eastern R. Co., 14 Allen, 433... 779
 Seaver v. B. & M. R. Co., 14 Gray, 466... 446
 Senn v. R. R. Co., 108 Mo. 142... 418
 Seymour v. Maddox, 16 Ad. & E. 327... 637, n638
 Shamp v. Meyer, 20 Neb. 223... 588
 Shea v. Sixth Ave. R. Co., 62 N. Y. 180... 95
 Sheehan v. N. Y. Cent. R. Co., 91 N. Y. 332... 787
 Sherman v. Chicago, M. & St. P. R. Co., 34 Minn. 259... n281
 Siela v. R. R. Co., 82 Mo. 435... 477
 Sims v. American S. B. Co., 56 Minn. 68... 266
 Sims v. N. Y. College of Dentistry, 35 Hun, 344... 840
 Sioux City R. Co. v. Brown, 13 Neb. 317... 533
 Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578... 594, 600, n601
 Sjogren v. Hall, 53 Mich. 274... n29, 132
 Skipp v. Eastern, etc., R. Co., 9 W. H. & G. 223... 614, 759, n759
 Slater v. Chapman, 67 Mich. 523... 13, 14
 Slater v. Jewett, 85 N. Y. 61... 783, 785, n788, 796
 Smith v. L. & S. W. R'y Co., L. R. 6 C. P. 14... 318, n318
 Smith v. N. Y. & H. R. Co., 19 N. Y. 127... 656
 Smith v. Oxford Iron Co., 42 N. J. L. 467... n7, 45, 48, 676, 683, n685, n686, n707

Smith v. Peninsular Car Works, 60 Mich. 501... 55, 108, 144
 Smith v. Potter, 46 Mich. 264... 115, 118, 135, 168
 Smith v. R. R. Co., 92 Mo. 359... 480
 Smith v. St. L., etc., R. Co., 69 Mo. 32... 383, n474, 560
 Smith v. Townsend, 148 U. S. 490... 331
 Smith v. Tromanhauser, 63 Minn. 98... n224
 Snider v. Express Co., 63 Mo. 376... 461
 Snow v. Housatonic R. Co., 8 Allen, 441... 92, 246, 248, 446, 474, 536, 641, 744, 759
 Snyder v. Hann. & St. J. R. Co., 60 Mo. 413... n438
 Soeder v. R. R. Co., 100 Mo. 681... 473, 475
 Solen v. Va. & T. R. Co., 13 Nev. 120... 606
 Spelman v. Fisher Iron Co., 56 Barb. 151... 48
 Sprague v. Smith, 29 Vt. 421... n668
 Sprong v. B. & A. R. Co., 58 N. Y. 56... 292, n766
 State v. B. & O. R. Co., 36 Fed. 655... 589
 State v. Brin, 30 Minn. 522... 333
 Stebbins v. Township of Keene, 55 Mich. 552... 55
 Stephens v. R. R. Co., 96 Mo. 207... 402, 410, 480, 511
 Stephenson v. Duncan, 73 Wis. 404... 601
 Stockman v. Terre Haute, etc., R. Co., 15 Mo. App. 503... 487
 Stone v. Coleman, 15 Pick. 297... 708
 Stone v. Sleigle Co., 70 Wis. 585... 21
 Stoppert v. Nierle, 45 Neb. 105... 573
 Strahlendorf v. Rosenthal, 30 Wis. 675... 45, 92
 Sullivan v. India Mfg. Co., 113 Mass. 393... 248
 Sullivan v. Louis. Bridge Co., 9 Bush. 81... 606
 Sullivan v. M. & M. R. Co., 11 Iowa, 421... 365, n365
 Sullivan v. R. R. Co., 97 Mo. 117... 480
 Sullivan v. R. R. Co., 107 Mo. 66... 415
 Sutherland v. Troy & B. R. Co., 125 N. Y. 737... 788
 Swadley v. R. R. Co., 118 Mo. 268... 480
 Sweeney v. Berlin & Jones Env. Co., 101 N. Y. 520... 559
 Swoboda v. Ward, 40 Mich. 420... n5, n7, 45, 55, n76, 107, 131, 248

T

Tabler v. R. R. Co., 93 Mo. 79... 477
 Tangney v. J. B. Wilson & Co., 87 Mich. 455... 102, 103
 Tanner v. R. R. Co., 60 Ala. 621... 153

- Tarrant v. Webb, 18 C. B. 797....
 640, n640, 743, n743
 Taylor v. Penn. Co., 78 Ky. 348.... 487
 Teipel v. Hilsendegen, 44 Mich. 461. 49
 Thayer v. St. L. & T. H. R. Co., 22
 Ind. 26 454
 Thompson v. Chicago, M. & St. P.
 R'y Co., 14 Fed. 564 251
 Thompson v. Mosely, 29 Mo. 477... 420
 Thompson v. R. R. Co., 57 Mich.
 308 605, 606
 Tierney v. Minn. & St. L. R'y Co.,
 33 Minn. 311 204, n290
 Toy v. U. S. Cartridge Co., 159
 Mass. 313 676
 Treadwell v. Brider, 3 E. D. Smith,
 596 840
 Trow v. R. R. Co., 24 Vt. 493.... 606
 Tucker v. Henniker, 41 N. H. 317.. 606
 Turner v. R. R. Co., 51 Mo. 501.... 481
 Tuttle v. Detroit, etc., R. Co., 122
 U. S. 189 558
- U**
- Union Pac. R. Co. v. Broderick, 30
 Neb. 735 594
 Union Pac. R. Co. v. Daniels, 152
 U. S. 684 676
 Union Pac. R. Co. v. Erickson, 41
 Neb. 1 573
 Union Pac. R. Co. v. Fort, 17 Wall.
 553 46
 U. S. v. Union Pac. R. Co., 91 U.
 S. 72 331
- V**
- Valtez v. Ohio & M. R'y Co., 85 Ill.
 500 712
 Vanderbeck v. Hendry, 5 Vr. 467..
 665, 667
 Van Dusen v. Letellier, 78 Mich.
 492 24, n52, 101, 118, n121
 Van Steenburg v. Thornton, 29 Vr.
 160 726
 Vawter v. Mo. Pac. R'y Co., 84
 Mo. 679 n487
 Vicks. & M. R. Co. v. Phillips, 64
 Miss. 693 368
- W**
- Wabash R'y Co. v. McDaniels, 107
 U. S. 454 48
 Waite v. R. R. Co., 96 Eng. C. L.
 725 605
- Waldele v. N. Y. Cent. R. Co., 95
 N. Y. 374 816
 Walker v. Bolling, 22 Ala. 294.... 756
 Wallace v. Cent. Vt. R. Co., 138
 N. Y. 302 657
 Walsh v. Peet Valve Co., 110 Mass.
 23 92
 Warner v. Erie R'y Co., 39 N. Y.
 468 684, 752, n753, 755, 768, 769
 Washburn v. Nashville R. Co., 3
 Head, 638 686
 Watson v. Wabash, etc., R. Co.
 (Iowa) 19 Am. & Eng. R. Cas.
 114 549
 Weiden v. Electric Light Co., 73
 Mich. 268 n52
 Welch v. Brainard, 108 Mich. 38... 138
 Wells v. Coe, 9 Colo. 166..... 607
 Welsh v. Ala. & V. R'y Co., 70
 Miss. 20 37
 Welsh v. R. R. Co., 81 Mo. 466.... n49
 Whaalan v. Mad River, etc., R. Co.,
 8 Ohio St. 249 68
 Whalen v. Centenary Church, 62
 Mo. 326 61
 Wheeler v. Berry, 95 Mich. 251.... 1
 Whittaker v. West Boylston, 97
 Mass. 273
 Wiggett v. Fox, 11 Exch. 832.. 709, n7
 Wigmore v. Jay, 5 Exch. 352.. 637, n6
 Williams v. Clough, 3 H. & N. 259..
 448, 606,
 Williams v. Planter's Ins. Co., 57
 Miss. 759.....
 Wilson v. Madison R. Co., 18 Ind.
 226
 Wilson v. Merry, 1 H. L. Sc. 326..
 684, 687, 745, n745, 755,
 Wilson v. Winona & St. P. R. Co.,
 37 Minn. 326..... n281, n282
 Winship v. Enfield, 42 N. H. 213...
 Winters v. Hann. & St. J. R. Co.
 39 Mo. 468
 Wolford v. Oakley, 43 How. Pr
 118
 Wonder v. B. & O. R. Co., 32 Mo.
 411 6
 Wood v. Locke, 147 Mass. 604....
 Woodley v. Met. Dist. R'y Co.,
 R. 2 Exch. Div. 384..... 287
 Woodward v. Mich., etc., R. Co.,
 Ohio St. 121
 Wormsdorf v. R'y Co., 75 Mich.
 476
 Wright v. N. Y. Cent. R. Co., 25
 Y. 565..... 48, 448, 454, 684, 7
 744, n744, 752, n752, 753, 7
 755, 756, 757, 7
 Wuotilla v. Duluth Lumber Co.,
 Minn. 153

AMERICAN NEGLIGENCE CASES.

MASTER AND SERVANT.

SWOBODA v. WARD.

Supreme Court, Michigan, April Term, 1879.

[Reported in 40 Mich. 420.]

SAFE MACHINERY AND APPLIANCES.—An employer who introduces improved and complex machinery must take such corresponding precautions to keep his employees from harm in using it as are customary with prudent men.

SAFE PLACE TO WORK.—An employer must furnish a suitable place in which his servant, with due care, may do his work without exposure to dangers that are not usual to his occupation as ordinarily performed (1).

1. Master and Servant Cases — Injuries to Employees. — The cases reported in this volume (16 AM. NEG. CAS.) relate to actions brought by employees to recover damages for injuries sustained by them in the course of their employment, and the liability of the employers therefor, and comprise the decisions from the earliest period to 1897, in the courts of last resort in MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI (Supreme and Appeals), MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY (Supreme and Errors and Appeals), NEW

MEXICO, NEW YORK (Appeals and Supreme and Appellate Division), etc., together with numerous notes of English cases, and many notes on Master and Servant topics.

The cases reported in vol. 13 AM. NEG. CAS., the first of the volumes devoted to the subject of MASTER AND SERVANT, are those decided in ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO (Supreme and Appellate Courts), CONNECTICUT, DAKOTA, DELAWARE (Supreme and Superior Courts), DISTRICT OF COLUMBIA and FLORIDA.

Vol. 14 Am. Neg. Cas., which con-

ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE
 employee assumes the risks of his employment when the machinery is not defective and the usual means are adopted to guard against accidents. But if he voluntarily remains in service in spite of any defect in either respect, and without any promise by the master to correct he is without remedy for any injury he may suffer in consequence master is guilty of negligence, and the servant of contributory negligence.

EMPLOYEE ONLY BOUND TO KNOW RISKS OF HIS OWN V
 — An employee is not bound, before beginning work, to familiarize himself with the condition of all the machinery he may come in contact with. It is enough if he knows his own work and the risks connected with it.

EXTRA HAZARDS—KNOWLEDGE OF DANGER—BURDEN OF PROOF.—If a servant shows that he has been injured in consequence of an unusual risk due to his master's negligence, the master has the burden of showing that the servant knew of the increased danger.

CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—Where the fact of contributory negligence depends on the credibility of witnesses or upon inferences in which intelligent persons may differ, it is a question for the jury.

SAME—PRESUMPTION.—Contributory negligence presumes a negligent act or omission.

SAME—WHAT DETERMINES.—The age, intelligence and experience of one who has suffered from an injury help determine whether he has been guilty of contributory negligence.

continues the subject of **MASTER AND SERVANT**, contains the decisions in **15 and 16 AM. NEG. CAS.**
GEORGIA, HAWAII, IDAHO, ILLINOIS (Supreme and Appellate), **INDIANA** (Supreme and Appellate), **INDIAN TERRITORY** and **IOWA**.

Vol. 15 AM. NEG. CAS. contains **MASTER AND SERVANT** cases decided in **KANSAS** (Supreme and Appellate), **KENTUCKY, LOUISIANA, MAINE, MARYLAND** and **MASSACHUSETTS**.

The **MASTER AND SERVANT** cases not covered in Vols. 13, 14, 15, and 16 AM. NEG. CAS., will be reported and the topic completed in Vol. 17 AM. NEG. CAS.

Special Notes on Master and Servant Topics.—See list of notes compiled in the series of **AMERICAN NEGLIGENCE CASES** and **AMERICAN NEGLIGENCE REPORTS**, appended as a note, in 13 AM. NEG. CAS. 2. Subsequent **NOTES** appear in the **TABLE**

OF CASES REPORTED, in vols. 15 and 16 AM. NEG. CAS.

A few of the **SPECIAL NOTES** relating to the subject of **MASTER AND SERVANT** in Vols. 13, 14, 15 AM. NEG. CAS. are: **EMPLOYEE LIABILITY ACTS IN FORCE IN THE STATES OF ALABAMA, COLORADO, ILLINOIS, MASSACHUSETTS, NEW YORK, PENNSYLVANIA, LAND AND BRITISH COLONIES; FOREIGN SERVANT STATUTES; VOLUNTARY ASSUMPTION OF LIABILITY; INJURIA; RAILROAD RULES AND REGULATIONS; LIABILITY OF MASTER AND TORT OF SERVANT; RESPONDEAT SUPERIOR; LIABILITY OF INDEPENDENT CONTRACTORS; SCOPE OF SERVANT'S AUTHORITY IN RESPECT TO MEDICAL AND SURGICAL AID TO EMPLOYEES, etc.**

Master and Servant Cases in the series of American Negligence Cases and American Negligence Reports.—Numerous

EMPLOYEE SLIPPING IN SAW-MILL—FALLING AGAINST COG-WHEELS—CLOTHING CAUGHT IN MACHINERY—CONTRIBUTORY NEGLIGENCE.—A workman employed in a saw-mill to carry slabs from the gang plank, while pulling backwards at one that was too heavy for one man to carry, slipped on some wet bark and fell against certain cog-wheels that caught his pantaloons and injured him. He had not been warned and did not know that the wheels were uncovered. *Held*, that the question whether he was guilty of contributory negligence ought to have been left to the jury.

(*Syllabus to official report.*)

ERROR to Mason Circuit Court. Trespass on the case. Verdict directed for defendant. Plaintiff brings error. The case is stated in the opinion. *Judgment reversed.*

ISAAC GIBSON, for plaintiff in error.

WHITE & HAIGHT, for defendant in error.

Marston, J.—This was an action brought to recover damages for injuries received while working in the saw-mill of defendant.

The evidence on the part of the plaintiff went to show that he had been working in and about the mill some fourteen days; that he was placed near the gang and had to carry slabs from the gang and place them on rollers; that when injured he had taken hold of a heavy slab, too heavy for one man to carry,

arising out of the relations of Master and Servant and the Liability of the Master for Negligent Acts of the Servant causing Injuries to Third Persons are reported in the several published volumes of **AMERICAN NEGLIGENCE CASES** (vols. 1-12), the decisions being chiefly those in which Carriers of Persons are concerned. Vol. 8 **AM. NEG. CAS.**, which is devoted to the cases bearing on the Liability of the Carrier for the Arrest, Assault and Ejection of Passengers is especially pertinent to the subject of Master and Servant on account of the many decisions on the question of what acts constitute the servant's scope of employment and the liability of the master therefor. There are cases in that volume decided in all the State and Federal courts on the question, reference to which will be found useful in con-

nection with the treatment of the topic of Master and Servant in vols. 13, 14, 15 and 16 of **AM. NEG. CAS.** Reference should also be made to vols. 11 and 12 **AM. NEG. CAS.**, in which several Master and Servant cases are reported under the subject of Collisions and Crossings covered in those volumes.

The cases reported in the **AMERICAN NEGLIGENCE CASES** series are arranged in alphabetical order of States and chronologically grouped from the earliest period to 1897.

For actions arising out of the relations of Master and Servant in Personal Injury cases, from 1897 to date, see vols. 1-17 **AM. NEG. REP.**, and the current numbers of that series of Reports. The **AMERICAN NEGLIGENCE REPORTS** supplement the **AMERICAN NEGLIGENCE CASES**, and contain the cases on all branches of the Law of

and was pulling it, walking backwards; that while so engaged he accidentally stepped on a piece of wet bark and slipped against the cog-wheels near the slab run; that his pants caught and his leg drawn into the cog-wheels and severely permanently injured; that he had not been warned or cautioned about these cog-wheels, and had never noticed them until he was hurt, but that he could have seen the cogs if he had stopped work to look for them. Evidence was also given to show that these cogs should have been covered in order to prevent persons getting injured, and that it is dangerous to run them without being covered. Evidence was also given to show plaintiff's lack of experience and knowledge in such mills of the nature and extent of the injury received. No evidence was introduced on the part of the defendant (1).

*The court instructed the jury that these cogs being

Negligence decided from the year 1897 to date, making a series of current cases on Negligence.

1. HUIZEGA *v.* CUTLER & SAVIDGE LUMBER Co., 51 Mich. 272 (October, 1883), was a case closely resembling *Swoboda v. Ward*, 40 Mich. 420 [the case at bar], and the ruling in the latter case was followed.

In the HUIZEGA case, judgment for plaintiff was *affirmed*, the facts being stated by SHERWOOD, J., as follows: "The plaintiff in this case, while in the employ of the defendant, was seriously injured by accidentally coming in contact with some of the machinery in the defendant's saw-mill, when he was at work under the direction of the head sawyer in the mill. At the time the injury occurred he was, under the direction of the sawyer, removing a slab from some gearing that extended up through the floor two or three feet, and a portion of his pants caught in some cogs that were uncovered, and his leg was drawn thereby between the wheels and severely lacerated. From this injury he underwent great suffering

and was laid up many months; finally, after much care bestowed by physicians and nurses, which cost him \$500 or \$600, he recovered, and the injury proved not to be permanent. When the injury occurred the plaintiff was sixteen years old, and had been in the employ of the defendant about twelve days, at a compensation of twelve shillings per day. It further appears that the plaintiff had once before been in the employ of the defendant in the same mill, but on different work, and that the mill, after he left it, had undergone some changes and repairs, somewhat altering the machinery therein. The plaintiff claimed upon the trial that the defendant was not familiar with the location of the machinery which injured him; that it was the duty of the defendant to cover it, and that the same had negligently been allowed by the defendant to remain uncovered, and in a dangerous condition; that he had never noticed or been warned of such danger by defendants, and that he had no knowledge of the same; and that the said machinery might have been covered or boxed, without any

uncovered and dangerous, and plaintiff, with a knowledge of such facts, having continued at work, he was thereby guilty of such contributory negligence as would prevent his right to recover, and instructed the jury to return a verdict in favor of the defendant.

It is very evident that the increased dangers to which persons are exposed in the use of machinery at the present day have kept even pace with the progress made in the manufacture of new, improved and complicated varieties thereof, and the employer, therefore, who, in carrying on his business, uses such machinery, must take those precautionary measures which are usual and customary with careful, prudent men to protect his employees from all unnecessary dangers arising from the use thereof.

He is to use that degree of care which every prudent man is expected to employ and does employ under similar circum-

ment or impairment of its usefulness." * * * The points decided are stated in the syllabus to the official report as follows:

"Evidence from competent persons as to the dangerous character of machinery, and the consequences of coming in contact with it, is admissible in an action for injuries caused thereby.

"In an action by a laborer for personal injuries from machinery, testimony as to his consequent inability to work, the amount of time he lost through sickness, what that time was worth to him, and his reasonable expenses for medical attendance, is admissible as bearing on the amount of damages to which he may be entitled.

"Damages for personal injury include everything of which the person recovering them has been deprived as a direct and natural consequence of the injury.

"A youth employed in a saw-mill was injured by the machinery before he had been there long. He had once before been employed in the same mill. Held, that in an action for the

injury he could show the changes made in the arrangement of the mill in the interval between his terms of employment as bearing upon his want of familiarity with them when hurt.

"In an action for a personal injury from mill machinery, the question whether a witness had ever heard of such injuries to other persons is improper as calling for hearsay testimony.

"The age and intelligence of a laborer injured by machinery, and his experience in the use of such machinery, may be considered by the jury in an action by him for the injury."

See, also, the following case referred to in the HUIZEGA case (preceding paragraph), in which the ruling in *Swoboda v. Ward*, 40 Mich. 420, was followed.

In *PARKHURST v. JOHNSON*, 50 Mich. 70 (January Term, 1883), judgment for plaintiff in the Saginaw Circuit Court was *affirmed*, the opinion rendered by Mr. Justice Cooley being as follows: "The plaintiff, as administrator of her deceased husband Daniel Parkhurst, brings suit against Johnson for causing the

stances in carrying on the same kind of business. *Coal Torts*, 556-557, and cases cited; *Mich. Cent. R. Co. v. I* 32 Mich. 513.

The employer must also provide a suitable place in the servant, exercising due care, can perform his duty with exposure to dangers that do not ordinarily come within the obvious scope of such employment as usually carried on. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 11 Neg. Cas. 506.

A party entering upon a particular employment assumes the risks and perils usual thereto. Where the machinery is not defective, either in its construction or from want of repair, and where the usual and customary means are adopted to guard against accidents, if wanting in either respect there is no increased risk, and if the servant is injured in consequence thereof, the master must be held responsible therefor.

death of her husband by negligence. She recovered judgment in the Circuit Court, and the principal question on this record is, whether there was any evidence of negligence on the part of defendant to go to the jury. The principal facts in the case are these: Johnson, in the fall of 1880, was proprietor of a lime kiln in East Saginaw, which he was then operating. It was customary, when the stone at the base of the kiln was sufficiently burned, to take it out. When this was done the insufficiently burned stone above did not fall into the cleared space but was retained by lateral pressure. To force it down men either stood on the curb at the top of the kiln and pounded upon it with heavy iron bars, or they got upon the stone with their implements and worked upon it until it fell. The fall would be in proportion to the quantity which had been taken out below, and might be one foot, or four, or even more. As the stone below would be hot, it would be necessary that the men standing upon the stone when it fell should immediately step off. As the falling would begin from the

underside, they commonly had a faint warning in the sound, and could easily step upon the curbing to escape danger. Daniel Parker was a common laborer, and had very little of lime-burning. It is not shown that he had any experience which would make him acquainted with its dangers. Johnson hired him and took him upon the stone with himself and an experienced man to assist in pounding the stone out. Two draws had been taken out beneath. This was an unusual situation, and the probability that it would be considerable was in proportion. It does not appear that Johnson apprised Parker of this fact, or that he gave him any warning whatever. In going upon the stone Johnson had the danger in mind, and looked to see when he would step off when the fall began, but it does not appear that Parker was anticipating danger or preparing for it. The three men worked upon the stone for a time when it suddenly fell to the depth of from four to six feet. Johnson and the experienced man stepped off, but Parker

If, however, the servant with full knowledge of the facts, and understanding the increased risk occasioned thereby, in the absence of any promise by the master to remedy the same, consents to and remains in the master's employ, then he voluntarily incurs such increased risk, and if he suffers damages in consequence of an injury received thereby, he will be without remedy. The fact that he remains in the master's employ under such circumstances and with such knowledge, is what constitutes contributory negligence on his part.

The master in permitting his machinery to be thus more than ordinarily dangerous is guilty of negligence; the servant with full knowledge thereof, by remaining, contributes thereto. Cooley on Torts, 551-552, and cases cited.

A person when employed and instructed to commence work at a particular place, as for instance in this case in a mill, is under no obligation, in order to protect himself from the

with the stone, and it was impossible to extricate him alive. The circuit judge thought there was some evidence of negligence on the part of Johnson in these facts, and we agree with him. He took an inexperienced man into a place of danger without apprising him of the risk, and without any warning that danger was to be anticipated. It is true the workmen in the business testify that they do not consider it dangerous, and probably it is not when one fully understands it; but this man did not fully understand it, and the danger and loss of life came to him in consequence. The negligence consisted mainly in not informing him. *Coombs v. New Bedford Cordage Co.*, 102 Mass. 585, 15 Am. Neg. Cas. 506; *Smith v. Oxford Iron Co.*, 42 N. J. Law, 467; *Baker v. Allegheny Valley R. Co.*, 95 Pa. St. 211; *Swoboda v. Ward*, 40 Mich. 420 [the case at bar]. We have given above the result of the evidence upon our minds, and do not deem it important to present it in detail here. The case was fairly submitted to the jury, and the judgment must be affirmed, with costs. The other justices concurred."

See, also, the following cases of clothing being caught by, and employees falling against, machinery:

Sleeve catching in cogs of planing machine.—In *SCHROEDER v. THE MICHIGAN CAR COMPANY*, 56 Mich. 132 (1885), the syllabus to the official report states the case and decision as follows: "A workman caught his sleeve in the exposed cogs of an ordinary planing machine, and hurt his hand. He had run the machine for only a day or two, but he had worked within a few feet of it for two years and more, and among similar machinery for twenty-five years. *Held*, that the injury was accidental, and the workman, who must have been familiar with the machine, could not recover on the ground that his employer was negligent in setting him to work at it without having the cogs covered."

Falling against saw machine.—In *LINDSTRAND v. THE DELTA LUMBER COMPANY*, 65 Mich. 254 (1887), judgment for plaintiff in the Schoolcraft Circuit Court was *reversed*, for erroneous charge as to employer's duty to provide every safeguard against accident, etc. The case is stated in the

charge of contributory negligence, to first go all through the building, and make himself familiar with each piece of machinery, and the danger he may incur in case he comes in contact with it in its then condition. It is sufficient for the plaintiff that in entering upon the active discharge of the duties assigned to him, he ascertains what he is expected to do, and the dangers directly connected therewith, and he has a right to assume that in the performance of that particular duty reasonable care therefor will be afforded him, without coming in contact with other unforeseen or unsuspected dangers.

Where the servant shows that the injury he received was the consequence of an increased risk, — one not ordinarily incident to the employment, — growing out of the master's negligence, the burthen of proof is upon the master to show that the servant knew of and understood the increased danger. See *Cooley on Torts*, 661 *et seq.*

syllabus to the official report as follows:

"Plaintiff was employed in loading slabs upon a dump car in defendant's saw-mill, and, finding the car out of order, prepared to use another not designed for the same purpose in its place, but was told by the foreman not to do so, but to fix it temporarily, and it should be afterwards permanently repaired. Needing a piece of scantling a certain length plaintiff went to the other side of the mill to cut it to the required length on a circular saw used for trimming off the ends of defective boards, and with the use of which he was unfamiliar, and while so doing stepped into a hole through which the ends of the boards dropped, and fell against the saw, and suffered the loss of an arm, for which injury he brought suit. The complaint charged as negligence on the part of defendant, the bad condition of the dump car, the refusal to allow the use of another, requiring plaintiff to use and to fix it, which was claimed to be outside of his employment, and leaving the saw and its surroundings unguarded, so that, in attempting to

obey the order of the foreman, he met with the injury. *Held*, that there is no legal theory on which the plaintiff should have been allowed to recover on any negligence that did not amount to the dangerous character of the premises as placed, in reference to the arrangements; and if such arrangements were negligently improved, dangerous, if the defendant was responsible for plaintiff's undoing in using it, and if he used it with care on his own part, the issue must include all that was material.

In *LINDSTRAND v. THE DELTA LUMBER Co.*, 68 Mich. 261 (1888), the Supreme Court reversed its former ruling (65 Mich. 310), and the appeal by plaintiff from the verdict was reversed for defendant. Judgment *affirmed*.

Falling against circular saw. *SMITH v. DUNHAM ET AL.*, 310 (1889), where plaintiff was working in defendants' saw-mill, and fell against a circular saw, which cut off his right hand, judgment for plaintiff for \$3,500, in the Lake Circuit Court was *affirmed*.

Where the essential fact in a case is whether contributory negligence did or did not exist, and this depends upon the credibility of witnesses, or inferences from facts and circumstances about which honest, intelligent and impartial men might differ, such a case should be submitted to the jury. *Conley v. McDonald*, 40 Mich. 150; *Dublin, etc., R. Co. v. Slattery*, L. R., 3 App. Cas. 1155, 39 L. T. Rep., N. S., 265 (1).

Applying these rules to this case, it is clear the court erred in withdrawing it from the consideration of the jury.

The plaintiff at the time of the injury was properly engaged in the active discharge of his duty. He testified that he had not been warned about these cogs, and had not noticed them until after he was hurt. Contributory negligence presupposes the doing of some act which ought not to be done, or the omission to do something which should be done. In other words, a want of due care. 5 Am. Law Reg. (N. S.) 405*n*. If he did not know of the exposed and dangerous condition of these cogs, then by remaining at work he was not doing something

1. The facts in *Dublin, Wicklow & Wexford R. Co. v. Slattery*, L. R., 3 App. Cas. 1155, were as follows: S. attempted to cross the line of a railway at night at a spot where persons were in the habit of crossing with the acquiescence of the company. At the time he attempted to cross there was a train standing still on the up line in such a position as to prevent a person on the line behind it from seeing anything on the down line. S. came from behind the train on the up line, and on crossing onto the down line was struck by an express train, and killed. It was a rule of the company that express trains should whistle at that point, but evidence was produced that the train had not, in fact, whistled on that occasion. This evidence was contradicted by the servants of the company, who also proved that the train carried lights, and might have been seen by S. before he stepped onto the down line. *Held*, that there was evidence of negligence on the part of the company, and that the case was

properly left to the jury. *Held*, also, that where there is conflicting evidence on a question of fact, whatever may be the opinion of the judge who tries the cause as to the value of that evidence, he must leave the consideration of it for the decision of the jury. *Held*, also, that a man is not necessarily to be regarded as having caused or contributed to his own injury by acting in a manner *prima facie* dangerous and imprudent, if there is evidence of acts or omissions by which he may have been put off his guard. It was also *held*, that when notices have been put up by a railway company, forbidding persons to cross the line at a particular point, but these notices have been continually disregarded by the public, and the company's servants have not interfered to enforce their observance, the company cannot, in the case of an injury occurring to any one crossing the line at that point, set up the existence of the notices, by way of answer to an action for damages for such injury.

which he ought not to have done, and the effort he was n at the time of the accident, to remove the slab, shov want of due care on his part, but, on the contrary, wa mendable. Even had he known of the cogs and unguarded condition, it would not thereby conclusively that he could not recover. Other facts and circum would have to be considered in connection therewith; h his intelligence, his experience and such like, so that t might ascertain and determine whether he fully unde and appreciated the danger. *Reed v. Northfield*, 13 Pi Whittaker *v. West Boylston*, 97 Mass. 273; also *Coo New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg 506, which in many respects resembled the present case.

I am of opinion that the judgment should be reverse costs and a new trial ordered. The other justices conc

SHUMWAY V. THE WALWORTH AND NEW MANUFACTURING COMPANY.

Supreme Court, Michigan, January Term, 1894.

[Reported in 98 Mich. 411.]

EMPLOYEE INJURED WHILE OILING PLANER MACHINE SETTING MACHINE IN MOTION—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.—Where plaintiff was engaged running a planer machine in defendant's factory, and while attempting to oil the machine, having thrown it out of gear, the defendant's intendent turned on the feed motion, and plaintiff's hand was caught in the gearing, the question of contributory negligence was properly submitted to the jury (1).

1. *See, also, the following cases arising out of injuries to employees while cleaning or repairing machinery:*

Cleaning machine rolls.—In *KEAN v. THE DETROIT COPPER & BRASS ROLLING MILLS*, 66 Mich. 277 (June, 1887), plaintiff, while attempting to clean the rolls of a certain machine used in defendant's works, injured by his hand being drawn in the rolls and fingers crushed, judgment for plaintiff in the Superior Court of Detroit

was reversed, on the grounds others, of contributory negligence and assumption of risk.

Trimming grindstone.—In *v. PENINSULAR CAR CO.*, 76 Mich. 1 (July, 1889), plaintiff injured while trimming a grindstone for defendant, his hand and arm and fingers caught by the machine, judgment for defendant in the Wayne Circuit Court was affirmed, it being held that plaintiff assumed the risks of the employment.

SUPERINTENDENT — SUPERIOR SERVANT.— The act of defendant's superintendent, who had general authority to manage the business, in starting the machine which plaintiff was oiling, was that of a superior servant and was within the scope of his authority.

ILL-HEALTH OF INJURED PARTY — DAMAGES.— The fact that plaintiff was afflicted with a scrofulous difficulty, which rendered it possible, or even likely, that a slight injury would produce more serious results than if inflicted upon a perfectly healthy person, does not put him beyond the pale of the law, or prevent a recovery of such actual damages as he has sustained.

ERROR to Bay Circuit Court. Defendant brings error. The case is stated in the opinion. *Judgment affirmed.*

T. A. E. & J. C. WEADOCK, for appellant (defendant).

J. E. KINNANE and SHEPARD & LYON, for plaintiff.

Montgomery, J.— Plaintiff sued for negligent injury. He was employed in defendant's factory, and engaged in running a planer. George E. Neville, one of the officers of the corporation, had charge of defendant's factory, and employed and discharged men. On November 28, 1890, plaintiff had been interrupted in oiling his machine by the necessity of moving some timber which had been placed so near to his machine as to interfere with his work. He started the machine, and passed some of the timber through. It was discovered that the machine was out of order. The plaintiff threw it out of gear, took the oil-can, and attempted to oil the machine from underneath, leaving his mitten on the surface of the planer. In order to oil one portion of the machine, it became necessary

Cleaning sawdust from machine.— In **BERGSTROM, ADM'X, v. STAPLES ET AL.**, 82 Mich. 654 (October, 1890), where plaintiff's intestate, an employee in defendants' saw-mill, was killed by the starting of the engine and machinery while he was upon the lower band-saw wheel cleaning out the sawdust, verdict directed for defendants in the Muskegon Circuit Court was upheld and judgment *affirmed*, the negligence being that of the engineer, who was a fellow-servant of deceased.

Oiling saw machine.— In **RIBBLE v. STARRATT**, 83 Mich. 140 (October, 1890), it was held (as per syllabus to official report) that: "A request for

an instruction in a negligence case that if the defendant knew that the plaintiff was about to oil a saw, and assented to it, and while plaintiff was oiling it negligently pushed plaintiff onto the saw, he may recover damages for the injuries thereby occasioned, is defective in omitting the important element of plaintiff's non-negligence." Judgment for defendant in the Wayne Circuit Court was *affirmed*.

See, also, former decision reversing judgment for plaintiff. **RIBBLE v. STARRATT**, 79 Mich. 204 (1889).

Removing refuse from lath machine.— In **TORONGO v. SALLIOTTE ET AL.**, 99 Mich. 41 (February, 1894), de-

for the plaintiff to put his hand between the spokes of the wheels connected with the gearing, and remove it of a box. While his hand was in this position, Mr. [redacted] turned on the feed motion. Plaintiff's hand was caught in the gearing, and he sustained the injury complained of. Plaintiff's duty to see that the machine was properly oil adjusted, when being operated by him.

The parties are not agreed as to the facts. The plaintiff testified that, when he started to oil the machine, Mr. [redacted] came up, and plaintiff passed him, leaving him standing in front of the machine. Mr. Neville, on the contrary, testified that the plaintiff and himself had been engaged in an effort to cover what was wrong with the machine, and in so doing started and stopped the machine repeatedly; that he discovered the difficulty, which he found was a small piece of wood between the rollers and the crossbar of the bed machine. He looked around, and did not see the plaintiff. He saw that the oil-can was not in its place, and supposed the plaintiff had gone out of the mill to fill the oil-can for some other purpose. He took a probe, and drove it into the machine, backed up the machine, threw the lever forward, and started the feed motion. It was this starting of the machine that caused the injury.

The case was submitted under instructions which left the jury to decide: First. Whether the act of Neville was

the cause of the injury. If the declaration was sustained, judgment in action where plaintiff was injured by saw machine while attempting to remove refuse accumulating around a lath machine while saw was in motion. Declaration fatally defective where it neither alleges exercise of due care on part of plaintiff, nor negligence on part of defendant.

Repairing fan in mill. — In *KINNEY v. FOLKERTS ET AL.*, 78 Mich. 687 (October Term, 1889), judgment for plaintiff for \$5,000 in the Alpena Circuit Court was *reversed*, in action for damages for injuries sustained by plaintiff while engaged in defendants' planing mill in repairing and changing the pipes to a machine called a "fan," used in the disposal of the

shavings made at the mill, machinery being set in motion while plaintiff was so at work, whereby the plaintiff came in contact with his hand in the grounds of reversal were evidence of admission of certain evidence of error in charging the jury as to the facts. The opinion was rendered by MR. JUSTICE LONG, J.

A subsequent trial of the case resulted in a verdict in favor of the plaintiff for \$5,000. Defendants appealed. The Court (per MORSE, J.) *affirmed* the judgment. See *KINNEY v. FOLKERTS ET AL.*, 84 Mich. 616 (January Term, 1891).

not negligent. Second. Whether the plaintiff, in attempting to oil that portion of the machine concealed from Mr. Neville's view from the point where he stood, was guilty of negligence contributing to the injury.

The defendant's two principal contentions in this court are:

1. That, as a matter of law, the plaintiff was guilty of contributory negligence in placing himself in the position which he occupied without notifying Neville of his purpose. 2. That Neville was, in what he did, a fellow-servant of plaintiff, and, if guilty of negligence, it was not the master's negligence.

1. We are not prepared to hold, as a matter of law, that the plaintiff was guilty of negligence contributing to the injury. The jury, in answer to a special question, found that plaintiff was in charge of the machine at the time of the injury, and had the care of the machine, and the duty to keep it in order. This being the case, if he had no reason to anticipate the starting of the machine by Mr. Neville, it would be going far to hold that he was negligent in failing to anticipate such a possibility.

2. Was the act of Mr. Neville in turning on the feed motion that of a fellow-servant of plaintiff? The defendant concedes, in effect, that Mr. Neville's relations to the defendant corporation and to the plaintiff were such as that for some purposes he might in law be regarded as a representative of the master, but that in the performance of the particular act of starting the machine he was acting in the capacity of a fellow-servant; and the contention is that the question of whether the act was that of a master or of a fellow-servant depends for its solution rather upon the nature of the act, than upon the general scope or extent of the superior servant's authority. The contention, precisely as made, is undoubtedly supported by eminent authority, but we are constrained to hold that the previous holdings of this court have not so limited the liability of the master. See *Slater v. Chapman*, 67 Mich. 523; *Palmer v. R. R. Co.*, 93 Mich. 363; *Ryan v. Bagaley*, 50 Mich. 179; *Harrison v. R. R. Co.*, 79 Mich. 409; *Erickson v. R'y Co.*, 83 Mich. 281, 93 Mich. 414 (1). The decisions of this court have extended the rule so that it may be said that when the master delegates to a superintendent full power to manage a business, and

1. The Michigan cases cited in the found reported with the MICHIGAN opinion in the case at bar will be cases in this volume of AM. NEG. CAS.

employ and discharge servants, without interference, such superior servant, in whatever he does in furtherance of the business and operations he has in charge, stands in place of the master, and the negligence of such superior servant is the negligence of the master. This is apparently upon the ground that the servant, in entering the employment, does not take upon himself the risk of negligence on the part of one who occupies that relation to the business of the master.

In McKinney on Fellow-Servants, section 41, it is said: "Many authorities of great weight have held that if the master places the entire charge of the business in the hands of an agent, exercising no authority therein, he may be liable for the negligence of such agent to a subordinate employee, and that this rule prevails whether the master be an individual or a corporation;" citing a large number of cases, among which are *Ryan v. Bagaley*, 50 Mich. 179, and *Slater v. Chapman*, 67 Mich. 523. Again, at section 55, in commenting on *Ryan v. Bagaley*, *supra*, the learned author says. "The report of the case does not indicate the nature of the act the mining captain was performing, and owing to the negligent performance of which the subordinate servant was injured, but the principle on which the case is based is the generally accepted one, — that a master giving the control of his entire business to an agent is responsible for his negligence."

It is not necessary to a decision of this case to hold that an agent exercising only occasional acts of authority, while performing duties, in the main, those of a subordinate, is, in the performance of the latter duties, to be regarded as a representative of the principal; but, in the performance of the particular duty in question, Neville was performing an act of authority which he only had the right to perform by virtue of his authority as superintendent of the mills, and within the scope of his authority to see that the machinery was in safe condition. We think, under the former rulings of this court, he must be held to have been, in the performance of this act, a representative of the master rather than a fellow-servant.

3. It is contended by defendant that plaintiff's loss of his fingers was not the result of the injury, but was the result of his own condition, being an unhealthy man. There was testimony in the case tending very strongly to show that the plaintiff was, previous to this time, afflicted with a scrofulous disease; and the inference, perhaps, is justified that such serious

consequences would not have followed from the injury had not this been his condition. The court, in commenting upon this testimony, instructed the jury as follows:

“In consequence of there being something wrong about his own constitution, the injury was aggravated, and it amounted to about this: That the permanent injury was partially or quite the result of just that thing, rather than the result of the accident itself, in the machinery. Now, you may decide this question: How much of the injury which he has suffered is the consequence of that, rather than the consequence of the injury itself? There is no kind of question, of course, that the accident or injury there — the hurting of his hand in the machine — did cause him some injury, but whether it was all caused by it, or the greater part of it, or only a small part of it, is another question, and a question which you will have to decide.”

In another portion of the charge the court stated:

“If it be true that his constitution is in such a condition that a little injury, which is liable to occur to many men at any time, will have these aggravated results, he is not a man in such a condition and situation as a man who is sound, and the diminution of his capacity to work may not be as great.”

These instructions were sufficiently favorable to the defendant. The fact that the plaintiff was afflicted with a scrofulous difficulty, which rendered it possible, or even likely, that a slight injury would produce more serious results than if inflicted upon a perfectly healthy person, does not put him beyond the pale of the law, or prevent a recovery of such actual damages as he has sustained.

The other questions presented, we think, do not require discussion.

The judgment will be affirmed, with costs. McGRATH, Ch. J., LONG and HOOKER, JJ., concurred. GRANT, J., did not sit.

ROUX v. THE BLODGETT AND DAVIS LUMBER COMPANY (1).

Supreme Court, Michigan, February, 1893.

[Reported in 94 Mich. 607.]

MACHINERY — UNCOVERED GEARING — PRINCIPAL AND AGENT — RES GESTAE — EVIDENCE — INSTRUCTION — CONTRIBUTORY NEGLIGENCE — PRACTICE — ERROR — FOREMAN — FELLOW-SERVANT — VICE-PRINCIPAL. — In an action by plaintiff, an employee of defendant, for damages for injuries sustained by him by reason of his leg being caught in uncovered gearing of machinery in defendant's mill, judgment for plaintiff was affirmed, the points decided in the opinion by LONG, J., being stated in the syllabus to the official report as follows:

- "The error, if any, in admitting testimony of the statements of an agent as binding upon the principal, is cured, if the principal seeks to impeach such testimony by that of the agent, who denies that such statements were made.
- "A charge from which the jury must have understood that, inasmuch as men of equal candor might differ on the subject as to whether the plaintiff was in the exercise of due care, the question being one where different views might reasonably be taken, it was the special province of the jury to determine it as a question of fact, is not open to objection.
- "Where a negligence case is tried upon the theory that the machinery by which plaintiff was injured was dangerous if uncovered, which fact the undisputed evidence tends to prove, the defendant cannot assign as error that the court in his charge assumed the existence of such fact, it being disputed for the first time by such assignment, except as questioned by a general request to direct a verdict for the defendant.
- "A foreman in a mill, whose duty it is to see that certain machinery, which is dangerous to employees working around it if uncovered, is covered, is not a fellow-servant of such employees in that regard, but represents the master, who is liable to an employee who is injured by reason of the non-performance of said duty. Citing *Sadowski v. Michigan Car Co.*, 84 Mich. 100" (2).

ERROR to Menominee Circuit Court. From judgment for plaintiff, Noe Roux, for \$6,000, the defendant brings error.

1. A former appeal in this case resulted in reversal of the judgment of the trial court in taking the case from the jury on the ground of plaintiff's contributory negligence. See *ROUX v. THE BLODGETT & DAVIS LUMBER Co.*, 85 Mich. 519 (1891).

2. See, also, the following notes of cases relating to machinery accidents: *Employee injured by circular saw.* — In *WHEELER v. BERRY ET AL.*, 95 Mich. 250 (April, 1893), where plaintiff, while employed in defendants' carpenter shop, was injured by his

The facts are stated in the opinion, and also in the former appeal in 85 Mich. 519. *Judgment affirmed.*

SAWYER & WAITE, for appellant (defendant).

B. J. BROWN (H. O. FAIRCHILD, of counsel), for plaintiff.

Long, J. — This case was in this court at the April term, 1891, and is reported in 85 Mich. 519. On the former trial in the court below the court took the case from the jury on the ground that the plaintiff was guilty of contributory negligence. The case has again been tried and the plaintiff recovered judgment in the sum of \$6,000. Defendant brings the case in this court by writ of error. The facts appearing in the present case are substantially as they appeared in the former record, and are so fully stated in the former opinion that a restatement of them is unnecessary.

hand being caught by the circular saw which he was operating, judgment for defendants in the Wayne Circuit Court was *affirmed*, the injury being one of the risks of the employment.

Injured by logs upon saw carriage. — In REDMOND v. THE DELTA LUMBER Co., 96 Mich. 545 (July, 1893), where plaintiff was injured by one of the logs upon a saw carriage in defendant's saw-mill, while he was operating a machine called a "jack," used for drawing the logs into the mill, it was *held* that "the mere fact that a machine, which is shown to have performed its accustomed work properly, both before and after an accident, failed so to work on that particular occasion, is not sufficient to justify the conclusion of negligence. Negligence cannot be presumed from the mere fact of an injury, and cannot be based upon guesses or conjecture." Judgment for defendant *affirmed*.

Contact with "peep saw." — In JOHNSON v. HOVEY ET AL., 98 Mich. 343 (January Term, 1894), where plaintiff was injured by his hand coming in contact with a "peep saw" in defendants' steam saw-mill, judgment for plaintiff in the Muskegon Circuit

Court was *reversed*, the Supreme Court (per LONG, J.) holding that the evidence conclusively showed contributory negligence of plaintiff, and there was nothing to sustain the claim of negligence on the part of the defendants, and that a verdict should have been directed for defendant. It was also held that: "The opinion of a plaintiff in a negligence case, not based upon any knowledge of facts testified to by himself or any one else, as to the cause of a saw failing to operate in the usual manner, whereby the injury complained of is claimed to have been received, cannot be received as evidence of the fact sought to be proved, or as evidence tending in any degree to establish it."

Breaking of saw. — In LAU v. FLETCHER ET AL., 104 Mich. 295 (March, 1895), judgment for defendants in the Alpena Circuit Court was *affirmed*, the case being stated in the syllabus to the official report as follows:

"In an action by an employee for injuries received by the breaking of a saw, it is competent for witnesses who are shown to be familiar with such saws, and who have had large experience in their use, and know

It is claimed by defendant's counsel that the court was in error in permitting plaintiff, upon the trial, to prove statements made by Mr. McDougal after the accident occurred. It appears that while a witness for plaintiff was upon the stand, under examination by plaintiff's counsel, he testified that he saw Mr. McDougal standing at the foot of the stairs while they were bringing the plaintiff down, after he was injured. He was asked to state what, if anything, he heard Mr. McDougal say to plaintiff, and responded that he heard Mr. McDougal say, "It is too bad, Noe," speaking to the plaintiff, who said, "I know, Mr. McDougal, but it is your fault. I told you to fix it last night." And Mr. McDougal said: "I know, but I had too much to do. I could not fix it." This conversation

their strength, and the force to which they are subjected, to testify that in their judgment the saw in question was suitable and safe for use.

"The testimony on the part of the defendant tended to show that the plaintiff was not struck by a piece of the saw, as claimed by him, and that the saw, which had been mended, was suitable and safe for the use to which it was applied. And it is held that the court properly refused to direct a verdict for the plaintiff, leaving to the jury only the question of damages."

Injured by hoisting apparatus. — In *FINDLAY v. RUSSEL WHEEL & FOUNDRY Co.*, 108 Mich. 286 (February, 1896), where plaintiff was injured in defendant's car shops, he having been directed by defendant's foreman to assist in placing a flat car upon trucks, and his hand being upon the rope attached to a winch was drawn into the sheave, resulting in loss of two fingers, judgment for plaintiff in the Wayne Circuit Court was *reversed*. The syllabus to the official report states the case as set out in the opinion by HOOKER, J., as follows:

"It is not without the scope of the employment of one employed in a car factory to do general work — such as

carrying timbers, painting, lifting, etc., to assist in hoisting a car upon its trucks by means of a block and tackle apparatus, especially where he has been accustomed to render such service whenever called upon to do so.

"A master is not bound to inform an employee of dangers that are open to ordinary observation.

"The foreman of a department in a factory, who works with the men under his charge, is a fellow-servant of the men as to all acts which it is not the duty of the master to perform."

Injured by saw machine. — In *LEWIS v. EMERY*, 108 Mich. 641 (January, 1896), where plaintiff, employed in defendant's saw-mill as tail sawyer, received an injury by reason of the carriage getting beyond the control of the head sawyer, judgment for plaintiff in the Iosco Circuit Court was *reversed*. One of the questions involved was as to the competency of the head sawyer, and it was held competent for defendant's foreman and regular head sawyer to testify on that subject. "A master does not insure the competency of his servants, but contracts to use all ordinary care in their selection and retention."

took place about five minutes after the accident occurred by which the plaintiff was injured, and while the mill hands were removing him from the mill to the carriage ready to take him home. Defendant's counsel cite many cases to the point that this testimony was incompetent for the reason that the statements were made after the accident occurred, and were therefore mere hearsay.

The rule is that declarations of a servant or agent do not, in general, bind that principal. To be admissible they must be in the nature of original, and not hearsay evidence. They must be made not only during the continuancy of the agency, but in regard to a transaction depending at the very time. There are authorities, however, holding that when the statements are made so close upon the time when the act was completed, such statements are a part of the *res gestæ*.

Whether the statements made by Mr. McDougal in the present case were competent or not, as evidence against the defendant, under these rules, and the cases cited upon either side of the proposition, need not be considered here. At the time this testimony was given, it was objected to by defendant's counsel as incompetent. The court admitted it. If the consideration of the question rested here, it would become important to consider the authorities cited by counsel; but it appears that afterwards, and during the trial, the testimony of Mr. McDougal, taken upon the former trial, was produced and read on the part of defendant, by consent of both parties, to the effect that the plaintiff gave him no notice of the broken covering previous to the accident. Mr. McDougal also testified that he remembered when the plaintiff was taken down stairs, but that he did not stand at the foot of the stairs when the plaintiff was taken down, and had no conversation with plaintiff in regard to his agreeing to fix the covering over the gear wheels. He testified fully upon that subject, and claimed that he was not there at all, but went on ahead to get the carriage ready to take plaintiff home. He testified further: "I did not have any conversation with Mr. Roux while he was fast in the gearing. He spoke to me several times. When he saw me coming first, he halloed out to me to send for the priest; and while they were getting him out I think he repeated that as much as five or six times, and I promised to do so. That is all the conversation I can remember. He said nothing to me about it being my fault, while he stood there with his leg in the gearing. Q.

Didn't you say anything to him, that you admitted to him that it was your fault, and that you ought to have had it fixed? A. No, sir."

Mr. McDougal testified further that about a year before the trial he did have a talk with the plaintiff, and told him that he did not know of this board being off, when the plaintiff said to him that he intended to tell him at noon of the day he got hurt that the board was off.

It appears from this that the defendant on the trial introduced independent evidence upon its part, from the only witness who could testify in that respect, that the plaintiff had given no notice previous to the accident of the broken condition of this covering, and who also expressly denied the declarations imputed to Mr. McDougal, defendant's foreman, by the testimony of plaintiff and another witness. This testimony being introduced by the defendant for the purpose of impeaching the testimony of plaintiff and his witness, whatever error, if it was error, there might have been in permitting the plaintiff and his witness to testify to this conversation with Mr. McDougal after the accident occurred, was cured by defendant in introducing in evidence the deposition of Mr. McDougal himself, and showing by such deposition the denial made by Mr. McDougal of any and all conversation with plaintiff relative to his agreement to fix the covering over the wheels. If Mr. McDougal's deposition had been read in evidence by defendant first, it certainly would have been competent for the plaintiff and his witness to testify upon that subject thereafter, or if Mr. McDougal had been placed upon the witness stand, and upon cross-examination had been asked if he did not make these statements claimed by plaintiff to have been made by him at the foot of the stairs, and had denied them, it would then have been competent for the plaintiff to introduce testimony showing that he did so state. The whole matter, then, becomes a question simply of the order of proof; and we think it is well ruled that the trial court, under the circumstances here, committed no error in permitting testimony to stand which was afterwards made competent by the introduction of other evidence.

It was held in *Rounsavell v. Pease*, 45 Wis. 506, that where, in an action by the principal, defendants were improperly permitted to introduce evidence of declarations by the agent, but afterwards the agent was called as a witness in plaintiff's behalf, and, after testifying to the facts of the transaction in

question, denied that he had ever made the statements imputed to him, the error in admitting the impeaching evidence was cured. This principle was again approved in *Stone v. Sleigh Co.*, 70 Wis. 585. See, also, *Mawich v. Elsey*, 47 Mich. 10; *Roberts v. Pepple*, 5 Mich. 367.

It is claimed that the court was in error in instructing the jury in that portion of its charge as follows:

“ Did the performance of plaintiff’s duties require him to go into the vicinity of this machinery, and was he in the exercise of ordinary care in so going? Was it necessary that he should act promptly and with rapidity, and did the performance of his duty so absorb his attention that he might not always carry in mind the danger lying there? If the plaintiff’s claim in this case is the true one — and the court leaves it to you to say whether it is or not — then I advise you that it is a case where two reasonable and different views might be taken, and two men of equal candor might differ as to whether the plaintiff was in the exercise of ordinary care in going into the vicinity of this machinery, as it is claimed, and whether he did conduct himself with reasonable care; and, therefore, the question as to whether he was guilty of contributory negligence in so doing is submitted to you.”

It is contended by defendant’s counsel that by this charge the jury, in effect, were told that a reasonable view was that the plaintiff was not guilty of contributory negligence, and that a man of candor might think he was not guilty of contributory negligence; and not only this, but the jury must have understood from the charge that it was a case where a finding that plaintiff was not guilty of contributory negligence was a reasonable view. The plaintiff’s counsel answer this by the proposition that the court meant to be understood by this charge that because of the fact that the case, as made by the plaintiff, was one concerning which two men of equal candor might differ, the question was one for the decision of the jury.

When the case was in this court upon the former hearing, the important question considered was whether the plaintiff, as matter of law, was guilty of contributory negligence; and it was held that such question must be submitted to the jury for their determination. Mr. Justice McGrath, speaking for the court, then said: “ This is one of those cases where two reasonable and different views might be taken and two men of equal candor might differ.” And for this reason it was

held that the court below, upon that trial, was in error in taking the case from the jury, and ruling that, as matter of law, the plaintiff was guilty of contributory negligence. The same rule was laid down in *Brezee v. Powers*, 80 Mich. 172, and cases there cited. On the present trial the court below stated the proposition to the jury in the exact language used by this court; and it is evident that the jury must have understood from the charge that, inasmuch that men of equal candor might differ on the subject as to whether the plaintiff was in the exercise of due care, and the question was one where different views might reasonably be taken, it was the especial province of the jury to determine it, as a question of fact. We think counsel for defendant are not correct in their claim.

It is said that the court did not fairly submit to the jury the question whether or not the defendant was guilty of negligence. The court, among other things, stated to the jury, in the general charge:

“It is the law that when a servant, having the right to abandon the service because it is dangerous, refrains from so doing in consequence of the assurance that the danger shall be removed, the duty to remove the danger is manifestly imperative; and the master is not in the exercise of ordinary care unless, or until, he makes his assurance good. Were these assurances and promises made as claimed by the plaintiff here? If the plaintiff did not notify the defendant of this defect, and if the defendant did not — as claimed by the plaintiff — make the promise to repair, and by making such promise induce the plaintiff to continue his work there, then the plaintiff cannot recover in this case. If you find that he understood the increased risk of the gears being uncovered, the defendant cannot be held responsible, if he continued his work for any considerable time, knowing the danger, without being induced by his master to believe that a change would be made, and without any complaint of such dangers or defects, or calling the attention of the master to them. If the servant, with full knowledge of the facts and understanding the increased risk and danger occasioned thereby, in the absence of any promise of the master to remedy the same, remains in the master's employ, then the plaintiff voluntarily incurs such increased risk.”

It is claimed by counsel that this portion of the charge — and, in fact, the entire charge — took from the jury the ques-

tion whether the machinery was out of repair, and that, in effect, the court decided, as matter of law, that it was out of repair, while the question in dispute on the trial was whether or not it was out of repair.

The case, from its commencement to its close, seems to have been defended upon the grounds: 1. That the gear-wheels were not uncovered or exposed at all. 2. That the plaintiff had no right to go near the gear-wheels, as his duty did not call him there. 3. That Mr. McDougal did not promise to fix the covering to the rollers. 4. That the plaintiff knew as well as Mr. McDougal did that if the gears were uncovered they were dangerous. 5. That the plaintiff was careless and negligent in going near them, if he knew they were uncovered.

No claim was made on the trial, so far as shown by this record, that if the gears were uncovered they were not dangerous to one who had occasion to go near them; no request was made to the court to charge that they were not dangerous, if uncovered, but the whole case proceeded upon the lines above indicated. It is apparent from all the facts and circumstances shown that if the gears were uncovered — rolling inward, as they did — one would, if getting against them, necessarily be injured. That question did not seem to be in dispute upon the trial, and it seems to be raised for the first time by the brief of defendant's counsel, except under the first request to charge the jury to find a verdict in favor of the defendant. There was evidence in the case showing the dangerous character of these gear-wheels when uncovered, and which was not disputed. If the defendant desired a more specific charge upon that question than that contained in the general charge, it was its duty to have asked an instruction upon that subject.

One other question is raised which we deem necessary to discuss. The court was asked to direct the jury that: "If the plaintiff's injury was caused solely through the neglect of McDougal to fix or cause the covering of the gearing to be fixed, then plaintiff cannot recover, as that was the negligence of a fellow-servant, under the facts in this case." This was refused, and, we think, properly. The rule laid down in *Sadowski v. Michigan Car Co.*, 84 Mich. 100 (1), has special

1. In *SADOWSKI v. MICHIGAN CAR COMPANY*, 84 Mich. 100 (October Term, 1890), where plaintiff, a laborer employed in defendant's lumber yard, fell into an uncovered ditch which had been dug by direction of defendant's superintendent, verdict and judgment for plaintiff in the Wayne

reference to the facts in this case. In that case it was said by Mr. Justice Cahill: "That doctrine [the non-liability of the master for the negligence of a fellow-servant] was never applied unless the one injured and the one at fault were engaged in the same general employment. Whatever conflict has arisen in cases has been as to what should be considered the same general employment. The rule adopted by the federal courts, and in most of the States, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not, therefore, as to each other, fellow-servants. In such case the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence." This rule is supported by *Ford v. Fitchburg R. R. Co.*, 110 Mass. 240, 15 Am. Neg. Cas. 427, and *R. R. Co. v. Herbert*, 116 U. S. 653, which were cited and approved in the above case. This rule is but the reiteration of the principle laid down in *Van Dusen v. Letellier*, 78 Mich. 492; *Morton v. R. R. Co.*, 81 Mich. 423, and has since been followed in *Fox v. Iron Co.*, 89 Mich. 387; *Ashman v. R. R. Co.*, 90 Mich. 567 (1).

Here Mr. McDougal was the foreman of the mill, and, according to the evidence in the case, it was his duty to have fixed this covering over the gears, if it was out of repair, as that duty was delegated to him by the master. If the plaintiff's testimony is true, he agreed to do so, and by reason of such promise the plaintiff continued in the service.

Circuit Court was *affirmed*. Discussing the fellow-servant rule, the Supreme Court (per CAHILL, J.), said: "The rule adopted by the Federal courts, and in most of the States, and which seems to us most in consonance with reason and humanity, is that those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools, for labor, are engaged in a different employment from those who are to use the place or appliances, when provided, and

they are not therefor, as to each other, fellow-servants. In such case, the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master in such a sense that the latter is liable for his negligence." The foregoing rule was applied to the case under consideration.

1. The Michigan cases cited in the opinion in the case at bar are reported with the Michigan cases in this volume of AM. NEG. CAS.

But one other point need be noticed. It is claimed that the court failed to instruct the jury that it was for them to say whether the omission to put a board in front of the gears was such a defect in ordinary repairs that none but a reckless servant, entirely careless of his safety, would have worked near the gears without their being covered. We think this question was fully covered by the general charge, so far as the defendant had a right to the instruction.

Several other questions are raised which will not be discussed, but which have been carefully examined, and are overruled. A fair trial has been had, and the questions involved fairly submitted.

Judgment must be affirmed, with costs. HOOKER, CH. J., McGRATH and MONTGOMERY, JJ., concurred. GRANT, J., did not sit.

MINOR EMPLOYEE INJURED BY FOOT CATCHING IN GEARING-WHEEL IN SAW-MILL — ACCIDENT. — In **SJOGREN v. HALL et al.**, 53 Mich 275 (*April Term, 1884*), judgment for plaintiff was *reversed*. The material facts were stated by COOLEY, CH. J., as follows: "The defendants are joint owners of a steam saw-mill at Muskegon. In September, 1882, three of the defendants were operating the mill, and it is claimed that the fourth was so interested in the result of the business as to be jointly liable with the others for negligent management. A large force of hands is employed in the mill when it is in operation. It stands with one end to the lake, and the logs are taken directly from the water to the log deck. The log-way for this purpose is an inclined trough-shaped way, in the bottom of which runs an endless chain with spikes upon it, which take hold upon the log and carry it up the trough to a spike roller, which catches it and tolls it to one side on the log deck. The chain and the spike roller are moved and controlled by a large iron gearing-wheel, or bull-wheel at the upper end of the log-way. The wheel gearing has a lever attached, which is operated by a man in charge, who throws the wheel in and out of gear at pleasure, and moves or stops the logs as occasion may require. It sometimes happens that a crooked log, in coming up, will roll to one side or the other, and that the man in charge will need assistance to bring the log back to its place. When he does so he calls for help, and this help is furnished by some one employed on the same floor. The bull-wheel is a heavy iron wheel, about thirty-eight inches in diameter. Its speed is about fifteen revolutions to the minute, and it runs within an inch or so of the bridge-tree which supports it. The bridge-tree on the side where the injury occurred

is ten inches in width, and at the time of the injury there was a box at the side of it, and of the same height, which gave ten inches additional width. The center of the shaft of the wheel sat a few inches above the bridge-tree so that the wheel was more than half above it. The wheel was entirely uncovered. The man in charge stood partially behind the wheel and above it. The injury occurred September 12, 1882. The plaintiff, who was eighteen years of age, had been at work in the service of the defendants, who were operating the mill, and had been employed on the log deck for four weeks or so at that time (1). His business was to catch the sawed lumber

1. *See, also, the following cases arising out of injuries sustained by minor employees:*

Boy injured by machinery in planing mill.—In *PALMER v. HARRISON*, 57 Mich. 182 (1885), the case is stated in the syllabus to the official report as follows: "A fairly intelligent youth of sixteen had his hand mutilated by the jointer in a planing mill where for two weeks he had been at work. He had had no previous experience with such machinery, but the dangerous nature of the jointer was manifest to any one who looked at it, and he would not have been hurt if he had not laid his hand, without looking, upon the table in which the jointer operated. *Held*, that the injury was accidental, and he could not recover for it."

Boy injured by wool machine.—In *KAILLEN v. NORTHWESTERN BEDDING Co.*, 46 Minn. 187 (May, 1891), minor employee, a boy fourteen and a half years old, injured while operating a wool machine or picker in defendant's factory, his hand coming in contact with the revolving rollers, order refusing new trial after verdict for plaintiff for \$500 in the District Court for Ramsey County was *affirmed*.

Minor employee injured by saw.—In *PRENTISS v. THE KENT FURNITURE MANUFACTURING Co.*, 63 Mich. 478 (November, 1886), minor employee injured in defendant's furniture factory, judgment for defendant in the

Superior Court of Grand Rapids was *affirmed*, it being held that the injury was purely accidental. It appeared that "the plaintiff was injured in October, 1883, at which time he was about nineteen years of age. At the time the injury occurred the plaintiff was at work in the defendant's furniture factory in the city of Grand Rapids, and, while engaged in running a split saw, his hand came in contact with the saw, in consequence of which he lost a little finger, and his hand was seriously injured, and, as plaintiff alleges, without fault on his part." The Supreme Court (per *SHERWOOD, J.*) said: "The record, I think, sufficiently shows that, with the plaintiff's knowledge and experience in the use of machinery, and his three days' operation of this particular saw, under the instruction given him by the foreman, he must be regarded as having acquired a knowledge of all the ordinary dangers accompanying its use, and until the extraordinary dangers which may possibly arise are known to the defendant, or are of such a character as should be known by its foreman, it cannot be held liable when accidents occur therefrom. This case does not show injury arising from that class of dangers."

Boy injured while cleaning machine.—In *STEILER v. HART ET AL.*, 65 Mich. 644 (April, 1887), minor employee, a boy thirteen years of age,

from the carriers, and place it where it should be required. While working there he had been called two or three times to assist the man at the bull-wheel in bringing a log back to its place, and had given the required aid. In the afternoon of the day named he was called to give assistance again, and he went with his cant-hook, stepped upon the box by the side of the bridge-tree, reached over the wheel, and drew the log to its place. The wheel was then standing still, but as the plaintiff turned to go back to his work, the wheel started up. The man in charge of it was not at the time looking at the plaintiff, but immediately he heard a cry, and turning saw the

injured by his hand being caught while cleaning a machine which he was operating in defendants' factory, judgment for plaintiff in the Superior Court of Detroit was *reversed* for erroneous admission of evidence as to effect upon plaintiff when operating the machine, and also upon another boy who had the machine after plaintiff's injury, the complaint not alleging the same.

Boy killed by revolving knife. — In MARSHALL, ADM'R, *v.* THE WIDDICOMB FURNITURE Co., 67 Mich. 167 (October Term, 1887), minor employee, a boy fourteen years old, killed by a knife flying out of a rapidly revolving "shaper-head," used in defendant's factory, judgment for defendant in the Superior Court of Grand Rapids was *reversed*, on the ground that the case was for the jury. The ruling is stated in the syllabus to the official report (per CAMPBELL, Ch. J., in which MORSE and CHAMPLIN, JJ., concurred, but SHERWOOD, J., dissented), as follows:

"The law does not hold persons using machinery to any absolute duty of insuring its safety, but does require some care in introducing untried novelties. That which has been approved as safe by reasonable experience may be presumed safe by those who rely on that experience to justify them in selecting it. But where the result of any defect must be an immediate danger to human

life, it devolves on those who expose it to the danger of a new experiment, which turns out badly, to show that they have followed such a course as the understood rules of science or mechanics applicable to such matters rendered safe according to ordinary probabilities.

"There was at least enough in this case to go to the jury on the question whether the new shaper-head was a reasonably safe implement and properly designed, and whether the principle involved in it was not a departure from safe methods as before applied; and the fact that there may have been some conflict on one or another question would not allow the trial judge to deprive the jury of the power to determine the conflict."

Boy thrown against revolving shaft. — In KING *v.* THE FORD RIVER LUMBER Co., 93 Mich. 172 (October Term, 1892), plaintiff, a boy thirteen years of age, injured while working in defendant's saw-mill, being thrown against a revolving shaft and his arm taken off, judgment for plaintiff in the Delta Circuit Court was *affirmed*. Among the rulings was the following: "An employee, by reason of youth or inexperience, may not understand and appreciate a danger to which he is exposed, although the place and the dangerous machinery are open to observation. In one case, it may be due care to inform a servant of mature years and experience of the

plaintiff's foot in the wheel. He threw the wheel out of gear instantly, but the plaintiff's limb was found to be so badly crushed as to require amputation above the knee. How the accident occurred is not well explained. The plaintiff appears to have slipped as he turned about, but no one seems to understand why this should have brought his foot into the bull-wheel." * * *

The plaintiff claimed that defendants were negligent in leaving the wheel uncovered, but the Supreme Court in reviewing the case held that the injury was the result of a pure accident, with no more negligence on one side than on the other.

Continuing, the court said: "This case closely resembles *Richards*

danger which he must guard against; while in the case of an infant, or one not of mature age, and without experience, it would be carelessness in a master to content himself with merely pointing out dangers which are not likely to be appreciated. Citing *Cooley on Torts*, 553."

Minor employee injured by planer. — In *MACKIN v. THE ALASKA REFRIGERATOR CO.*, 100 Mich. 276 (May, 1894), where plaintiff, a young man between eighteen and nineteen years of age, while removing small pieces of wood from the planer table, was injured by defendant's buzz planer, judgment for plaintiff for \$5,000 in the Muskegon Circuit Court was *reversed*. It was held that, "an employer is not guilty of negligence in failing to instruct a boy eighteen years of age that he must keep his hands away from the knives forming a part of the machine at which he is working, or he will get injured, the working of such machine being apparent at a glance, and it further appearing that the boy had been apprenticed to a plumber, for whom he had worked for some time, and that he had also worked in a pulp mill."

Boy falling against uncovered cogwheels. — In *BORCK v. MICHIGAN BOLT & NUT WORKS*, 111 Mich. 129 (December, 1896), judgment for defendant in the Wayne Circuit Court

was *affirmed*. The case is stated in the syllabus to the official report as follows:

"An employer cannot be held liable for injuries to a boy twelve years of age resulting from his falling against uncovered cogwheels during a scuffle with a companion, on the ground that he was too young to be placed at work in the vicinity of uncovered machinery, where it appears from his own testimony that he was familiar with the construction of the machine and was fully aware of the danger."

"The fact that the boy was employed without the written permission of his parents or guardian, contrary to the provisions of 3 H. Stat., § 1997, c. 3, was not the proximate cause of the injuries so received."

"The notice contemplated by How. Stat., § 1997, c. 7, providing that 'if * * * belting, shafting, gearing, elevators, drums, and machinery in the shops and factories be located so as to be dangerous to employees, and not sufficiently guarded * * * after *due notice* of such defect, said proprietors or agents shall be deemed guilty of violating the provisions of this Act,' is notice by the inspector mentioned in the preceding section of the Act, and until this notice is given the statutory liability does not exist."

v. Rough, 53 Mich. 212 (1), which was submitted a few days earlier. In both cases the person injured was a laborer, who had the same means as the employer of understanding the danger. In both cases the injury was the result of such an accident as no one would have been likely to foresee,—its liability to happen was only proved by its actually happening. And in both after the injury had occurred it was easy to show how it might have been avoided. But the very fact that the laborer, who was not wanting in intelligence, or incapable of judging of probable dangers, should continue to expose himself without hesitation, and apparently without fear, to such risks as these were, is very conclusive proof, either that the employer was not culpable in the matter complained of, or that the laborer was inexcusably careless of his own safety. But the truth undoubtedly is that the accident which occurred, so far from having been anticipated by either party, was a surprise to both. The precise accident that occurred in either of these cases might never occur again at all. The next might be something entirely different, and require altogether different precautions. But it might, nevertheless, be seen after it had occurred that it could have been easily guarded against. If the fact that prevention was possible is to render the employer liable, then he may as well be made an insurer of the safety of those in his service in express terms, for to all intents and purposes he would in law be insurer, whether nominally so or not. But this would work a radical change in the law of negligence in its application to the relation in which these parties stood to each other.” * * *

MINOR EMPLOYEE INJURED BY SPARKS FROM MOLTEN IRON—INCOMPETENCY OF ASSISTANT—NOTICE—MASTER NOT LIABLE.—In **JUNGNITSCH** (by **Next Friend**) **v. THE MICHIGAN MALLEABLE IRON COMPANY**, 105 Mich. 270 (*May, 1895*), plaintiff, a lad of eighteen years blinded by sparks from molten iron which escaped from ladle used in filling molds in defendant's iron foundry, judgment for plaintiff in the Wayne Circuit Court was *reversed*. The case is stated in the syllabus to the official report (from opinion of GRANT, J.) as follows:

“Knowledge on the part of the foreman in the core room of an iron foundry, who is charged with the duty of directing employees

1. In **RICHARDS v. ROUGH ET AL.**, 53 Mich. 212 (April Term, 1884), the case referred to in **Sjogren v. Hall**, 53 Mich. 275, as being similar to that case (see the case at bar), judgment for plaintiff for \$4,383.33 was *reversed*. In this case plaintiff was injured while working in the blacksmith shop of the defendants, cutting iron and punching holes in iron plates with a punching machine, which machine seems to have collapsed causing the injury complained of.

where to go and assist the molders in filling the molds, that boy of the age and size of one so sent are competent to perform said work, and that said boy has performed it for six months to the satisfaction of all with whom he has worked, justifies the foreman in the assumption that he is dealing with a boy of the average size and strength, ordinarily competent to do the work, and who has shown himself competent, and in instructing said boy to do said work, notwithstanding his statement, made in answer to such instruction, that he is not strong enough to do it.

"The molder whom the boy was instructed to assist was perfectly familiar with his ability, had worked with him and beside him, and had seen him do work requiring as much strength as that in which he and the boy were about to engage. And it is held that, accepting the service of the boy without objection, the molder estopped himself from claiming that the common employer is liable for a weakness on the part of the boy unknown to the foreman."

"The reduction of danger to a minimum requires the exercise of the highest degree of care attainable, and the law imposes no special duty upon the employer, but only the exercise of that reasonable care which the ordinarily prudent and careful man exercises in such or similar work."

BOY IN EMPLOY OF CONTRACTOR INJURED BY BURSTING OF EMERY WHEEL ON DEFENDANT'S PREMISES — DEFENDANT NOT LIABLE. — In **REIER v. DETROIT STEEL & SPRING WORKS**, 109 Mich. 244 (1896), judgment for defendant on verdict directed by the Wayne Circuit Court was *affirmed*. GRANT, J., stated the case as follows:

"Plaintiff, a boy fifteen years old, was seriously injured by the bursting of an emery wheel, at which he was engaged in grinding the burrs off some coil springs. The court directed a verdict for the defendant. The declaration is based upon the existence of the relation of master and servant. It alleges that plaintiff was in defendant's employ, and that it was guilty of negligence in placing an inexperienced boy at dangerous work, without warning or instruction, in not furnishing him with a safe machine to work upon, in that the journals upon which the wheels ran were worn, so that they jumped and wobbled; that the wheel itself was out of condition, worn out, and needed turning; that it was not provided with a wire web, and did not have a wire web for strengthening it (1). The instruction of the court was correct. Plaintiff was not in the employ of the defendant."

1. In **HOFFMAN v. ADAMS**, 106 Mich. 111 (July, 1895), action by plaintiff, an eighteen years of age, a servant in defendant's employ, for injuries sustained by the running away of a delivery wagon attached to a delivery wagon he was driving, judgment for plaintiff in the Wayne Circuit Court.

of the defendant, but in the employ of a contractor, to whom the defendant furnished the building, tools, and machinery with which to perform the work contracted. The contractor employed and paid all his workmen, including the plaintiff, and had the sole control and direction over them. If it was negligence to set the plaintiff at this work, about which we express no opinion, the contractor alone was at fault. Plaintiff testified that he was employed and paid by the contractor, and was not employed by the company. The defendant, upon a proper declaration, could be held liable only for failure to furnish suitable machinery, and to keep it in proper repair, provided it was its duty to do so, upon sufficient notice. The emery wheel was one of the kind in common use, and new. There was no evidence to show that the machinery and appliances were not in good condition, and safe, when furnished. The defendant is not responsible for their negligent use, or for the rate of speed at which the wheel was running. Judgment affirmed."

FOX V. THE SPRING LAKE IRON COMPANY.

Supreme Court, Michigan, October Term, 1891.

[Reported in 89 Mich. 387.]

EMPLOYEE INJURED AT BLAST FURNACE—DEFECTIVE APPLIANCE—HOISTING MACHINE—PLEADING AND PRACTICE—FELLOW-SERVANT—VICE-PRINCIPAL—CONTRIBUTORY NEGLIGENCE—CORPORATIONS—AGENTS—DIRECTING VERDICT.—In an action by plaintiff to recover damages for injuries sustained while performing his duties in defendant's blast furnace, he being a top filler, that is putting coal and ore into the top of the furnace and keeping it full, his arm being crushed by a part of the machinery due to alleged defective appliance, judgment for plaintiff was affirmed, the rulings, as per opinion by CHAMPLIN, Ch. J., being stated in the syllabus to the official report as follows:

"A failure to aver in a declaration in a negligence case that it was the duty of the defendant to have exercised due care in those respects wherein his acts are charged to have been negligent may be taken advantage of by special demurrer, but not after verdict.

"The court adopted the New York rule governing the liability of the master for the negligent act of his servant, whereby another servant is injured, namely, to hold the master liable for negligence in respect to such acts and duties as he is required to perform as master, without regard to the

affirmed. Whether defendant was one, without warning plaintiff, and in negligent in intrusting the horse, furnishing insufficient harness, were which was a high spirited and nervous questions proper for the jury.

rank or title of the agent intrusted with their performance, as to which acts he occupies the place of the master, who is liable for the manner in which they are performed.

- "There was ample evidence in this case (see opinion) to go to the jury upon the question of the defendant's negligence.
- "Where the question of the contributory negligence of the plaintiff in a negligence case depends upon the finding of a certain fact for or against his contention, as to which the testimony is conflicting, it should be submitted to the jury.
- "Corporations must act through agents, and it is immaterial whether the agent, if duly authorized to act as such, is or is not a stockholder.
- "In the absence of the officers and corporators of a corporation, it may be inferred that a servant who assumes to and does discharge the duty of keeping the machinery and appliances necessary to the prosecution of the corporate business in repair is the representative of the corporation in so doing.
- "A motion that the court direct a verdict in favor of the defendant at the close of the plaintiff's testimony should not be granted where there are any inferences of fact to be drawn by a jury from the testimony."

ERROR to Muskegon Circuit Court. From judgment for plaintiff, the defendant brings error. The facts are stated in the opinion. *Judgment affirmed.*

SMITH, NIMS, HOYT & ERWIN, for appellant.

MYRON H. WALKER and JOHN M. MATHEWSON (DE LONG & O'HARA, of counsel), for plaintiff.

Champlin, Ch. J. — The defendant was operating a blast-furnace at Bangor, Mich., in March, 1888, and employed plaintiff as top-filler, whose duty it was to put coal and ore into the top of the furnace, and keep it full. There was a platform at the top of the furnace, to which coal and ore were brought by means of a car running up an inclined plane from the stock-house, and operated by an engine in the engine-house connected with the car by a wire rope which wound around an iron drum. There was a brake attached to the drum for the purpose of stopping and holding the car at any point on the track. The whole machinery was called an "automatic hoist," and its operation was under the control of the top-filler. When the car was drawn to the platform at the top of the inclined plane it was level with the platform, and the coal with which it was laden, being in hand carts, and the ore in wheelbarrows, were removed to the platform and dumped. When this was being done the retention of the car in place was not secured alone by the brake, but there was a hook and staple attached to the platform and car which was used to hold and secure the

car in place safely. It was a fact well known to the plaintiff and to the other employees that the brake could not be trusted at all times to hold the car in place. In the operation of the hoisting engine it had sometimes happened that, by reason of the wire rope stretching or some other cause, the car would not be brought quite up to the platform, and then the level of the car would be below that of the platform, making it difficult to unload. Whenever this happened, the engineer, with such help as he required, would readjust the automatic part of the machine by setting it ahead to let the car run up higher. To do this it was necessary to draw the key which held the automatic gear-wheel to the shaft.

The plaintiff's shift was from 12 o'clock at night to 12 o'clock noon. On the night of the 12th of March, 1888, when he went to his place at the top of the furnace, he found that the car did not quite come to the platform. He had observed this fact before he ascended the ladder or steps leading to the platform, and had notified one Winch, then in charge of the engine, of that fact, and he said it would be repaired as soon as Mr. Marshall, the head engineer, came. George Marshall was the head engineer, and it was his duty to remedy the difficulty. Hiram Barnes was night furnaceman. He had charge of the furnace, and charge of the men from 12 at night until noon. The plaintiff was subject to his orders. One Gibson was the "boss foundryman," who had general oversight and supervision of the men at work, and who hired and discharged employees. It was testified to that Barnes had in one instance discharged a man employed as top-filler, and employed another in his place.

After unloading the car, plaintiff let the car run down to the stock room, and went to putting in and leveling off the coal and ore, when Barnes called to him to come down, and then Marshall called to him to come down and help fix the engine. He came down, and went to the hoisting engine-room, and found them engaged in trying to remove the key to the wheel of the automatic appliance. Marshall was holding an iron bar with the end turned up to hook onto the end of the key, and Barnes was striking the other end of the bar with a sledge hammer. Barnes told plaintiff to hold the light. The light was a torch with a handle six or eight inches long. It was lighted and upon the floor. Plaintiff took up the light and held it.

The bar broke without loosening the key, and then Marshall took a cold-chisel and hammer, and went to the other side of the drum, and tried to get the key out. The drum is of iron, about twenty inches or two feet wide, having flanges at the rim to hold the coil, and about four feet in diameter. It has iron spokes an inch thick and four inches wide. Barnes told plaintiff to hold the light so Marshall could see. Plaintiff stepped to the end of the drum, and held the light partially into it, and Marshall said he could not see where plaintiff was holding the light. Then plaintiff said, "You wait till I see where I can see, and then you can see." He then turned himself around a little, and stuck his arm into the drum between the spokes and standard of the drum, leaned over so he could see where Marshall was working, and held the light that way. Plaintiff testifies, and so does Johnson, that Barnes told him to hold the light into the drum. Plaintiff also testifies that Marshall was working with the cold-chisel and hammer inside the drum on the opposite side from him, a distance from where he stood holding the torch of twenty inches or two feet; that he held the light below the shaft where Marshall was at work so he could see. The iron cable was wound around the drum, and attached to the car. Marshall had finished his work, and was straightening up, and before plaintiff removed the torch the drum revolved, and caught his arm between the spoke of the drum and standard, and crushed and broke his arm. The plaintiff brought this action to recover damages for the injury thus received (1).

The declaration contains four counts. The first, second, and fourth counts do not set forth or allege any duty of defendant towards plaintiff, but avers certain acts which they charge were negligent, viz.: In the first count plaintiff avers: "That while

1. *See, also, the following cases arising out of injuries caused by defective appliances:*

In *WEIDEN v. THE BRUSH ELECTRIC LIGHT Co.*, 73 Mich. 268 (January, 1889), lineman in defendant's employ injured while ascending tower in elevator to trim lamps under direction of foreman, the cable of the elevator breaking causing him to fall a distance of seventy feet, severely bruising him, etc., judgment for plaintiff in Wayne County Circuit Court

for \$750 was *affirmed*. Defendant was negligent is not making examination of the tower, and also in not paying attention to notice given to its superintendent of the defective condition of the tower, elevator, etc.

In *ROBINSON v. CHARLES WRIGHT & COMPANY* (a corporation), 94 Mich. 283 (December, 1892), judgment for defendant in the Wayne Circuit Court was *affirmed*. Plaintiff, while in defendant's employ, rolled a barrel weighing about 250 pounds

holding said light in such manner said engine was started carelessly and negligently by said Barnes and Marshall, or one of them, and without any warning to or knowledge of the plaintiff, the said wheel began to revolve, whereupon the plaintiff's right arm was caught," etc.

In the second count it is averred: "That said Marshall and Barnes did attempt and undertake * * * to repair and fix said hoist, and did for that purpose direct said plaintiff, who was under the orders and authority and whose duty it was to obey said Barnes and Marshall aforesaid, to assist them in repairing the same; and in so assisting them said plaintiff was directed and ordered by said Barnes to hold said torch or light inside of the drum of said automatic safety hoist; that while so holding the same, through the careless, negligent, and unskillful acts of said Barnes and Marshall in repairing said engine, the automatic brake attached to said engine, and with which the same was started and stopped, was released or set off in such manner as to cause said drum to revolve rapidly, and without any notice or warning to said plaintiff, and his right hand and arm were thereby caught," etc.

The fourth count avers: "That said plaintiff was under the direction and orders of said Barnes and Marshall in his work for said defendant, and it was a part of his duty to obey their orders and directions; and that the said Barnes and Marshall, in repairing said hoist, did carelessly and negligently pry up the drum or wheel of said hoist, around which was wound the wire rope or cord which was fastened to and raised said car of ore to the top of said furnace, and in prying up said drum or wheel they, the said Barnes and Marshall, did carelessly and negligently wind up around said wheel or drum a part of said cord or rope, thereby lifting and hoisting from the pit the car

upon the elevator, placing it on one side. He then rolled a second barrel on, when the platform commenced to descend, and went suddenly to the bottom, carrying plaintiff with it, and injuring him. The opinion was rendered by GRANT, J., and the rulings are stated in the syllabus to the official report as follows:

"Where an employee is familiar with a freight elevator, its construction and use, and knows that, unless

the brake is properly set and locked, a weight placed upon the car will cause it to descend, and that the brake must be set according to the weight of the material placed upon it for carriage, it is his duty to see that the brake is properly set and locked before using the elevator.

"The sudden breaking or giving way of a piece of machinery, properly constructed, is not sufficient to justify the conclusion of negligence."

so attached to the end of said rope, and thereby hoisting the same some distance up said inclined plane or runway towards the top of said furnace, and did then negligently neglect and fail to fasten said wheel or drum except as said automatic brake held it in position, or to block or in anywise support said car, but left the weight of said car attached to said rope or cord pulling at said wheel or drum, and did then proceed with the repairing of said hoist; that thereupon, while so holding the light, and having his arm part way inside of said drum or wheel, the automatic brake holding said wheel in position was in some manner negligently released or set off by the said Marshall in making said repairs, and was at the same time, and would not at all times hold said wheel, of which defect defendant then and there had notice, and by reason of said defect and said negligence of said Marshall became released and was set off, and thereupon the weight of said car attached to said rope or wire wound around said wheel, as it descends said inclined road to the bottom of the pit from whence it had been hoisted, caused said wheel or drum to revolve rapidly and with great force, and before said plaintiff had any warning," etc.

The third count alleges that: "It became and was the duty of said defendant to keep said machinery and said automatic engine or hoist in proper repair and in good condition, so that it should not be in anywise dangerous or injurious to defendant's employees and to this plaintiff. And, such being their duty as aforesaid, the defendant did on, to wit, the 14th day of March, A. D., 1888, neglect to keep or put the same in repair, and had for a considerable time prior thereto permitted and allowed the same to become and remain in poor and dangerous condition and out of repair, whereby the said hoist would not lift or carry the car of ore up said inclined track to the top of said furnace in proper manner, and whereby the safety or automatic brake, so called, by which said hoist was stopped and started, would not work, and would not safely and securely stop said hoist, and stop the lifting and hoisting of said cars of ore, and hold said car in position, as it was intended to do, but would and did allow the said hoisting wheel or drum of said hoist, around which the wire or rope hoisting said car was wound, to revolve and be unwound by the weight of said car in descending said inclined plane or track, and would not safely and promptly start or stop the revolving of said wheel, and securely hold the same stationary, of all of which said defendant then and there

had notice; and thereby, while said plaintiff was so holding said torch, under the direction and orders of said Barnes and Marshall, inside the drum or wheel of said hoist, which necessitated the putting his arm inside thereof, and to assist them in repairing said hoist, said brake did give way because of the defectiveness of said hoist, and cause or allow said hoisting wheel or drum to revolve rapidly, and thereby said plaintiff's arm was caught between the spokes of said drum and the standard upon which said drum rested, and his said hand and arm were thereby crushed," etc.

The first, second, and fourth counts would not have been good upon special demurrer, but after verdict they will be considered as having averred it to have been the duty of defendant to observe due care in those respects wherein the acts of defendant are charged as negligent.

In this State the rule governing the liability of the master for the negligent act of his servant, whereby another servant is injured, is that which is clearly stated by Chief Justice Church in *Flike v. R. R. Co.*, 53 N. Y. 549, in these words: "The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care, in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter * * * is liable for the manner in which they are performed." And hence a true test is: "Whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master." *McKinney Fellow Servant*, p. 54.

Applying this test to the facts of this case, there can be no doubt that Marshall was charged with the duty of keeping the hoisting apparatus in repair, and that such duty properly belonged to the corporation to perform. He was not, therefore, merely a fellow-servant with plaintiff, and the case may be considered in the same light as if Marshall were the owner and the proprietor of the plant at Bangor, and was engaged in repairing the hoisting apparatus, and had called upon his servant Fox to assist him. Whatever duty Marshall owed to Fox, under the circumstances, the company is chargeable with. There was no testimony in the case that either Marshall or Barnes negligently released the brake holding the automatic wheel, and, if recovery can be had at all, it must be upon the

ground that the brake was defective, and liable to slip, and let the car down the inclined plane by its gravity; and that Marshall had knowledge of the defect, and, having such knowledge, failed to take the precaution to block or fasten the car so that it could not fall back into the car-pit, and thus revolve the drum around which the cable was coiled. And, if it be determined that Marshall was negligent in that respect, the further question arises, was the plaintiff free from contributory negligence?

The testimony is undisputed that Marshall knew that the brake did not always safely and securely hold the car from going down the track; that it had slipped a number of times, and was liable to slip at any time. He testified on his direct examination, on behalf of defendant, as follows:

“ Q. What have you to say as to ever instructing any person to put their hand into that drum? A. I have told everybody that was helping me never to put their hand in there.”

And upon cross-examination the witness testified as follows:

“ Q. Did you say anything to Fox? A. I don't know as I did. Q. Nor Fox didn't say anything to you? A. No, sir. Q. From the time that you first came in there, about 12 o'clock, until after his arm was injured. You say he had never assisted you in fixing the hoisting works there before? A. I don't think he had. Q. Before that time. Why didn't you tell Fox then and there, if it was the first time he had ever helped you fix that hoisting work, the same as you had those other times, not to put his hand inside of that drum? A. I knowed he was an old top-hoist man, and had worked there off and on for four or five years. He stood there and see me hoist it up, and I presumed he knew the result as well as I did. Q. You presumed he did? A. Yes, sir; he stood right there. Q. But you don't think he was ever present when it was fixed before? A. I couldn't say as to that. Q. And that he never assisted you in fixing it? A. Never assisted me. Q. What was the result that you presumed Fox knew as well as you did? A. He knew that the car was standing on the track and it was liable to slip. Q. You said that the brake slipped was the cause of the drum revolving? A. Yes, sir. Q. Was it in the habit of slipping? A. Why, not very often. Q. Was it in the habit of slipping when it was in good repair? A. All that it ever would slip as a general thing when it would not quite come to the top, when the rope was getting a little long may be it .

would come up, and then it would slip back a little; and when it would get so bad that it would not stay up it had to be fixed.

Q. At the time that it did slip, you had just fixed it and got done? A. Yes, sir; I had got done. * * * Q. If it was not in the habit of slipping very often, why was it you warned these other men not to put their arm in there? A. Because there was not any use in putting their arm in there, and it might slip. Q. When you was fixing that you knew that Fox had his arm in there, didn't you? A. No, sir; I did not."

And again, on further cross-examination, he testified as follows:

"Q. Whose duty was it to fix this machinery or engine where the injury occurred? A. I supposed it was mine. Q. You had a work bench and tools? A. Yes, sir. Q. And vise? A. Yes, sir. Q. Furnished you by the company to do that kind of business? A. Yes, sir. Q. Whenever it was needed. Now, when did you first see Johnson there? A. I didn't see him until after the accident happened. I see him in the stock-house, when I first seen him. Q. This was part and parcel of your business, this fixing of this machine, this hoisting machine? A. Yes, sir. Q. Now, who brought that car up onto the track? A. I did. Q. How far did you hoist it? A. I presume, I didn't go out to see; but from the way the engine revolved it would take the car about two or three feet from the floor. Q. Now, if this brake was in the habit of slipping, why didn't you block the car? A. Well, sir; I could draw the key and do all my work while I was going down to block the car. I didn't have to work in connection with the drum, was the reason I didn't block the car. Q. Isn't it a fact that the leaving of that car on the track rendered it still more unsafe than as though it had been down in the pit? A. Yes, sir; it would not have slipped if it had been down in the pit. Q. And that was what caused the brake to slip? A. Yes, sir. Q. Then, if you had blocked the car when you brought it up, this accident would not have occurred, would it? A. It might not. Q. Would it? Would it have slipped? Would there have been anything to cause it to slip? A. I don't think it would,

And further: "Q. Now witness, this brake was constructed and operated for the purpose of holding a loaded car, was it not, as well as an empty one? A. Yes, sir. Q. When it was in proper order it would hold a loaded car, would it not? A.

Yes; it has held it. Q. On this occasion, it would not hold an empty car, or did not? A. No, sir; it slipped."

And these further questions were asked and answered:

"Q. Well, the reason you give for not going out to block that car was because you were in a hurry? A. I was in a hurry, and I didn't think it was necessary, because I didn't have any work to do in connection with the drum. Q. You thought you could fix it in a short time, and so you neglected it? A. I wasn't working in the drum, where I thought it would be connected with the drum."

It was testified to by witnesses on the part of the plaintiff that the drum was revolved about a quarter around, so that the car was drawn up the track three feet, and that it was not blocked, and suddenly went back. There was ample evidence to go to the jury upon the question of the defendant's negligence.

Was there testimony to be submitted to the jury upon the question of plaintiff's contributory negligence? The plaintiff had worked at the place for defendant and its predecessors for upwards of twelve years. He knew all about the liability of the brake to slip, and let the car down the track, and had observed that fact himself. He was called to assist in making the repairs, and told where to hold the light. He put his arm in between the spokes of the drum, in order to do so satisfactorily to Marshall. If the car had been at the bottom of the pit, it would have been perfectly safe for him to do so. He himself let the car to the bottom of the pit only a few minutes before. If he was aware that the car had been hoisted by revolving the shaft he would have been guilty of negligence in putting his arm into the drum. If he did not know that the drum had been revolved and the car drawn up, but supposed that the car was still in the bottom of the pit, then his negligence would not be so apparent; and it cannot be said, beyond all question, that he was guilty of negligence in putting his arm into this drum without ascertaining or inquiring whether the car had been drawn up the incline a short distance or not. It appears to me to be a debatable question, and, under all the circumstances, is not so plain that I can declare it to be negligence, as matter of law. Fox testified that he did not know that the drum had been revolved, and says that it was not done after he arrived in the engine-house. Johnson testified that it was done before Fox came. His testimony is not very clear as to the

precise time, and seems somewhat contradictory. Marshall testifies that Fox knew that the drum had been turned so as to bring the key upon the upper part of the shaft of the automatic wheel, and also that he did not know that Fox had his arm inside of the drum. Here was a conflict of testimony, and the jury was the proper tribunal to ascertain what the fact was from the testimony. I think the question of plaintiff's contributory negligence was one for the jury.

The witness Ford was inquired of, upon cross-examination, as to where the stockholders resided, for the purpose of showing that this branch of the business at Bangor, was run largely by persons who were not members, stockholders, or officers. This was objected to as immaterial. The circuit judge permitted the question to be asked. The testimony had a remote bearing upon the authority reposed in Marshall to keep the machinery in repair. Corporations must act through agents, and it is immaterial whether the agent, if duly authorized, is a stockholder or not. In operating a plant of this kind, some one at the furnace must have authority, or, at least, it must be the duty of some one, to keep the machinery and appliances in repair, and, in the absence of the officers and corporators, it may be inferred that a servant who assumes to and does discharge that duty is the representative of the corporation in so doing.

At the close of plaintiff's testimony, counsel for defendant stated to the court orally that he demurred to the plaintiff's proofs, and asked the court to direct a verdict at the close of the plaintiff's case. The motion is not one to be commended, as the circuit court would rarely and never except in a very plain case which was free from all doubt, grant such motion. The practice of demurring to the evidence is laid down in Gould, Pl., pt. 2, chap. 9, and the demurrer is required to be in writing, with certain formalities, and will only be entertained after admissions are made on the part of the demurring party that will settle all questions of fact, and leave nothing but a pure question of law to be decided. Although the practice has gone into disuse in this State, yet a practice has been recognized that the defendant may, at the close of the plaintiff's testimony, move the court to direct a verdict for defendant. The motion should not be granted where there are any inferences of fact to be drawn by a jury from the testimony, and the motion was properly overruled in this case.

The judgment must be affirmed. MORSE, McGRATH, and LONG, J. J., concurred with CHAMPLIN, Ch. J.

Grant, J., (dissenting).—I think it was error to permit the residence of the stockholders to be shown. It could not affect the question of agency. I express no opinion on the other questions involved.

SMITH, ADM'X V. THE PENINSULAR CAR WORKS.

Supreme Court, Michigan, April, 1886.

[Reported in 60 Mich. 501.]

EXPLOSION OF MOLTEN METAL—EMPLOYEE KILLED—LAW OF MASTER AND SERVANT—SAFE PLACE TO WORK—LATENT DANGER—NOTICE—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE.—Plaintiff's intestate, a laborer in defendant's employ, engaged in the work of moulding, was ordered by defendant's foreman to go, with others, from room where he worked to another room to get a ladle of molten iron. To do this required the men to go out of doors, and while returning with the ladle one of the men slipped on the ice and water which had accumulated on the ground, and the molten iron coming in contact with the ice and water, an explosion ensued and plaintiff's intestate was so seriously injured that he died shortly afterwards. The rulings in the case, as stated by SHERWOOD, J., are as follows:

It is well settled that in large manufacturing institutions, like that of the defendant, the proprietors or masters are bound to furnish a suitable place in which work may be performed with a reasonable degree of safety to the persons employed, and without exposure to dangers that do not come within the obvious scope of the employment in the business as usually carried on.

It is presumed that the master or foreman placed in charge of and conducting a manufacturing business knows and is familiar with the dangers, latent and patent, ordinarily accompanying that business; and if there are latent risks that a servant is, from ignorance or inexperience, incapable of understanding and appreciating, or which he would not be likely to know, the master should inform him of such dangers.

This obligation of the master would not be discharged by informing the servant generally that the service engaged in is dangerous, especially where he is a person who neither by experience nor education has, or would be likely to have, knowledge thereof, but the servant should be informed, not only that the service is dangerous, and of the perils of a particular place, but where extraordinary risks are or may be encountered, if known to the master, or should be known by him, the servant should be warned of these, their character and extent, as far as possible.

An employer would not be responsible to the servant for an injury resulting from those dangers which are the subject of common knowledge, or which can be readily seen by common observation. Such risks, and the danger therefrom, are always assumed by the servant when he engages in the service; but when the danger to be avoided requires a knowledge of scientific facts or is the result of well-known chemical combinations among well-educated men, the rule applies with much force, and cannot be ignored.

The fact that the deceased and his fellow-workmen whistled and sang or "were laughing and talking and are full of fun," while in the performance of the work, did not tend to show any negligence or carelessness on their part, but was rather indicative of their good nature and happy disposition.

In the absence of testimony showing the proper notice given by the agent in charge, or knowledge on the part of the servant, it could not be said that plaintiff's intestate was guilty of contributory negligence or that he assumed all the risks and perils, ordinary and extraordinary, incident to the employment.

Error to Superior Court of Detroit. From judgment for defendant, the plaintiff brings error. The facts are stated in the opinion. *Judgment reversed.*

SUMNER COLLINS and CHAS. B. LOTHROP, for appellant (plaintiff).

C. A. KENT, for defendant.

Sherwood, J. The plaintiff's intestate, Adelbert A. Smith, was her husband. He was a laborer, and worked for the defendant during the year 1882, and until he died, in January, 1883. His business was principally that of a moulder, and he worked in the defendant's shop at Adrian. The work of moulding and carrying molten iron was ordinarily done in two rooms separate from each other, and being furnished with all appliances for melting iron and moulding.

On the day in question, the fires had gone out in the room in which deceased was employed, and he was ordered by the foreman, who had entire charge of the men, to go with others to get a ladle of iron from the other room, and bring it into the room where he was employed. To do this it was necessary to go out of doors, and into the open air. On this day the ground over which it was necessary to pass was covered with ice, and water standing on the ice, making it very slippery, and there was no other way to get this iron.

On returning, and while passing over the ice, the man in the rear slipped down, and the molten iron was brought into contact with the water and ice, from which a violent explosion

ensued, and deceased was, with one of the others, so injured that they died shortly afterwards, having made no statement of the manner and cause of the accident, and there was no eyewitness to the accident but the man who slipped down. The undisputed testimony was that deceased was a good and careful man (1).

The suit is for damages arising out of Smith's death. The negligence charged against defendant is that the passageway was not safe, and that Smith was not notified of the danger arising from the contact of molten iron with ice or water.

Plaintiff's claim is that this was not a suitable and proper place to perform deceased's labor, and that the danger of an explosion from contact of ice with molten iron was a latent danger of which deceased was ignorant, and not one within the usual hazards of the employment, and that defendant was guilty of negligence in sending him to do work in such a place and in not informing him of the danger of passage over the icy way with molten iron. The defense is that the passageway was safe; that its dangers were open, and were voluntarily

1. *Molder scalded by molten iron.* — In *KEHOE v. ALLEN ET AL.*, 92 Mich. 465 (July, 1892), where plaintiff, a molder in defendants' foundry, was injured while assisting in pouring heated metal into molds prepared by other employees, the metal running out of one of the molds and scalding and burning one of plaintiff's feet, judgment for defendant in the Wayne Circuit Court was *affirmed*, it being held that if there was negligence it was that of a fellow-servant, and that the work was in the line of his employment, the risks of which plaintiff assumed.

Employee injured by explosion of barrel of paint. — In *BURKE v. PARKER, WEBB & Co.*, 107 Mich. 88 (November, 1895), it appeared that plaintiff was a laborer in defendant's employ, and was injured by the explosion of a barrel of paint, which contained benzine, during a fire which he was called upon by the foreman to assist in extinguishing. The barrel

of paint had been placed in the press room by the order of the superintendent. A workman used a lighted candle while drawing paint from the barrel, igniting the fluid. The barrel, after it had taken fire, was drawn from the press room out upon the platform into the open air, and while plaintiff, with others, was endeavoring to extinguish the flames the explosion took place. The paint was an article of common and necessary use in the business in which defendant was engaged. The fire was not caused by reason of the presence of the barrel in an overheated room, but seemingly by the carelessness of a fellow-servant in drawing the fluid from the barrel. Judgment for plaintiff in the Wayne Circuit Court was *reversed*, the Supreme Court holding that the keeping of the barrel of paint on the premises was not negligence, and that plaintiff's injuries resulted from accident rather than negligence.

assumed; that Smith was as likely to know as defendant's managers of the effect of the meeting of molten iron with water or ice; and lastly, that the proof shows that Smith's death resulted from his own carelessness and that of Ray. When the plaintiff rested the court below directed a verdict for defendant. There are several exceptions as to the rejection of testimony, but the main question is on the charge of the court directing the verdict.

When the case was heard, my impressions favored the ruling made by the judge of the Superior Court, but a careful examination of the record, and more thorough investigation of the case, has very essentially modified those impressions. Indeed, I think the facts and circumstances stated by the witnesses, under the law applicable thereto, required the case to go to the jury.

It has come to be very well settled that in large manufacturing institutions, like that of the defendant, the proprietors or masters are bound to furnish a suitable place in which work may be performed with a reasonable degree of safety to the persons employed, and without exposure to dangers that do not come within the obvious scope of the employment in the business as usually carried on: *Swoboda v. Ward*, 40 Mich. 423, 16 Am. Neg. Cas. 1, *ante*; *Huizega v. Cutler & Savidge Lumber Co.*, 51 Mich. 272, 16 Am. Neg. Cas. 4, *ante*; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506; *Parkhurst v. Johnson*, 50 Mich. 70, 16 Am. Neg. Cas. 5, *ante*; *Smith v. Oxford Iron Co.*, 42 N. J. Law, 467; *Baker v. Alleghany Valley R. Co.*, 95 Pa. St. 211; *Cooley Torts*, 553.

It is presumed that the master or foreman placed in charge of and conducting a manufacturing business knows and is familiar with the dangers, latent and patent, ordinarily accompanying that business; and if there are latent risks that a servant is, from ignorance or inexperience, not capable of understanding and appreciating, or which he would not be likely to know, the master should inform him of such dangers. *Whart. Neg.*, § 209; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 584, 15 Am. Neg. Cas. 506; *Cooley Torts*, 549; 2 *Thomp. Neg.* 979; *Strahlendorf v. Rosenthal*, 30 Wis. 675; *O'Connor v. Adams*, 120 Mass. 427, 15 Am. Neg. Cas. 615; *McGowan v. La Plata Min. Co.*, 3 *McCrary (U. S.)*, 397; *Dowling v. Girard B. Allen Co.*, 14 *Cent. Law J.* 92; *Hathaway v. Michigan Cent.*

R. Co., 51 Mich. 253; St. Louis & S. E. Ry. Co. *v.* Valirius, 56 Ind. 511, 14 Am. Neg. Cas. 540*n*; Wood Mast. & Serv. § 349; Michigan Cent. R. R. Co. *v.* Smithson, 45 Mich. 212; Chicago & N W. Ry. Co. *v.* Bayfield, 37 Mich. 205 (1); O'Connor *v.* Adams, 120 Mass. 427, 15 Am. Neg. Cas. 615,

I do not understand that the obligation of the defendant would be discharged by informing the servant generally that the service engaged in is dangerous; especially where the servant is a person who neither by experience nor education has, or would be likely to have, any knowledge of the perils of the business, either latent or patent, but that in such case the servant should be informed, not only that the service is dangerous, and of the perils of a particular place, but where extraordinary risks are or may be encountered, if known to the master, or should be known by him, the servant should be warned of these, their character and extent, as far as possible.

It seems to me the value of human life, and the duty of the master in affording reasonable protection to persons while under his direction, cannot be held to require less than this: Cooley Torts, 554; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 596, 15 Am. Neg. Cas. 506; East Saginaw City Ry. Co. *v.* Bohn, 27 Mich. 503; Union Pac. R. R. Co. *v.* Fort, 17 Wall. 553.

Of course, this rule would not require the employer to become responsible to the servant for an injury he might receive, while in the employment of the master, resulting from those dangers which are the subject of common knowledge, or which can be readily seen by common observation. Some risks, and the danger therefrom, are always assumed by the servant when he engages in the service; but when the danger to be avoided requires a knowledge of scientific facts, or is the result of well-known chemical combinations among well-educated men, then I think the rule applies with much force, and cannot be ignored.

I do not think the court can presume that the common laborer in a foundry or machine-shop, such as this was, is possessed of the scientific knowledge necessary to enable him to comprehend and avoid any such danger as overtook Mr. Smith on that icy way, resulting in his death; and I think before he was called upon to perform the hazardous undertaking by Mr.

1. Chicago & N. W. R'y Co. *v.* Bay- the MICHIGAN cases in this volume field, 37 Mich. 205, is reported with of AM. NEG. CAS., p. 87 *post*.

Noban, the foreman in charge, he should have been informed somewhat of its dangerous character. This, however, was not done, and there is no pretense that the death of Mr. Smith was not caused by the explosion which followed the contact of the molten iron with the water and ice covering the dangerous passage over which the same was required to be carried.

And I think it may safely be said that, had Smith known of the dangerous character of the service arising from the accidental contact of the water and ice with the melted iron, he, in all probability would have refused to perform the service required. I know it is said he passed over the icy track but a few moments before the accident occurred, and did so safely, and must have observed the danger of falling. Conceding this, and that he was willing to take the risk of such danger, he certainly (if he did not know that the molten iron cast upon the water and ice would cause an explosion) could not have consented to take the risk of a fatal explosion. This was the danger he was subjected to in obeying the command of his employer, and of which he had no notice or knowledge, as is claimed by the plaintiff, and it is the neglect of the company, or its foreman, to notify the servant of such latent danger that she (plaintiff) makes the basis of her suit in this case.

The suggestion of the foreman to the men carrying the molten iron, that they worked or were going too fast, was no notice that if they allowed the water and ice to come in contact with the molten iron there would be danger of a terrific and perhaps fatal explosion. The testimony showed that Smith was a good workman and a careful hand. I do not think, because these men whistled and sang, "or were laughing and talking and full of fun" while in the performance of this work, this tended to show any negligence or carelessness on their part, but was rather indicative of the good nature and happy disposition of these servants. The law requires no such strained construction of the indications of the better feelings of our nature to excuse actionable negligence when accompanied with liability.

It is also suggested that it was as much the duty of Smith to have made the way safe over which the iron was carried as it was of any one. I do not understand the law applicable to the facts contained in the record. Smith was under the direction of the foreman in all he did, and the record does not show that he had any authority to clear this way of ice, or cover it with some other material. It was the duty of the foreman to

know of its condition and safety before sending those parties over it. Smith had never carried molten iron over it before. It was not really the department in which he worked. It nowhere appears that the manner in which the iron was carried, or the neglect of any duty devolving upon Smith, was the occasion of his slipping upon the ice.

Was there any negligence shown, or was there any testimony reasonably tending to show, that the defendant was guilty of negligence in the matter?

It is true, if the plaintiff's intestate had knowledge of all the facts, or had notice of all the facts, resulting in the fatal danger, before the accident occurred, then the plaintiff could not recover; but, as I have said before, he cannot be presumed to have known them under the testimony in this case, and certainly the record does not show that the defendant ever gave him any information upon the subject.

I think it was the duty of the defendant, by its agent or foreman, to have informed Smith of the dangerous character of the service, and it was incumbent upon the defendant to show that Smith had knowledge or notice of such extraordinary danger, — a danger not liable to exist or be incurred in carrying on the work which he was engaged to perform in the usual place and in the usual manner; and if the agent in charge had not such knowledge, or was not qualified to give such information to the servant, the defendant was guilty of negligence in not furnishing a foreman with the proper qualifications for the position.

In the absence of testimony showing the proper notice given by the agent in charge, or knowledge on the part of the servant, it is difficult to perceive how Smith could be said to be guilty of contributory negligence, or how he could be said to have assumed all the risks and perils, ordinary and extraordinary, incident to the employment. *McGowan v. La Plata Min. Co.*, 3 *McCrary* (U. S.), 397; *Kibele v. Philadelphia*, 105 Pa. St. 41; *Gilmore v. Northern Pacific R'y Co.*, 9 *Sawyer*, 558; *Spelman v. Fisher Iron Co.*, 56 *Barb.* 1151; *Parkhurst v. Johnson*, 50 *Mich.* 70, 16 *Am. Neg. Cas.* 5, *ante*; *Smith v. Oxford Iron Co.*, 42 *N. J. Law*, 475; *Wood Master and Servant*, 749; *Ford v. Fitchburg R. Co.*, 110 *Mass.* 240, 15 *Am. Neg. Cas.* 427; *Fuller v. Jewett*, 80 *N. Y.* 46; *Wright v. N. Y. Cent. R. R. Co.*, 25 *N. Y.* 569; *Green v. Minneapolis & St. L. R. Co.*, 31 *Minn.* 248; *Wabash Ry. Co. v. McDaniels*, 107 *U. S.* 454; *Hough v.*

T. & P. R'y Co., 100 U. S. 214; Corcoran v. Holbrook, 59 N. Y. 517; Teipel v. Hilsendegen, 44 Mich. 461; Billings v. Breinig, 45 Mich. 71.

The facts from which contributory negligence are proper to be inferred ought to have been submitted to the jury, and there was testimony from which the jury might have found defendant guilty of negligence, and the court should have left both questions to the jury.

These views render the consideration of the other assignments of error unnecessary.

The judgment must be reversed, and a new trial granted. CHAMPLIN and MORSE, JJ., concurred.

Campbell, Ch. J., (dissenting).—I do not think this case presents any ground of recovery. The only point which seems to me to be of any legal importance is whether the defendant was responsible, at all events, for not seeing that there should be no ice on the path over which the decedent and the other workmen passed with the melted metal. The particular danger of explosion, if melted metal should come in contact with water, is the same that would exist anywhere, inside or outside of the building, with water as well as with ice. It is one of those dangers incident to all foundries which all persons of any experience in such employment must be presumed to have sufficient understanding to avoid. But in this case I cannot see that it differs, except perhaps in degree, from the other and palpable dangers which a slip or fall, when carrying such material over any slippery place, must almost inevitably bring about. A fall on the ice is very likely at any time to cause serious injury to a grown-up person, and a fall which will spill hot iron over him can hardly fail to produce very dangerous results to life and limb. The fact that risks may differ in extent, when all are of similar danger to personal security, cannot change the rule of diligence on either side.

It cannot be said that the foreman knew, any better than the deceased, that ice was liable to cause slipping, or that a slip on it with such a burden would probably be a serious matter. The risk was open to any observation. Neither could it be supposed that it needed any special knowledge to discover it in broad daylight, or to expect its possibility in such weather. No workman is expected or bound, unless he chooses, to incur any serious danger without remonstrance, or

any use of means to avoid it; and where any one deliberately chooses to go over a path which is as easily seen by him as it could be by any one else, then he must be responsible himself for an accident arising out of its condition, unless there is such a positive duty in his employer to provide an absolutely safe path as to relieve him from any obligation to look where he is going.

To require such extreme care on the one side, and to allow such blind reliance on the other, would introduce into the law rules which go beyond reason. The rule that a safe place of employment must be furnished is one that cannot go so far without destroying all safety to employers themselves. It is a sensible and proper rule in cases where the place and its surroundings are not open to the knowledge of all persons employed; but it can have no application to things where everybody has the same opportunity of judgment, and no peculiar knowledge or experience is involved.

No rule can be a safe one which will render it unsafe for persons to employ others to aid them. The cases that generally come up arise where employment is upon a considerable scale, and it is supposed the employer can afford to lose better than the person employed. But the principle, if correct, will apply just as forcibly to domestic service and small industries as to any other. An errand to the barn or woodpile over an icy path involves the same kind of danger as an errand anywhere else. It will not do to look at the large cases and not at the smaller ones. The loss and damage, when it occurs, is no greater and no less by reason of the nature of the employment or the extent of the business. It would ruin any small business to pay such damages, and it would shock common sense to require it. The ordinary risks of business, and the ordinary duties springing from it, must go together.

I think that the deceased could not, nor can his representatives sue for an injury arising out of his falling on a path such as appears to have been the cause of this accident.

DANGEROUS PREMISES — FALL OF DOCK IN MILL YARD — INSPECTION — SAFE PLACE TO WORK — MACHINERY AND APPLIANCES — DELEGATION — VICE-PRINCIPAL — DAMAGES — EVIDENCE — ADMISSION — RES GESTÆ. — In **VAN DUSEN v. LETELLIER et al.**, 78 Mich. 493 (*October Term, 1889*), judgment for plaintiff in the Osceola

Circuit Court was *reversed*. The facts of the case are stated in the opinion by MORSE, J., as follows:

"The plaintiff, on May 8, 1888, was severely injured by a fall, while in the employ of the defendants, sorting lumber at their mill in Rose Lake, Osceola county. He had been working for them but one day and a half. The mill yard was furnished with a number of docks connected with the mill. These docks were arranged in parallel lines, running north and south, and connected by two or more cross-docks, and having tramways on the ground below and between them. These docks were about twelve feet wide, and from seven to sixteen feet high from the ground. They were on a level with the platform of the mill at the end where the lumber came from the saw. They were built of timber, and covered with two-inch plank. As the lumber was sawed, it was loaded upon carts, and wheeled out upon these docks. It was sorted and distributed along the sides of the docks opposite and above the piles on the ground, ready for the pilers, who took it from the docks, and piled it on the spaces along the tramways, when it could readily be loaded on tram-cars. At the time of his injury the plaintiff was engaged in wheeling lumber from the mill, pushing the cart before him, loaded with green hemlock plank, upon one of the central docks, known as "Dock 6." Another cart, also loaded with hemlock plank, was being pushed ahead of him by a young man named Henry Oakes. On the sides of this dock, waiting for the pilers, was an unusually large quantity of lumber, which had been placed there during the day by the plaintiff and others; and this had accumulated to a large amount at the place where the accident occurred. There was also at this place a short plank, accidentally left by some one, and which did not belong there. The wheel of Oakes' cart struck this short plank, and shook up and disarranged Oakes' load, so that he had to stop and straighten it up. This stopped the cart of plaintiff, who went forward, and helped Oakes to re-arrange his load. As plaintiff stepped back to his own cart, and was about to start it, the dock gave way, and the plaintiff fell with it (1).

1. *Fall of staircase in building.* — In *SLATER v. CHAPMAN*, 67 Mich. 523 (October Term, 1887), where plaintiff was injured from a fall of the staircase in a hotel, which was being constructed by defendant, where he was employed as a carpenter, another employee having full charge of the work, defendant was held liable, and judgment for plaintiff for \$1,000 was *affirmed*.

Struck by descending elevator. — In *SELL v. CHARLES RIETZ & BROS. LUMBER Co.*, 70 Mich. 479 (1888), judgment for defendant in the Manistee Circuit Court was *affirmed* by an equal division of the court. It appeared that plaintiff was a man over sixty years of age at the time of injury, was in employ of defendant, accustomed to do such work about defendant's premises, etc. He

"The negligence alleged in the declaration is that, at the point where the plaintiff was injured, the defendants had grossly, carelessly, and negligently allowed the posts, timbers, and braces of which the dock was constructed to become rotten and in a dangerous condition, and without the knowledge of the plaintiff, or notice to him. The plaintiff recovered a verdict and judgment for the sum of \$3,250." * * *

The learned justice discussed at length the evidence, the instructions given and refused, and the law of master and servant, citing numerous authorities, and the points decided are fully set out in the syllabus to the official report, as follows:

"1. The duty of inspection, when required by the circumstances

had been at work in the garden, and after finishing, went to defendant's warehouse to find the superintendent of the company. While in the warehouse, and passing under the elevator used for raising and lowering barrels of salt, he was struck and seriously injured by the descending elevator. It was held that the evidence did not sustain the claim of defendant's negligence.

Struck by falling plank while loading goods on elevator.—In *ALFORD v. METCALF BROTHERS & Co.*, 74 Mich. 369 (1889), where plaintiff, a porter in the carpet department of defendant's store, was injured while assisting in loading a large case of goods on the freight elevator, by a plank which came down the shaft and struck him on the back of the head, judgment for defendant in the Wayne Circuit Court was *affirmed*, no negligence being shown on defendant's part, and if there was negligence it was that of fellow-servants.

Fall of iron door.—In *TANGNEY v. J. B. WILSON & COMPANY* (a corporation), 87 Mich. 453 (June Term, 1891), judgment for defendant in the Wayne Circuit Court was *reversed*, the case being stated in the syllabus to the official report as follows:

"Plaintiff, twenty years of age, while pulling down an iron door, which was moved by means of a

chain running over pulleys, and fastened to the top of the door, a weight being attached to the other end of the chain, was injured by its falling upon him. The chain broke, and on inspection it was found to have been connected together at one point with coils or strands of wire which had broken or pulled apart. Plaintiff was unaware of this wire connection, and one of his fellow-servants, who had been in defendant's employ for eight years, testified to his want of such knowledge, and that he had never known of any repairs or inspection of the chain. And it is held that plaintiff made a sufficient showing to go to the jury, the case being ruled by *Weiden v. Electric Light Co.*, 73 Mich. 268; *Johnson v. Spear*, 76 Mich. 139; *Van Dusen v. Letellier*, 78 Mich. 492; *Morton v. R. R. Co.*, 81 Mich. 423."

Fall of iron boiler front.—In *TOOMEY v. EUREKA IRON & STEEL WORKS*, 89 Mich. 249 (October Term, 1891), judgment for defendant in the Wayne Circuit Court was *affirmed*. The facts, as stated in the opinion by GRANT, J., were: Plaintiff was a machinist in defendant's employ, and was at work in the boiler shop when he received the injury. He was directed by the foreman of the shop to rivet the cast-iron front for two boilers. This front was about eight

of the case, cannot be delegated by the master in such manner as to avoid responsibility.

"*So held*, where a firm of lumber manufacturers,—none of the members of which undertook to personally supervise the manufacture of lumber at the point where the mill was located, and all of whom resided in another county,—employed a general foreman or superintendent who was to look after the sawing of the lumber and in a general way the entire business, who employed competent men to inspect the docks upon which the lumber was placed preparatory to piling, and the posts and stringers supporting the same, one of which docks fell by reason of the breaking of one of said posts, which was weakened where the stringer was mortised in by reason

feet square, and was placed in position in front of the boilers for the purpose of being riveted together. This front consisted of four pieces, which stood alongside each other in an upright position, and temporarily held together by bolts. They were to be permanently united by iron strips riveted to the pieces over their several points of juncture. Plaintiff was shown the work, and directed to complete it as soon as possible. He commenced it about five o'clock in the afternoon. He first riveted the strips to unite the two end pieces. Upon proceeding to rivet the strip, which was to unite the center pieces, he discovered that the holes did not fit. He reported this to the foreman, who told him to get the castings, bolt them up, and get them through as quick as he could. He thereupon proceeded to chip out a hole for the rivet, and after giving a blow or two the front, which weighed about 1,800 pounds, fell over upon him, and injured him. *Held*, that plaintiff assumed the risks.

Fall of roof of building. — In *BARNOWSKY, ADM'R, v. HELSON*, 89 Mich. 523 (October Term, 1891), judgment for defendant in the Wayne Circuit Court was *reversed*, the case being thus stated in the syllabus to the official report (as per opinion by *MORSE, J.*):

"In a negligence case to recover for the death of plaintiff's decedent, caused by the falling of the roof of a building which the defendant was raising, evidence on the part of the plaintiff that the roof suddenly gave way, slipped or tipped to one side, and fell, raises the presumption that it fell because not sufficiently braced or stayed, and in the absence of any showing by the defendant, why the roof fell, or of negligence on the part of the deceased, the case should be submitted to the jury on the plaintiff's proofs."

Fall of ice bucket—Independent contractor—Master and servant. — In *PIETTE v. THE BAVARIAN BREWING COMPANY*, 91 Mich. 605 (May, 1892), judgment for defendant in the Wayne Circuit Court was *reversed*. The syllabus to the official report states the case as follows:

"Plaintiff's employer had contracted to fill defendant's ice house, and to that end to use a hoisting apparatus furnished by the defendant. Plaintiff was injured by an ice bucket falling upon him by reason of the breaking of a wire cable attached to the buckets. And it was *held* that defendant's duty was discharged when it furnished the hoisting apparatus in a reasonably safe condition, and that it cannot be held responsible for injuries to plaintiff resulting from

of dry-rot not visible on an outward inspection of the post,—the mortise being covered by a plank which was not removed at time of inspection,—and injured an employee, who was awarded damages for the injuries thus sustained.

“2. The following propositions are summarized from the opinion of Mr. Justice Morse, in which LONG, J., concurred:

“a. The circuit judge was right in instructing the jury that, if the defendants themselves could have discovered the defect in the dock—the fall of which injured plaintiff—by exercising reasonable care and diligence, they were responsible, notwithstanding they had employed skilful and competent persons to look after the docks, and had furnished them with the proper materials for repairing the same.

“b. It is well settled by all of the authorities that the master must provide his servant with a safe place to work in, and furnish him

the improper management of the apparatus by plaintiff's fellow-servants.

“The fact that the relation of master and servant did not exist between the plaintiff and defendant will not prevent a recovery by the plaintiff.

“A danger which exists only because of defective appliances, of which an employee has no notice, cannot be said to be one of the risks assumed by the employee.

“Where a corporation succeeds to the business of a copartnership, which it continues, and assumes the contracts and obligations of the partnership, it is liable to the same extent as the copartners would have been for a failure to furnish suitable machinery to a contractor under one of said firm contracts.”

Fall of ventilator.—In *BRODERICK v. DETROIT UNION RAILROAD STATION & DEPOT COMPANY*, 56 Mich. 261 (1885), the syllabus to the official report states the case as follows:

“Where not demurred to, a declaration for negligent injury must be held sufficient, after verdict, if it stated a cause of action though it did not specify the negligence, and especially if it counted upon other negligence which it did set forth. So *held* where a workman sued his employer for an injury suffered from

the use of defective machinery and did not point out the defect, but also averred as negligence that he had been set at work that was outside the scope of his employment.

“An employer cannot escape liability for an injury suffered by a laborer while at work for him, on the ground that he was hurt outside of working hours and therefore while not in his employment.

“A workman who stays upon his employer's premises during the noon recess to eat his dinner is not a trespasser, he has implied permission to stay there, and if called upon to resume work before the recess has expired it is his duty to do so. And whatever he does under such circumstances is within the scope of his employment, and to that extent not voluntary.

“Whatever a workman does under competent authority for the comfort and convenience of his fellow workmen is presumed to be for his employer's benefit, and such work is not so foreign to his employment that he would be justified in refusing to do it. So *held* where a workman was called upon during noon recess to open a ventilator and was severely injured while doing it.”

with suitable machinery and appliances with which to perform such work; and it is his duty to keep such machinery and appliances in good repair. If he cannot do this personally he must provide some other person to take his place in this respect, and the person to whom this duty is delegated,—no matter what his rank or grade, or by what name he may be called,—cannot be a servant in the sense or under the rule applicable to injuries occasioned by fellow-servants.

“*c.* In order to keep such machinery and appliances safely in repair, the law makes it the duty of the master to make all needed inspections and examinations; and he cannot escape responsibility by delegating this duty to one who, in other respects, may be a fellow-servant of the person injured by the failure to properly perform this duty. *Swoboda v. Ward*, 40 Mich. 420; *Mining Co. v. Kitts*, 42 Mich. 39; *Parkhurst v. Johnson*, 50 Mich. 70; *Ryan v. Bagaley*, 50 Mich. 179; *Huizega v. Lumber Co.*, 51 Mich. 272; *Smith v. Car Works*, 60 Mich. 502; *Marshall v. Furniture Co.*, 67 Mich. 167 (1).

“*d.* From all the circumstances of the case, it was for the jury to determine whether the inspection, as made, was made at the particular spot where the post broke, and whether, if made there, it was a sufficient inspection to look at it, or sound it with a hammer or other instrument, without tearing off the plank which was nailed over the mortises and tenons, or without cutting or boring into the wood.

“*e.* It was not error for plaintiff to show what wages he commonly earned, but it was not proper to show that he had no other means of support than day-labor, which fact was immaterial to the issue, and an indirect way of bringing the poverty of plaintiff before the jury, which is not permissible in actions of this character. *Marsh v. Bristol*, 65 Mich. 383.

“*f.* An admission by defendant's vice-principal of knowledge, before the accident, of the particular defect causing it, made the next day and away from the place where it happened, is inadmissible. *R. R. Co. v. Coleman*, 28 Mich. 440; *Ruggles v. Fay*, 31 Mich. 141; *Mabley v. Kittleberger*, 37 Mich. 360; *Gates v. Boom Co.*, 70 Mich. 309; *Patterson v. R'y Co.*, 54 Mich. 92; *Stebbins v. Township of Keene*, 55 Mich. 552; *Wormsdorf v. R'y Co.*, 75 Mich. 476.”

For the errors noted in the foregoing paragraphs the judgment for plaintiff was reversed and new trial granted, with costs to defendants. LONG, J., concurred with MORSE, J., and Sherwood, Ch. J., concurred in the result. CHAMPLIN, J., said: “I do not

1. The cases cited in the case at bar are reported with the MICHIGAN cases in this volume of AM. NEG. CAS.

think that the duty of inspection, when such inspection is required by the circumstances of the case, can be delegated by the master in such manner as to avoid responsibility, and I concur in reversing the judgment." CAMPBELL, J., said: "I agree in reversing the judgment, but I do not think it proper to throw doubt on our previous decisions which have dealt with the questions in this cause. I have not discovered anything indicating negligence in the defendants in this case; and I think that business cannot be conducted on a large scale on the doctrines which my Brother Morse has expressed as his personal views." The appellants (defendants below) were represented by J. C. FITZGERALD (and CHARLES CHANDLER and FRANCIS A. STACE, of counsel); the plaintiff by CHARLES A. WITHEY (and RANSOM COOPER, of counsel).

EMPLOYEE FALLING FROM LADDER IN SAW-MILL — OBVIOUS DANGER — MASTER NOT LIABLE. — In **LA-MOTTE v. BOYCE**, 105 Mich. 545 (*May, 1895*), judgment for plaintiff in the Bay Circuit Court was *reversed*. The points decided and the facts of the case as stated in the opinion by HOOKER, J., are set out in the syllabus to the official report, as follows:

"1. There is no obligation upon the part of an employer to make his premises and machinery perfectly safe, or to have the most approved appliances. His duty to provide reasonably safe machinery is qualified by his right to contract for the use of machinery which falls short of the best and most approved; and when the defect is obvious, and cannot escape ordinarily careful observation, which is always due from the employee, the risks attendant upon such use are assumed by the employee.

"2. In places like saw-mills, appliances more or less crude may reasonably be expected, and employees who use them are ordinarily as good judges of their safety as the employer. If unsafe, and the employee still consents to use them, the risk is his; and the employer has a right to expect that the employee assumes it, where the nature of the appliance and its dangers are obvious; *citing* **Batterson v. Railway Co.**, 53 Mich. 129; **Ragon v. Railway Co.**, 97 Mich. 274.

"3. Plaintiff, who was experienced in saw-mill work, fell from a ladder in the defendant's saw-mill, where he had been engaged for a month or more firing a boiler. The ladder, which was intended as a means of reaching the boiler, consisted of strips of wood nailed upon a wooden post or stanchion, which supported the wall encasing the boiler, and which extended a foot or eighteen inches above the brickwork. The sawdust carrier passed over the boiler, and sawdust scattered upon the top of the boiler ignited. Plaintiff testified that the night watchman told him to take a broom, hurry up the ladder, and sweep it off; that he took the broom in

his right hand, and went up the ladder; that, when he reached the top of the post, he thought it extended further up; that it did not extend up far enough for him to land on the boiler; that it was dark, and he could not see, and that he fell, and was injured. He further testified that he had seen the post, but never noticed how high it was, and that on the occasion of the accident he knew that he had reached the last slat, but was feeling for the post, which he supposed went higher. And it is held:

“a. That, had the defendant himself been there, there could have been no occasion for him to caution the plaintiff that the post was short, for that fact was obvious, and the most ordinary familiarity with his surroundings could have apprised plaintiff of it; that it was not the case of a latent or hidden danger, but one which was apparent to the casual observer, and therefore one which the defendant had every reason to believe was known to the plaintiff, and the accident was one for which the defendant should not be held liable.

“b. That the fact that the sawdust was allowed to accumulate upon the boiler was not the proximate cause of the injury.”

EMPLOYEE FALLING INTO VAT AND DROWNED — ASSUMPTION OF RISK. — In **BALLE, Adm'x, v. THE DETROIT LEATHER COMPANY**, 73 Mich. 158 (*January Term, 1890*), where plaintiff's intestate who was employed in defendant's tannery in taking hides from certain vats to place elsewhere in the “beam-house” where the vats were located, while performing his duties fell into one of the vats and was drowned, it was held that there was no evidence of defendant's negligence and verdict for defendant was properly directed. It was also held that plaintiff assumed the risks, he having knowledge of the danger. Judgment for defendant in the Wayne Circuit Court *affirmed*. Opinion by LONG, J. JAMES H. POUND appeared for appellant (plaintiff); HENRY A. HARMON, for defendant.

BLACKSMITH STRUCK BY FLYING PIECE OF STEEL — MASTER NOT LIABLE. — In **RAWLEY v. COLLIAU et al.**, 90 Mich. 31 (*January, 1892*), it appeared that plaintiff was a blacksmith of many years' experience and, although but a short time in defendant's employ, was familiar with the work on which he was engaged at the time of injury. At the time he was hurt he was holding a heavy iron bar against a section of boiler iron, while another employee was holding a steel punch against the other side, and a third employee was striking the punch with a sledge-hammer, for the purpose of making holes through said plate or section of boiler iron. A piece of steel flew off from the face or edge of the sledge-hammer and struck plaintiff in the eye, injuring and destroy-

ing the sight. In the Wayne Circuit Court a verdict was directed for defendants which, on appeal, was *affirmed*. It was held that "it will not be assumed, as matter of law that a master is negligent in allowing a sledge-hammer to lie about his shop with its face cracked or battered, when there are others at hand that are sound, and in fit and safe condition for use, and when his servants are not obliged or directed by him to use the defective hammer, but can use the sound ones in their work." Opinion by MORSE, Ch. J.

THE QUINCY MINING COMPANY v. KITTS.

Supreme Court, Michigan, October Term, 1879.

[Reported in 42 Mich. 34.]

EMPLOYEE FALLING INTO EXCAVATION IN MINE — PLANK OF BRIDGE OVER EXCAVATION BREAKING — ASSUMPTION OF RISK — DELEGATION OF MASTER'S DUTY TO AGENT — LIABILITY FOR NEGLIGENCE OF AGENT — FELLOW-SERVANT — INSTRUCTION. — Where an employee in defendant's copper mine, while crossing a "bridge" over an excavation in the mine, was injured by the breaking of one of the planks of the "bridge" which precipitated him into the excavation, a distance of about 100 feet, judgment for plaintiff was reversed, the rulings being stated in the syllabus to the official report, as follows:

- "A servant cannot recover from his master for an injury received in his service without showing some fault on the part of the master.
- "A servant assumes all the usual risks of his employment, including the risk of injury from the carelessness of fellow-servants, provided they have been prudently chosen and not retained in the employer's service after he has knowledge of their unfitness or negligence.
- "A master cannot, by delegating it to another, relieve himself of the duty of exercising due care in the employment and retention of competent servants; and if he does delegate it to a general manager, foreman or superintendent, he remains responsible.
- "A servant does not assume the risk of the master's negligence, or that of any one to whom the master entrusts his superintending authority.
- "A servant assumes the risk of a fellow-servant's negligence even though the latter is in a position of greater responsibility or a different line of employment, so long as both are in the same general business, so that the negligence of one may contribute to the danger of the other."

ERROR to Houghton. Trespass on the case. Defendant brings error. The case is stated in the opinion. *Judgment reversed.*

CHANDLER & GRANT, T. L. CHADBOURNE, and ASHLEY POND, for plaintiff in error.

DAN. H. BALL, for defendant in error.

Cooley, J. — Kitts sued the mining company to recover damages for an injury alleged to have been suffered by himself through the company's negligence while in its employ as a miner (1).

It appears from the evidence that what in the declaration is called a bridge over the chasm where the accident occurred, consisted merely of two timbers laid side by side, one of which broke and fell with the plaintiff as he was passing over. The timbers were of pine, and had been in place some five years. The evidence tended to show that they disclosed no defect when put in, and that if sound originally, five years was not time sufficient to cause dangerous decay or weakness. The only evidence of any effort to examine the broken timber after

1. The declaration referred to in the opinion in the *KITTS* case (the case at bar) is set out as a footnote to the official report and is as follows: "County of Houghton, ss.:

"Joseph Kitts, of said county, complainant herein, by Ball & Owen, his attorneys, complains of the Quincy Mining Company, a corporation existing under the laws of this State, and doing business in said county of Houghton, defendant herein, of a plea of trespass on the case, filing this declaration as commencement of suit. For that whereas, the said defendant, heretofore, to wit: on the 20th day of April, A. D. 1876, and for a long time prior thereto, to wit: at said county of Houghton, was the owner of, and was operating and working a certain copper mine there situated, for the working of which said defendant required and employed a large number of men, and wherein were shafts and other excavations sunk to a great depth, and sundry and numerous drifts or levels, in which, for the purpose of operating said mine, a large number of men employed as aforesaid were required to work, and

to pass and repass; and that in the floor of one of said 'drifts' or 'levels' of said mine, to wit: that known as the 'hundred fathom level,' along which the employees of said defendant were required to pass and repass many times daily, was a deep and dangerous excavation, which required to be bridged over and was bridged over by said defendant, in order that its said employees while engaged about the work of said defendant, and under its direction and requirement, might pass along said 'drift' or 'level,' and said employees were, by said defendant, required to pass over said excavation upon the bridge so constructed by it, about their work in said mine.

"And by reason of the premises, it became and was the duty of said defendant to use and exercise reasonable care and diligence in the construction and maintenance of such bridge, and to keep the same in a secure and safe condition for its said employees to pass over, so long as they were so required to pass over said bridge, in doing the work of said defendant.

"Yet the said defendant, well

the accident showed that it fell among others where it could not be distinguished, and the occasion of the breaking was therefore, wholly unexplained. Other persons, including the plaintiff himself, had crossed upon these timbers with safety on the same day.

It was suggested, rather than urged, on the part of the defense, that the timber may have been weakened by a fragment of a rock falling upon it from above, and an inference to this effect might be drawn from the proofs. On the other hand, the effort of the plaintiff seems to have been directed to satisfying the jury that the timber must have been weak originally, or became weakened from some unexplained cause, and that from want of proper supervision the defect had never been discovered. An effort was made to bring home the want of proper supervision to one Wagner, who was said to be charged with the duty, and who, though he had casually examined the timbers sometimes, had never applied some of the

knowing the premises, did not nor would keep and maintain said bridge in such condition as to be safe for its said employees to pass over, but negligently and carelessly suffered the same to become unsafe, weak and insecure, and suffered the planks of which said bridge was constructed to become decayed, and negligently and carelessly suffered said decayed and weak planks to remain in said bridge for its said employees to pass over, although the same were unsound and of insufficient strength for said employees to pass over with safety.

"And the said plaintiff avers that heretofore, to wit: on the day and year first aforesaid, he was an employee of said defendant, and was hired by said defendant to labor for it in said mine, in and about the working thereof, and that while he was carefully and prudently passing along said 'drift' or 'level,' and over said bridge, in obedience to the orders and requirements of said defendant, and in the course of his said employment, ignorant of the unsafe condition of said bridge, and of the danger,

to wit: on the day aforesaid, one of the planks of said bridge, upon which he was necessarily walking, being weak and decayed as aforesaid, gave way and broke, and by reason thereof, and by reason of the negligence, carelessness and misconduct of the defendant as aforesaid, the plaintiff without fault or negligence on his part, fell down said excavation, to a great depth, to wit: to the depth of one hundred feet, upon the rocks at the bottom thereof, and was greatly wounded and injured by said fall, in the thigh, leg, side and head, and thereby became and was sick, disordered and sore for a long space of time, to wit: hitherto, during all which time he has suffered great pain, and has been put to great expense for medical attendance, care and nursing, to wit: the sum of \$1,000; and by reason thereof he has become permanently disabled and crippled in his left leg, and is entirely deprived of the use thereof, and to the damage of the said plaintiff of \$20,000, and thereupon he brings suit, etc."

most simple and usual tests, such as striking with a hammer, and piercing with a sharp instrument. Wagner was what was called a timberman in the mine; the timbermen put in and looked after such bridges or passages, and Wagner was sometimes called captain, as he had some authority over other timbermen, and might direct them as to their work. He, however, as well as the others, was under the general supervision and control of Capt. Cliff, who had the entire charge of the underground work. No claim was made that either Cliff or Wagner was incompetent, or that the company had been negligent in the employment of incompetent persons, and the principal reliance of the plaintiff seemed to be on such inferences of negligence on the part of Wagner as might be drawn from the evidence.

The circuit judge was requested to instruct the jury that even if they found that Wagner was negligent, yet his negligence was the negligence of a fellow-servant of the plaintiff, and of this the plaintiff took the risk. This was refused on the ground, as would seem, that in respect to the supervision of this bridge or passageway Wagner was charged with the responsibility of the company, and his neglect was the neglect of his principal. As between the competent and any third person, the extent of the authority or responsibility of Wagner would have been immaterial; but when a servant demands from his master compensation for an injury received in his service, it is necessary that he trace some distinct fault to the master himself. The mere fact of such injury is no evidence of such fault; neither is the mere fact that it resulted from the carelessness of some other person in the same employment. The servant assumes all the usual risks of his employment, and among these is the risk that fellow-servants will sometimes be careless and that injuries will result. All that can be required of the master in that regard is that his servants shall be prudently chosen, and that they shall not be retained in his service after unfitness or negligence has been discovered and has been communicated to him. The duty of due care in the employment and retention of competent servants is one the master cannot relieve himself of by any delegation, and if it becomes necessary to intrust its performance to a general manager, foreman or superintendent, such officer, whatever he may be called, must stand in the place of his principal, and the latter must assume the risks of his negligence. The same is true of the

general supervision of his business; if there is negligence in this, the master is responsible for it, whether the supervision be by the master in person or by some manager, superintendent or foreman to whom he delegates it. In other words, while the servant assumes the risk of the negligence of fellow-servants, he does not assume the risk of negligence in the master himself, or in any one to whom the master may see fit to intrust his superintending authority (1). *Albro v. Agawam Canal Co.*, 6 Cush. 75; *McAndrews v. Burns*, 39 N. J. 117; *Malone v. Hathaway*, 64 N. Y. 9; *Hard v. Vermont, etc., R. Co.*, 32 Vt. 473.

But Wagner did not stand in respect to this company in any such position. He was no superintendent or manager; he was nothing but a fellow-servant of the plaintiff. The duties of the two were different, it is true, but so commonly must the duties of fellow-servants be. He had one thing to do and the plaintiff another, but neither stood in the master's place in respect to the other; and if it be true, as the plaintiff claimed, that Wagner had special authority and was charged with special duty in respect to the particular passageway, this cannot vary the legal aspects of the case. In any such business there must be division of employments among servants; one looks after one thing and another after another; but this each understands when he enters the service; he knows that his fellow-servants are to be charged with duties and responsibilities of differing natures and differing grades, and he also knows that one of the necessary risks of the employment is that any one of them may be negligent and cause him injury. This risk he assumes. It is immaterial that the negligent servant was in a position of greater responsibility than himself, or in a different line of employment, so long as both were in the same general business,

1. *Mining captain not fellow-servant of laborer in mine.*—In *RYAN, ADM'X, v. BAGALEY*, 50 Mich. 179 (January Term, 1883), plaintiff's intestate, while working in defendant's iron-ore mine, killed by the fall of water pipes which were being hoisted from below, it was held (as per syllabus to the report) that: "A mining captain who has the entire management of the mine, without direction or interference by the owner,

occupies the owner's place and is not a mere fellow-servant of a laborer employed in the mine, even though he was not appointed directly by the owner, but only by the owner's agent; and the owner is liable for his negligence." Judgment for plaintiff in the Marquette Circuit Court was *affirmed*. The case was held to be within the principle of *Quincy Mining Co. v. Kitts*, 42 Mich. 34 (the case at bar).

so that the negligence of the one might contribute to the danger of the other. *Lehigh Valley Coal Co. v. Jones*, 86 Pa. St. 432; *McAndrews v. Burns*, 39 N. J. Law, 117.

If, therefore, it had appeared that Wagner was negligent, as the plaintiff claimed, the action must, nevertheless, have failed. But we look in vain in the record for any evidence that Wagner was negligent. It may be guessed or surmised that there was negligence somewhere, and one juror may guess that it was in the want of careful selection of timber; another, that it was in the want of subsequent inspection, or in the want of care to prevent rocks falling on the bridge; but the case affords no safe ground for anything beyond conjecture; and if the master can be held liable under the circumstances which the record discloses, on mere guesses or inference respecting the existence of fault somewhere, the rule that an employee assumes the ordinary risks of his employment will be wholly done away with. It is too late at this day to enter upon any discussion or defense of that rule; it has been too often enforced in this State and is too salutary in its effects upon the care and diligence of those engaged in employments where those qualities are especially requisite, to be now disturbed or questioned. *Davis v. Detroit, etc., R. Co.*, 20 Mich. 105; *Wonder v. Balt., etc., R. Co.*, 32 Md. 417, 15 Am. Neg. Cas. 352.

The judgment must be reversed with costs and a new trial ordered. The other justices concurred.

FALL OF ORE FROM ROOF OF MINE — SAFE PLACE TO WORK — FELLOW-SERVANTS.— In **PETAJA v. AURORA IRON MINING CO.**, 106 Mich. 463 (*September, 1895*), judgment upon verdict directed for defendant in the Gogebic Circuit Court was *affirmed*. Plaintiff was a trammer in defendant's iron mine, and was injured by the fall of ore from the roof of the room in which he was at work loading ore into a car. The case is stated in the syllabus to the official report as follows: "Plaintiff was employed in defendant's mine at loading upon cars and removing the ore as it was brought to the floor by the miners. As fast as the ore was removed, it was the practice to support the roof by a system of timbering, largely temporary in character, which was put in place by a force of men kept for that purpose, upon notification by the miners themselves or by the shift boss, who had charge of the work in the mine, subject to the general supervision of a mining captain. Before a newly-opened space had been timbered, and before the timbermen had been notified that their services were

required, plaintiff was injured by a fall of ore from the roof. Shortly before the accident, the attention of the shift boss had been directed to indications of danger, but he said that the roof was all right, and instructed the men to resume work. *Held*:

1. That, whether the injury was caused by excavating too large a space without placing the timbers, or whether it resulted from the fact that the timbering previously erected had ceased to support the roof by reason of the subsequent dropping of ore therefrom, thus leaving too great an area unsupported, the case was not within the rule requiring the master to provide the servant with a reasonably safe place in which to work; that the so-called "place" was a mere incident of the mining operations, the result of the common labor of those employed in the mine; and that the master's duty was discharged by the exercise of reasonable care in furnishing suitable material and employing competent men to do the work.

2. That if there was any negligence, it was that of the miners or of the shift boss, who were fellow-servants of plaintiff." JULIUS J. PATEK (CLARK & PEARL and CAHILL & OSTRANDER, of counsel), for appellant; CHARLES E. MILLER, for appellee. The opinion was rendered by HOOKER, J. A rehearing was granted December, 1895; final opinion rendered, in affirmance of earlier one, April, 1896.

NOTES OF MINING ACCIDENTS CASES.

Employees in mines injured by fall of rock, roof, etc.

In LAKE SUPERIOR IRON CO. *v.* ERICKSON, 39 Mich. 492 (1878), action by administratrix for death of husband who was killed by a falling rock while engaged in working in the mine of defendant, judgment for plaintiff was *affirmed*.

In SAMUELSON, ADM'X *v.* THE CLEVELAND IRON MINING CO., 49 Mich. 164 (October, 1882), where plaintiff's intestate, while working in an iron mine owned by defendant, was killed by being struck by a large quantity of rock which fell from the roof of the mine, judgment for defendant in the Marquette Circuit Court was *affirmed*, the leading point in the case being stated in the syllabus to the official report (as per opinion by COOLEY, J.) as follows: "The owner of a mine contracted with certain persons to work it, but stipulated that the contractors and not the owner should be responsible for any injuries to workmen, and the responsibility was assumed by the contractors. The mine was in proper condition when the contractors took possession and there was nothing in the contract to lead the workmen to suppose that the owner retained control of it or was responsible for their protection unless it were a stipulation that when the contractors repaired the mine the work should be done under the supervision of a person designated by the owner. *Held*, in an action against the owner for an injury to a workman, that this stipulation was not that the owner should supervise but that he should have the right to supervise, and was for the protection of the owner; that the neglect of his own interests was not a legal wrong to others and that plaintiff had no right of action."

In *JAMES, ADM'X, v. THE EMMET MINING Co.*, 55 Mich. 335 (1884), laborer, and not a miner, in defendant's mine killed by the caving in of the surface over the mine, judgment for plaintiff was *affirmed*. It was held that "a common workman employed about a mine but not himself a miner, is not a fellow-employee of the miners in any such sense that he cannot recover for an injury caused him by the mining operations."

In *NELSON, ADM'X v. THE LUMBERMAN'S MINING Co.*, 65 Mich. 288 (April Term, 1887), plaintiff's intestate, while working in defendant's mine, fatally injured by falling ore, caused by alleged defect in the floor of timbers upon which the ore was placed when mined, judgment for plaintiff was *affirmed*.

In *SCHLACKER, ADM'X v. THE ASHLAND IRON MINING Co.*, 89 Mich. 253 (October Term, 1891), plaintiff's intestate, a trammer in defendant's mine, fatally injured by the falling in of the roof of one of the chambers in the mine, caused by alleged negligent method of "caving-in" process, judgment for plaintiff was *reversed*. It was held that the evidence failed to disclose negligence of defendant, and it was a question whether the jury could do anything more than conjecture the manner in which the deceased fell into the shaft. The judgment should also have been reversed for incompetency of two of the jurors in the case.

Employees in mines injured by appliances, etc.

In *LUKE v. THE WHEAT MINING Co.*, 71 Mich. 364 (June Term, 1888), where plaintiff's leg was crushed by a "skip" car while he was going up the skip track to his work in defendant's mine, judgment for plaintiff was *affirmed*.

In *LENDBERG, ADM'X v. THE BROTHERTON IRON MINING Co.*, 75 Mich. 84 (1889), action by plaintiff for damages for death of her intestate, who was employed in defendant's mine and accidentally killed there, by alleged defective condition of rope attached to apparatus for raising buckets in mine, judgment for plaintiff was *reversed* for certain errors in practice.

A subsequent trial of the *LENDBERG* case resulted in verdict for defendant, which, on appeal, was *affirmed*. The trial court directed the jury that the case in all respects was as it appeared upon the former trial, and that, under the ruling made by this court upon the former record, defendant was entitled to their verdict. The Supreme Court (per LONG, J.) said: Whether or not the trial court was right in so directing the jury was immaterial, since under plaintiff's own testimony, it is shown that deceased came to his death by his own negligence. It appears without contradiction that he had been directed by the officers of defendant company not to work at the pump during the time the men at the windlass were raising or lowering the buckets. He knew, at the time, that the buckets were being so used. See *LENDBERG v. BROTHERTON IRON MINING Co.*, 97 Mich. 443 (1893).

In *EDDY v. THE AURORA IRON MINING Co.*, 81 Mich. 548 (June, 1890), plaintiff injured by the falling of a "set" or platform upon which he was employed while working in defendant's mine, it was held that there was evidence to go to jury on the question of negligence, and judgment on verdict directed for defendant was *reversed*.

IN *JAYNE v. SEBEWAING COAL CO.*, 108 Mich. 242 (January, 1896), the syllabus to the official report states the case as follows: "Where appliances are suitable and in proper condition for the purpose for which they are intended, the master is not liable in damages to an employee who is injured while unnecessarily using them for some other purpose. So *held* where a miner, while ascending from the mine in a cage constructed for that purpose, was injured by using as a handhold part of the apparatus provided for hoisting the cage from the mine." Judgment for plaintiff in the Huron Circuit Court was *reversed*.

FOX V. THE PENINSULAR WHITE LEAD AND COLOR WORKS.

Supreme Court, Michigan, June Term, 1892.

[Reported in 92 Mich. 243.]

EMPLOYEE INHALING POISONOUS MATTER — ARSENIC — PHYSICIAN — OPINION — EVIDENCE. — In an action to recover damages for injuries alleged to have been sustained by plaintiff by coming in contact with and inhaling poisonous matter while working in defendant's lead and color works, the plaintiff claiming *arsenical* but the defendant *lead* poisoning, where a physician testified that plaintiff was suffering from arsenical poisoning and partial paralysis, and that he made his diagnosis from a certain paper which was not in evidence, it was error to admit such testimony, as it was clear that the witness did not base his opinion upon a history of the case, but upon the conclusions of another physician.

KNOWLEDGE OF DANGER — NOTICE TO EMPLOYEES — EVIDENCE. — Testimony of co-employees of plaintiff, an injured employee, that they were not informed of the dangerous character of the employment, is inadmissible to rebut defendant's testimony that plaintiff was so informed.

WITNESS — EXPERT EVIDENCE. — One who has had an actual experience for fifteen years with 100 employees engaged in the manufacture of paris green, and who has had the opportunity to observe and has made observations of the effect upon the workmen so employed, is competent to testify as to cutaneous diseases and paralysis affecting persons engaged in the manufacture of paris green, and it was error to exclude such testimony.

ERROR to Wayne. From verdict and judgment for plaintiff the defendant brings error. The facts are stated in the opinion, and also in the former appeal in 84 Mich. 676. *Judgment reversed.*

CUTCHEON, STELLWAGEN & FLEMING, for appellant.

JAMES H. POUND (C. J. LOWRIE, of counsel), for plaintiff.

McGrath, J. — This case was before this court in January, 1891, and is reported in 84 Mich. 676, to which reference is made 'for a statement of the facts (1). On the second trial plaintiff recovered a judgment, and defendant appeals.

It appears that for some time after the injury plaintiff was at the Wayne county poorhouse. On the trial plaintiff offered in evidence the following poormaster's ticket:

“ DETROIT, *July 28, 1888.*

“ To the keeper of the Wayne county house:

“ Please admit John Fox to the Wayne county poorhouse, and provide for his necessities as a city charge.

“ John F. Martin,
“ Superintendent of the Poor.”

1. The decision in the former appeal, reversing judgment for defendant, in the case of *FOX v. PENINSULAR WHITE LEAD & COLOR WORKS*, 84 Mich. 676 (January Term, 1891), was rendered by MORSE, J. (all the justices concurring), and the facts of the case are stated as follows:

“ The defendant is engaged in the manufacture of paints, dry colors, paris green, and other poisons at Detroit. About June 12, 1888, the plaintiff was employed by the defendant corporation, and worked five days. He was first put to work cutting chromo yellow, a few hours. After that he was directed to take wet paris green out of filters with a trowel and put it in shallow tin pans on a board. After the first day he worked at stirring up the ingredients in vats, cleaning out vats, and in carrying dry paris green to the dry room. The boiling mass in the vats was heated to a high degree, and his business was to stir it until it was thoroughly dissolved. He brings this action for damages, claiming that he was a common laborer, ignorant of the constituents of the vats, and of the dangerous character of his employment, or that the substances handled by him were so poisonous as to endanger his health; that it was

the duty of the defendant to notify him of the poisonous character of the substances used in his employment, and that the vapor arising from the boiling vats was poisonous and dangerous when inhaled, and to provide him with appliances, to wit: rubber garments, boots, gloves, respirators and sponges, to be used and worn by him in his employment, so as to prevent the poisonous materials, and the steam arising therefrom, from coming in contact with, and from being inhaled and absorbed into, his body and system; that defendant did not perform this duty, by reason of which plaintiff was greatly injured and damaged.

“ The testimony shows that the plaintiff, soon after he commenced work, began breaking out on the exposed parts of his body, and at the end of the five days had to quit work, and finally went to Harper's Hospital. There seems to be no doubt that these sores were caused by mineral poison coming in contact with his skin while in his employment with defendant. It was further claimed that this poisoning, and the inhaling of the vapor or steam from the boiling vats, caused partial paralysis of his lower limbs, and permanent injury to his health. This was denied by the de-

Upon the back of this ticket is the following indorsement:

"This man was ill with arsenical poisoning at Harper Hospital, from which he was discharged on June 30. Shortly after he was affected with paralysis and anæsthesia of the feet, due to the same cause, and being unable to earn his living, is now sent to you for treatment.

"H. Erickson, City Physician."

Defendant's counsel objected to the admission of both ticket and indorsement, but both were admitted and read in evidence.

Defendant, and testimony of experts was given tending to show that the symptoms of paralysis, defective eyesight, and other permanent ailments were those of white lead poisoning and not of arsenic, it being shown that he had worked in white lead works before his employment by defendant. The jury rendered a verdict for the defendant. The plaintiff brings error.

"The record shows that plaintiff, by his counsel, contended that the vapors or steam that arose from the tubs or vats in which the arsenic and sulphate of copper were dissolved to form paris green, which plaintiff inhaled, were poisonous and deleterious to human health, and in such vapor and steam would be carried small particles of the arsenic and copper, which, in coming in contact with his skin, and particularly the soft spongy parts of the body, would poison and injure him, and produced the evidence of medical experts to sustain this contention; while the defendant claimed that such vapors would be composed entirely of water, and therefore harmless, and also sustained its theory by the evidence of medical experts. The court seems to have accepted the testimony of the defendant's experts as conclusive, and refused to permit the plaintiff's counsel to argue to the jury that plaintiff received any part of his injuries from the inhaling of the vapors, and di-

rected the jury that the plaintiff could not recover upon this branch of his claim; basing his opinion upon the testimony of defendant's foreman, who gave evidence that the minerals used did not become fused in vapor until they were heated to 250 degrees Fahrenheit, and stated that a heat of 150 degrees was all that was needed to manufacture paris green. This was clearly error. It was for the jury, and not for the court, to determine which theory of the experts was the true one.

"It is suggested by defendant's counsel that the pustulation or break-out upon the body was caused by contact with the arsenic, and the court directed the jury that the plaintiff was entitled to recover his damages suffered by such pustulation, unless it was shown that the defendant notified him of the danger of the arsenic touching the body, and its poisonous character, and, under this direction, the jury found for the defendant, therefore it must be considered that the jury found he had such notice; and, consequently, if the question of inhalation had been submitted to them, the verdict nevertheless would have been the same. But we find nothing in the record showing that he was notified of any danger in inhaling these vapors, and, therefore, a new trial must be granted. * * *

Neither was admissible. The fact that the poorhouse ticket necessary to plaintiff's admission did not make it admissible as evidence, nor did the fact that the State required a record to be made of his admission. The fact of his admission to the poorhouse as a public charge was irrelevant, and could not prejudice the jury in his favor.

Plaintiff had, before his employment by defendant, been employed by the Acme White Lead and Color Works, in grinding dry color and vermilion, which contained a large percentage of lead, and it was insisted by defendant that plaintiff's troubles were attributable to lead, rather than arsenical, poisoning. Dr. Erickson was not called, and no reason was given why he was not, except that upon the previous trial he was called by defendant, and it is urged by plaintiff's counsel, that he was presumably hostile. The indorsement purports to be simply information sought to be conveyed by Dr. Erickson to the officials at the poorhouse. It is urged that this information was usually entered upon the records of the poorhouse, and was admissible as a part of such records. There is no statute requiring the city physician to give such information or providing for its record. If entered at all, it was entered upon the official registry, undoubtedly kept of each patient on his admission. The rule is that such registrations are not, in general, evidence of any fact not required to be recorded in them, and which did not occur in the presence of the registering officer. Thus a registry of marriage or of baptism is evidence only of that fact. 1 Greenl. Ev., § 493. The mention of the child's age in the register of christenings is not proof of the day of its birth, to support a plea of infancy. *Burghart v. Angerstein*, 6 Car. and P. 690. Regarding certificates given by persons in official station, the rule is that, if the person was bound to record the fact, the proper evidence is a copy of the record; but as to matters which he was not bound to record, his certificate, being extra-official, is merely the statement of a private person. 1 Greenl. Ev., § 498; *Oakes v. Hill*, 14 Pick. 442.

Plaintiff called as a witness one Dr. Zimmerman, who was the practicing physician in charge of the Wayne county poorhouse, who stated that: "He became acquainted with the plaintiff; that plaintiff's feet were partially paralyzed; that he did not seem to have any use of his feet to any extent; that he was in the hospital about eight months; that he had no other sickness that witness could remember; that he has paid no

special attention to the subject of the effect or nature of arsenical or other poisons, but knew that arsenic and what was known as "blue vitriol" were deadly poisons; that he thought there was an eruption from external arsenical poisoning, and that partial paralysis, to a greater or less degree, is one of the consequences of arsenical poisoning; that when Fox came he brought with him a statement of his history, and that the paper shown was brought by Fox, and that at the time H. Erickson was one of the city physicians of the city of Detroit.

"Q. What was your diagnosis? Have you any recollection now of it at the time you received him? A. Partial paralysis. I think the cause was based upon that paper. Q. What did you arrive at from your inspection of it, and the information that was communicated to you by that there as a part of the history of the case? From the history of the case, what did you attribute that paralysis to in your diagnosis? A. From arsenical poisoning."

On cross-examination witness testified that "he never had a case of arsenical poisoning except this one; that he deduced his diagnosis of paralysis from plaintiff's appearance, and the cause was from the paper, and that he knew nothing about the case, except a paper that was before him, and is not in evidence."

Defendant's counsel moved that the testimony of the witness as to the diagnosis be stricken out, but the motion was overruled, and defendant excepted. It does not appear just what this paper contains, except that plaintiff's counsel in their brief claim that it was Dr. Erickson's certificate. It is clear, from the testimony of the witness, that he did not base his diagnosis upon any history of the case, but based his opinion as to the cause of the paralysis upon Dr. Erickson's conclusions. The court erred in overruling the motion.

Several physicians were called as experts to give their opinion upon hypothetical questions asked as to the cause of plaintiff's paralysis, and, from an examination of the record, it is clear that the hypothetical questions involved facts and conditions which were not supported by the testimony. In the manufacture of paris green, a quantity of sal-soda is first put into a vat. This is dissolved by steam turned in from the side of the vat, five or six inches from the bottom. The vat is about five feet six inches in height, and when the sal-soda is dissolved the vat is about two thirds full of sal-soda and water. The

steam is then turned off, and the powdered arsenic is shoveled and poured from kegs into the liquid already in the vat. After this is done, the steam is again turned on from twenty-five to forty minutes, during which time the stirring of the mass is kept up. The quantity of arsenic put into the vat would fill it up from one to two inches. The object of the injection of the steam is to boil the mass. It is clear that in this process the steam was forced, not into or upon a quantity of dry powdered arsenic, but was injected horizontally into a mass composed of sal-soda, water, and arsenic; but the hypothetical question put was:

“Suppose that the man was employed to mix powder, that is, was set to work mixing a powdered stuff with steam blowing on it, until it was reduced to a sort of jelly; that a portion of his duty while it was arriving at this stage, was to stand above the vat, and keep stirring it, * * * to what would you attribute the condition of that man, if you ascertained that the article that he was working in had been powdered arsenic?”

“Now, doctor, if you take a quantity of powdered arsenic, and place it in a vat, and reduce it to a solution by blowing steam on it, or allowing steam to blow into it, would the force that would be necessary to heat that matter hot enough so as to become fused into some different element be sufficient to raise any of the particles in your opinion?”

Again: “If a man went to work at the mixing and handling of powdered arsenic, by putting it in a vat and turning steam thereon until the steam and the water did form, from their coming together with the arsenic, an entirely different substance, rendering solid arsenic soluble, and that during the time that this process was going on, it was the duty of the man to keep the mass stirred, * * * and you ascertained that the contents of the vat was white powdered arsenic mixed with steam, what would you attribute the condition of this person to?”

After the usual answer, that they would attribute the condition of the man to arsenical poisoning, the witnesses replied as follows:

“The force of the steam would be strong enough to raise portions of it and circulate it in the air, and any person standing over it could not avoid inhaling it, if the particles came in contact with the spongy portions of his body.”

"The fact of the process necessary to reduce powdered arsenic to a paste or gelatine, in an open vat by steam, would necessarily force particles off with the steam, which would be just as virulent as the other arsenic."

One of plaintiff's co-employees was called, and testified as follows: "Q. What was said, if anything, by Mr. Abel (the superintendent) to Mr. Fox, telling him of the nature of the danger of the business? A. Nothing at all. Q. Was there anything said to you? (Objected to but answered)."

In the former case it was held that evidence that defendant notified other employees of the dangerous character of the common employment was inadmissible to rebut the testimony of plaintiff that he was not so informed. Equally inadmissible is the testimony of other co-employees that they were not informed, to rebut the testimony of defendant that plaintiff was so informed.

A witness connected with the Acme Works was called for defendant, who stated that the plaintiff had been discharged by that company three times for drunkenness. On cross-examination, plaintiff's counsel asked the witness this question: "You yourself are a total abstainer, are you not?" Objection was interposed, but the court overruled the objection. The question was an improper one, and the court erred in admitting the testimony.

Defendant called as a witness one who, although not a physician or graduate from any medical school, had given a good deal of attention to chemistry, who for fifteen years had been engaged in the manufacture of paris green, having about 100 men in his charge, and who had studied the effects upon the operation of steam arising from the compositions described. This witness was asked the following questions, all of which were objected to, and the testimony excluded.

"Beyond that, what have any of the men under your employ, during this long term and large experience, suffered?"

"How many men, during all that period, employed by you, or under your supervision, in the manufacture of paris green, have you known to be affected by the work on the paris green, beyond an occasional breaking out on the face, as you have described?"

"State whether or not you have observed any other injurious effect in any case, in all your experience, as to pustulation of the face arising from working over this striking tub."

We think the testimony was competent. Cutaneous diseases affecting the exposed parts of the body, and paralysis, are not latent, and it does not require either a description of symptoms or the skill of a physician to discover their existence. One who has had an actual experience for fifteen years, with 100 employees, engaged in a particular occupation, and who has had the opportunity to observe and has made observations, is certainly competent to testify as to whether these patent results follow such employment.

For these errors the judgment is reversed, and a new trial is ordered, with costs to defendant. MORSE, CH. J., LONG and GRANT, JJ., concurred with McGRATH, J.; MONTGOMERY, J., concurred in the result.

HORSE FRIGHTENED BY ESCAPE OF STEAM FROM LOCOMOTIVE — EMPLOYEE INJURED — SCOPE OF EMPLOYMENT — CONTRIBUTORY NEGLIGENCE. — In **MAHAN v. CLEE**, 87 Mich. 161 (*June Term, 1891*), judgment for defendant in the Wayne Circuit Court was *affirmed*, the facts being stated in the opinion by McGRATH, J., as follows: "Defendant owns and operates a flouring mill in the city of Detroit. Plaintiff, who is fifty years of age, had been in defendant's employ for nearly eight years. Plaintiff claims to have been employed to cooper barrels, fill them, and weigh them, and, when not thus engaged, wait on customers. Occasionally he was asked to deliver flour, but he claims to have objected to that kind of work, because not employed therefor. He had, however, during the time that he was in defendant's employ, delivered quite a number of loads of flour, and stated that he had objected at least forty times. He sets up that defendant had a delivery horse which was balky and fractious; that the horse would start suddenly with a load, and plunge; that at one time while he was driving the horse it balked, and at another it became frightened at a hand-cart that was being trundled along the street; that he had several times objected to driving this horse; that defendant had used this horse as a delivery horse for about three years, and plaintiff had driven him a number of times; that on the day of the injury he was told by defendant's son to deliver a load of flour, with this horse and truck, in the eastern part of the city, and then go to the Michigan Central Railroad freight sheds and get a load of flour; that he objected, for the reason that he had more work than he could do, and, more than that, "he was not hired to drive teams;" that he was told that it did not make any difference what he was hired to do there,—he had got to do whatever he was told to do; that thereupon he took the load of flour to the eastern part

of the city, and went down Woodbridge street on his way to the freight sheds, and when between Eighth and Tenth streets the steam from a passing locomotive frightened the horse, and it began to rear, when plaintiff jumped from the truck, intending to take the horse by the head, but broke one of the smaller bones of his leg in jumping." * * * *Held*, that plaintiff was guilty of contributory negligence in driving the horse so close to the moving locomotive, as he knew the character of the horse, and that steam from a locomotive was likely to frighten horses.

NOTES OF MISCELLANEOUS CASES.

Employee fatally injured by being run over by cars on furnace track — Negligence of engineer — Fellow-servant.

IN ADAMS AND WEST, ADM'RS *v.* THE IRON CLIFFS COMPANY, 78 Mich. 271 (October Term, 1889), where plaintiff, a founder in defendant's blast furnace, was fatally injured by being run over by cars while he was evidently trying to cross the furnace track on which an engine and cars were operated, a bank of snow about two feet high being close to the track, judgment for defendant in the Marquette Circuit Court was *affirmed*. The points decided by the Supreme Court (per MORSE, J.) are stated in the syllabus to the official report (paragraphs 5 and 6) as follows:

"5. Where a servant, whose duty it is at any time during working hours when upon the master's premises to perform the duties incident to his employment, starts to leave the premises, on his private business, and is injured by the alleged negligence of the master, while upon the premises, and during working hours, he is at the time in the employment of the master.

"6. A founder in a blast furnace for the manufacture of pig-iron, who has a separate department — the inside work of the furnace — and who has nothing to do with the other departments, except when acting through the general management or the foreman or boss of such departments, is held to be a fellow-servant of an engineer whose business it is to move the cars on the furnace track as desired in the business, and to assume the risk that said cars might be handled negligently by said engineer."

Brakeman on logging train struck by projecting object — Defective loading — Knowledge of danger.

IN POWERS, ADM'X *v.* THE THAYER LUMBER CO., 92 Mich. 533 (June Term, 1892), where plaintiff's intestate, a brakeman on one of defendant's logging trains, while engaged in running trains from the woods to the river, was fatally injured by a piece of a dead tree near the track which had been struck by a projecting log on one of the cars, judgment for plaintiff was *reversed*, the decedent being aware of the proximity of the tree to the track, and being responsible for the defective loading of the train.

Farm laborer injured — Falling object — Assumption of risk.

IN WELCH *v.* BRAINARD, 108 Mich. 38 (December, 1895), judgment for plaintiff in the Macomb Circuit Court was *reversed*, the case being stated in the syllabus to the official report as follows:

"1. Every adult of ordinary intelligence must be held to know that ensilage, or any similar article, if undermined so that the pile overhangs its base, is to be expected to fall.

"2. An employer does not become an insurer by requesting his employee to incur danger in his service, unless he conceals from the employee his knowledge of, or at least fails to make known to him, a latent danger.

"3. Among the daily duties of a farm laborer was the removal of ensilage from his employer's silo for the purpose of feeding stock. By direction of the employer, the ensilage was taken from the bottom of the pile, which became undermined, and a portion slid off, injuring the laborer. *Held*, that he assumed the risk, and that the employer was not liable."

Safe place to work — Pleading and practice.

In *PRATT v. DAVIS*, CIRCUIT JUDGE, 105 Mich. 499 (May, 1895), application for mandamus to compel the circuit judge of Montcalm county to vacate an order denying an amendment of plaintiff's declaration, the relator being the plaintiff below, the syllabus to the official report states the case as follows (paragraph 3): "The declaration in a personal injury case averred that the injury was received by reason of the failure of the defendant to provide plaintiff a safe place in which to work, and set out at considerable length the facts relied upon to make a case. And it is held that an amendment alleging that, in the performance of all the matters aforesaid, plaintiff was in the exercise of due care, and did not in any way contribute to any of the injuries thereinbefore and thereafter stated, and that he was, on the day and year aforesaid, while in the exercise of due care, caution, and prudence, injured, etc., does not introduce a new cause of action."

EMPLOYEE INJURED BY DEFECTIVE SCAFFOLD ON VESSEL — FELLOW-SERVANT — SAFE PLACE TO WORK — LAW OF MASTER AND SERVANT. — In *BEESLEY v. F. W. WHEELER & COMPANY*, 103 Mich. 196 (*December, 1894*), judgment for plaintiff in the Bay Circuit Court was *reversed* and no new trial ordered. *MOORE & MOORE* and *McDONELL & HALL* appeared for appellant (defendant); *SHEPARD & LYON* for plaintiff. The opinion was rendered by *HOOVER, J.*, who stated the case as follows: "The defendant is engaged in building steel vessels, in the construction of which scaffolds are necessary at various stages of the work. It employs about 800 men, of various trades, including fitters, bolters, chippers, drillers, riveters, searchers and carpenters. These men are continuously employed, and all are subject to the control of the superintendent. The labor is divided among the artisans, and to the carpenters is apportioned the building of scaffolds, though they are sometimes assisted by others. The plaintiff, a searcher,—*i. e.*, one who goes over the work, and supplies omitted rivets after the riveters of the plates of the vessel are through,—was injured by the breaking of a weak putlog, selected and used by the carpenters who built the scaffold; and his right to recover hinges upon the question of whether or not he and

the carpenters were fellow-servants in such a sense as to prevent the application of the rule that it was the duty of the master to provide a reasonably safe place for the plaintiff to work." (1).

The learned judge discussed the law of master and servant at length, and the points are set forth in the syllabus to the official report as follows:

"Plaintiff was employed by the defendant corporation, a builder of steel vessels, to go over the work, and supply omitted rivets, after the riveters of the plates of the vessel had completed their work. Artisans of various kinds were employed to do their respective shares of the work. The building of stagings, the erection of derricks, and the raising of materials were parts of the necessary work, incident to and simultaneous with, and in fact a part of, the building of the vessel. All was under the charge of one superintendent, who directed the different gangs through their respective foremen. Plaintiff, while working upon a scaffold, was injured by

1. *See, also, the following cases relating to employees injured while working on vessels:*

Unloading coal from vessel—Defective appliance.—In *JOHNSON v. SPEAR*, 76 Mich. 139 (July, 1889), where plaintiff, Johnson, was injured while unloading coal from a vessel moored at defendant's dock, although plaintiff was not in defendant's employ, judgment for defendant in the Marquette Circuit Court was *reversed*. It was held (as per syllabus to the official report) that: "The owner of a coal dock who contracts for unloading coal during the season of navigation at a specified price per ton, and to furnish the contractor a stationary engine upon the dock, and the appliances connected therewith, including the chain attached to the buckets in which the coal is hoisted from the vessels to the dock (under which ascending buckets the contractor's employees are obliged to work during the early part of such unloading), which contract is silent as to repairs, is charged with the duty of examining and inspecting such engine and appliances, and is liable for any injury resulting to said employees by reason of the weak and worn con-

dition of said chain, if he *knows*, or *could* have known by such inspection, of its insufficiency." Opinion by CHAMPLIN, J.

Another trial resulted in favor of plaintiff, which, on appeal, was *affirmed*. The ruling in the former appeal was adhered to. See *JOHNSON v. SPEAR*, 82 Mich. 453 (1890).

Falling overboard and drowned.—In *FISHER, ADM'X v. CHICAGO & GRAND TRUNK R'Y CO.*, 77 Mich. 546 (November, 1889), where plaintiff's intestate, while working upon a scow engaged in work of pile driving, fell overboard and was drowned, and it appeared that he had been in the employ of defendant in a similar kind of work for six or seven years, it was held that direction of verdict for defendant in the St. Clair Circuit Court was proper, the dangers of the employment being obvious and known to the deceased, and judgment *affirmed*. Following *Swoboda v. Ward*, 40 Mich. 423; *Balle v. Leather Co.*, 73 Mich. 158; *Kean v. Rolling Mills*, 66 Mich. 277; *Melzer v. Rolling Mills*, 76 Mich. 94 [reported in this volume of AM. NEG. CAS., *ante*].

Unloading coal—Fall of staging.—In *BROWN v. GILCHRIST ET AL.*, 80

the breaking of a weak cross-piece, selected and used by the carpenters who built the scaffold. In a suit to recover damages for the injury, there was nothing to indicate a contract on the part of the defendant to provide a safe scaffold to work upon, or an assumption by it of that duty. And it is held that plaintiff and the carpenters who built the scaffold were fellow-servants in such a sense as to prevent the application of the rule that it is the duty of the master to provide a reasonably safe place for the servant to work.

"This holding does no violence to the rule of safe place. The case is different from those where the master furnishes a permanent place in which to work, as in a ship or factory. A master's duty in such a case is to make and keep the place reasonably safe; but that rule would apply as to those working in, but not necessarily as to those constructing, the factory.

"The following propositions are summarized from the opinion of Mr. Justice Hooker:

"a — The doctrine which relieves the master from liability for

Mich. 56 (April, 1890), plaintiff, while unloading coal from a vessel belonging to defendants, being employed by and directed as to the work by defendant's foreman, injured by the fall of staging erected for the work on the boat, judgment for plaintiff in the Alpena Circuit Court was *reversed* for error in refusing instruction on contributory negligence. It was also held that the foreman in such case was not a fellow-servant with the men he employed and directed, and the master was responsible for the foreman's negligence.

Falling down hatchway. — In *BARON, ADM'X, v. DETROIT & CLEVELAND STEAM NAVIGATION CO.*, 91 Mich. 585 (May, 1892), it was held that "a ship carpenter cannot recover for injuries received while working on a vessel by falling down a hatchway which was left uncovered before the gangways were opened in the morning by his fellow-servants." Following *Caniff v. Navigation Co.*, 66 Mich. 638. Judgment for defendant in the Wayne Circuit Court *affirmed*.

The *CANIFF* case referred to in the preceding paragraph is as follows:

In *CANIFF v. THE BLANCHARD*

NAVIGATION COMPANY, 66 Mich. 638 (1887), action against the defendant as owner of a steam vessel for damages for injuries sustained by plaintiff, a mate on said vessel, by falling through a hatchway on said vessel, judgment for plaintiff in the Wayne Circuit Court was *reversed*, it being held that "the failure of a ship keeper who, contrary to the orders of the owner, invites a person on board while the vessel is laid up for the winter season, to inform him of the existence of an open hatchway, if negligence, cannot be imputed to such owner." The fourth paragraph of the syllabus to the official report is as follows: "Where the captain of a vessel employs a mate for the coming season, the vessel being then laid up for the winter in port, and invites him to inspect the vessel, but fails to inform him of open hatchways on board, into one of which he falls and is injured: *Held*, that conceding the *right* of the mate to make such inspection, the injury was caused through the negligence of a fellow-servant, which precluded a recovery, as would also the contributory negligence of the mate."

injuries caused by the negligence of fellow-servants is of wide application. It originated in cases where servants were engaged in a common enterprise, wherein, by reason of the negligence of one, another was injured. It modified the doctrine that the principal is liable for the negligent acts of the agents, upon the theory that the servant assumed the ordinary dangers incident to the employment, and that "an obligation on the part of the master to take more care of the servant than he may reasonably be expected to take of himself will not be implied.

" *b* — The rule laid down in *Farwell v. Railroad Corp.*, 4 Metc. (Mass.) 49, 58, 15 Am. Neg. Cas. 407, that where several persons are employed in the conduct of one common enterprise or undertaking, and the safety of each depends much on the care and skill with which each other shall perform his appropriate duty, each is an observer of the conduct of the others, and can give notice of any misconduct, incapacity, or neglect of duty, and leave the service if the common employers will not take such precautions, and employ such agents, as the safety of the whole party may require; that by these means the safety of each will be more effectually secured than could be done by a resort to the common employer for indemnity in case of loss by the negligence of each other; that, regarding it in this light, it is the ordinary case of one maintaining an injury in the course of his own employment, in which he must bear the loss himself, or seek his remedy, if he have any, against the actual wrongdoer, is of such general application that the citation of authorities to support it is unnecessary, although much difficulty has been found in discovering a true test of its application, and the decisions are consequently somewhat inharmonious.

" *c* — The rule that the master is bound to provide his servant with reasonably safe machinery, and a proper and reasonably safe place in which to work, has sometimes been invoked or overlooked when perhaps it should not have been, and the two rules, running parallel and in close proximity, have led to improper applications of both.

" *d* — There are some courts which have held that, in order to constitute servants of the same master fellow-servants, it is not enough that they are engaged in doing parts of some work not requiring co-operation, nor bringing the servants together or into such personal relations that they can exercise an influence, one upon the other, promotive of proper precaution in respect to their mutual safety. This doctrine finds its favorite fields where large enterprises result in systematic divisions of labor. But it is not the prevailing doctrine, as will be seen from an investigation of cases from most of the States, including Michigan; and it can be maintained only by overthrowing the rule that the implied contract of the mas-

ter ends with indemnity against his own negligence, and does not extend to that of co-employees engaged in the same enterprise.

“ *e* — Another attack upon the rule is made by the superior servant, as contradistinguished from the *alter ego*, or vice-principal, limitation. The courts of Illinois, Tennessee, Virginia, Kentucky and Georgia have adopted the superior servant rule. Similar cases can be found in Ohio, North Carolina, West Virginia, Kansas, Nebraska, Missouri, and in the federal courts. On the contrary, New York, Maine, Pennsylvania, Massachusetts, Maryland, Indiana, Michigan, Minnesota, California, and Texas have repudiated the doctrine.

“ *f* — The cases upholding the limitations of the rule in these particulars (*d* and *e*) are frequently cited in accident cases, and in hard or doubtful ones may sometimes lead to departures from the true rule, by reason of which greater or less obscurity inevitably follows, and no end of trouble from the consequences, where they are irreconcilable with the other rule.

“ *g* — It must not be assumed that there is no limitation to the doctrine of immunity on the part of the master. The law clearly imposes duties upon him from the discharge of which he cannot shelter himself by the interposition of an agent or servant, or the fellow-servant rule. He may assume liability for accidents suffered by his servant in the course of his employment, either expressly or by implication, where it is plain that it was the intention of both parties that he should do so. Again, where the rule that he must provide a reasonably safe place and machinery applies, the responsibility is his. In all of these cases he is held liable, because the negligence is *his*.

“ *h* — As said by a text-writer (McKinney Fellow-servants, § 23), “the true test whether an employee occupies the position of a fellow-servant to another employee, or is the representative of the master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant, by which another employee is injured; or, in other words, whether the person whose *status* is in question is charged with the performance of a duty which properly belongs to the master.” It would seem that this must be the governing principle, unless the limitations hereinbefore discussed are adopted, which, as stated, is not the case in this State.

“ *i* — This discussion of the superior servant question must not be considered as necessarily involving that of *alter ego*. If the liability of the master is in all cases to depend upon the rule above mentioned, it matters little whether the offender is called ‘*alter ego*’ or ‘servant.’ It is only when the act is one which does not fall within the duty that the law imposes upon the master, or which he has taken upon himself, that it becomes important. In such cases

the term is found an appropriate one, where it is sought to invoke the doctrine of *respondeat superior*. How far the courts have gone in holding that a master is liable for such acts, committed by a person in full charge of his business, it is unnecessary to investigate in this case, and no opinion is expressed upon the question.

“*j* — Having, then, determined the rule, it must be the guide in all cases, and if, in some instances, doubts shall have arisen which in the minds of some have led to greater or less departures from it, the rule, and not such cases, must be the magnetic pole towards which future adjudications must point, and discrepancies, if any exist, must be ascribed to differences of opinion in regard to the *application* of the rule, which all recognize.”

BENEFIT FUND — RELEASE — IGNORANCE OF INJURED EMPLOYEE — KNOWLEDGE — INTENT AND EFFECT — TENDER. — In **O'NEIL v. THE LAKE SUPERIOR IRON CO.**, 63 Mich. 690 (*November, 1886*), judgment for defendant in the Marquette Circuit Court was *reversed*. F. O. CLARK appeared for appellant (plaintiff); HAYDEN & YOUNG, for defendant. The case turned on the question of the validity of a release signed by an injured employee, which question is fully discussed in the opinion rendered by CHAMPLIN, J., the points being set out in the syllabus to the official report as follows:

“An iron mining company organized a ‘benefit club,’ the plan of which was printed in large posters, put up in conspicuous places on its premises, which, after reciting the hazardous nature of its business and the dependence of employees and their families, as a general rule, upon their labor, and the consequent importance of providing against the loss of the same by accident, affirmed that employers could not be legally responsible for the support of those dependent, and that ‘all employees must assume their own risk of accidents or illness, from whatever cause.’ It then formulated a plan whereby a benefit fund should be accumulated by the contribution of an equal sum each month by the miner and company, to be used in a specified manner under direction of an examining committee, chosen from among the employees by the agent of the mine, and, in case of death from accident, a certain sum was to be paid to the administrator of the deceased, on execution by him of a release of all claims for damages against the company by reason of such death, no matter how occasioned, and regardless of the negligence of the company, and a certain sum to the injured employee, on account of accident or permanent injury, upon his signing a similar release. The plan for the club was never adopted by a meeting of the miners, but was merely a manifesto addressed to the employees of the company.

" Plaintiff was injured while in the employ of the company and brought suit for damages, and the court, on production by the company of a release signed by plaintiff in the form above set forth, directed a verdict for the company, holding the release a bar to the action, regardless of whether plaintiff had made out a case or not. The plaintiff could not read and had no knowledge of the terms or conditions of the printed notice, but understood that there was a benefit club, to which the employees and the company contributed, and, in case of injury, the injured person was to receive aid to a given sum per month. He was not informed of the contents of the release when he signed it. On the foregoing facts the court *held* as follows:

" 1. That the statement in the manifesto that 'all employees assume their own risk of accidents or illness, from "whatever cause"' was an incorrect affirmative statement of what the law is, made to a class of persons ignorant of what it is, and who might justly rely upon the truth of the representation made, and that while all are presumed to know the law, yet in many cases this is a weak presumption, and disappears entirely in the face of a positive representation of what the law is, upon the truth and good faith of which reliance is placed.

" 2. That an injured person contributing to said benefit fund, and entitled to share therein, who can only obtain such aid by signing the aforesaid release, is not bound thereby, unless it appears that he was fully informed, or had knowledge of the fact of the negligence of the company, and its liability to him therefor, and fully understood that by such signing he was releasing the company from such liability. *Held, further*, that the question of such knowledge on his part was a question for the jury, and that it is not the intention but the effect upon the plaintiff of what was said and done at time of signing, that is material; for if the effect was to lead him to believe that he was signing a mere receipt for the money, he was deceived as to the real character of the paper he signed.

" 3. Where in such a case some of the monthly payments were received by plaintiff's wife, who could read, and yet signed the release, her authority to do so not being shown: *Held*, of no importance; that he sent her for the money, and this authorized her to receive and receipt for it, but gave her no authority to sign such release.

" 4. Where in such a case the plaintiff brought suit without tendering to the company the money received: *Held*, unimportant, unless the plaintiff had full knowledge of the conditions set forth in said release; that the fund was held by the company as trust money, and did not belong to it in any other right than as trustee, and the payments were made in that capacity."

DEFECTIVE SCAFFOLD — INDEPENDENT CONTRACTOR — SUPERINTENDENT — FOREMAN — FELLOW-SERVANT. — In **HOAR v. MERRITT**, 62 Mich. 386 (*June Term, 1886*), verdict directed for defendants in the Marquette Circuit Court was *affirmed*, the facts being stated in the syllabus to the official report as follows:

“Defendant Daniel H. Merritt erected a dwelling house on land owned by his wife. He employed a superintendent by the month, who had general charge of the work under Merritt’s direction, hiring all the men except the painters, and by whose direction a scaffold was erected for use in constructing the cornice to the building. Merritt furnished plenty of *suitable* material, but gave no directions as to building the scaffold or the manner of its construction. The superintendent directed that the supports should be brackets projecting from the windows of the upper story, and the carpenters followed his instructions. They were *competent* workmen, and there was no *defect* in the *plan* adopted. On completion of the cornice Merritt employed a foreman by the day to do the painting, who was to furnish brushes and employ his assistants, to be paid by Merritt, the foreman to receive twenty-five cents a day for each man so employed, to compensate him for said brushes and for overseeing the work. Merritt furnished all other material. The painters used the scaffold erected by the carpenters, which gave way, precipitating plaintiff, one of said assistant painters, to the ground, and permanently injuring him; whereupon he brought suit against Merritt and his wife for the injuries received, as he claimed, through their negligence in not constructing and maintaining sufficiently strong and safe scaffolding for him to work upon (1). The circuit judge directed a verdict for defendants on the foregoing facts, holding that plaintiff, being a fellow-laborer with the superintendent and the carpenters who built the scaffold, could not recover. *Held*, that there was no error in the action of the court; that the persons so employed being all fellow-servants, and the master having used *ordinary* or *reasonable* care in the selection of competent and trustworthy men to perform the work, and furnished them suitable means therefor, he is not answerable to the plaintiff for an injury received in consequence of the negligence of his fellow-servants while engaged in the common service. It was a risk incident to the common employment which plaintiff assumed when he

1. See, also, **DEWEY, ADM’X v. PARKE, DAVIS & COMPANY**, 76 Mich. 631 (1889), where plaintiff’s intestate, a carpenter in defendant’s employ, was injured by the breaking of a plank upon which he was at work with an-

other carpenter, and the court held that plaintiff had failed to make out a case of negligence against defendant. Following **Hoar v. Merritt**, 62 Mich. 386, 390, the case at bar.

entered the master's service. *Held, further*, that under no view of the facts can defendant's wife be made liable. She was merely the owner of the land, and had nothing to do with the building, which was constructed and paid for by her husband." The opinion was rendered by CHAMPLIN, J., in which CAMPBELL, Ch. J., and SHERWOOD, J., concurred. MORSE, J., dissenting on the ruling as to fellow-servant, holding that plaintiff was not a fellow-servant of the men who built the scaffold. W. P. HEALY appeared for appellant (plaintiff below); M. H. MAYNARD, D. H. BALL, SUMNER COLLINS, and EDWIN F. CONELY, for defendants.

MUNICIPAL CORPORATION — FIRE DEPARTMENT — RELATION OF MASTER AND SERVANT DOES NOT APPLY. — In **COOTS v. CITY OF DETROIT**, 75 Mich. 628 (1889), an action by an engine-driver in the fire department against the city for injuries by reason of defective street, judgment for plaintiff for \$10,000 in the Wayne Circuit Court was *affirmed*. It was held that "the *statutory* duty imposed upon the city of Detroit to keep its streets in repair, and reasonably safe and fit for the public travel, extends to the members of the fire department, the same as to others of the traveling public." *Held, also*, that "the relation of master and servant does not exist between the city of Detroit and members of its fire department."

LIABILITY OF MASTER FOR TORT OF SERVANT RESULTING IN INJURY TO THIRD PERSON.

Master liable where person was run over by horse owing to negligent act of driver — Scope of employment.

In **CLEVELAND v. NEWSOM**, 45 Mich. 62 (1880), where Newsom was run over by a horse of defendant Cleveland, driven by a boy, who, it was alleged, was, at the time, in defendant's employ, judgment for plaintiff was *affirmed*. "A master is liable for an injury done by his servant in the course of his employment, where the latter acted carelessly and recklessly, and in negligent disregard of his master's instructions, but not if the injury was wanton, wilful, and intentional."

Master liable for careless act of servant driving — Person run over at street crossing.

In **WILLIAMS v. EDMUNDS**, 75 Mich. 92 (1889), judgment for plaintiff for \$3,000 in the Wayne Circuit Court was *affirmed*. Plaintiff was run over by one of defendant's carriages as she was at a street crossing, the carriage being driven by defendant's employee. Master held liable for careless driving of servant.

Collision between vehicles — Negligence of teamster — Master liable.

In **VERNON v. CORNWELL**, 104 Mich. 62 (February, 1895), judgment for plaintiff in the Genesee Circuit Court was *affirmed*, the case being stated in the syllabus to the official report as follows:

"1. The plaintiff in a personal injury case sought to charge the defendant with the negligence of one of his teamsters, who, while returning with another teamster from a city where they had been with loads of grain for the defendant, ran into the wagon in which the plaintiff was riding, thereby throwing her upon the highway and causing the injury complained of. There was evidence tending to show that at the time of the collision the teamsters were voluntarily running their horses. The court, upon the request of the defendant, charged the jury that if they should find that the collision was caused by the wrongful and wanton act of the defendant's teamster, which act was beyond the scope of defendant's business, the plaintiff could not recover. And it is held that the defendant, who did not request a fuller explanation of the law in relation to what would constitute an act within the scope of the teamster's employment, cannot complain of the failure of the court to give such explanation.

"2. The teamster testified that he was unable to restrain his horses, and that they were running against his will. And it is held that the contention of defendant's counsel, that it is indisputable that the damage was caused by the wantonness of the teamster, cannot be sustained.

"3. Evidence concerning the defendant's knowledge of the teamster's habits of intemperance was objected to as immaterial on the ground that the proof showed that the teamster was not intoxicated at the time of the accident. The teamster testified that he had had one or two drinks of whiskey on the day of and prior to the accident. And it is held that it cannot be said that the question of the teamster's sobriety upon that occasion was beyond dispute, and, if found, it was a circumstance consistent with negligence."

Collision on highway—Negligent act of driver—Defective pleading—Damages.

In *JOSLIN v. GRAND RAPIDS ICE CO.*, 50 Mich. 516 (June Term, 1883), collision between vehicles on highway, judgment for plaintiff in Kent Circuit Court was *reversed*, the syllabus to the official report stating the case as follows: "A master is liable for the negligent driving of a servant, even while the latter is acting temporarily for a third person who has hired the team and its driver from the master; and it is immaterial that the person hiring expressly asked for the services of this particular driver. In an action brought by a lawyer for a personal injury caused by defendant's negligent driving, the plaintiff's business was not stated and there was only a general allegation of injury. *Held*, that in the absence of any practice of citing the plaintiff to make his allegations more specific, this was hardly sufficient to warrant the admission of his testimony that the injury prevented his regular attention upon his legal business as before, and of his own sworn estimate as to the value of the time lost to such business."

Collision between truck and carriage—Negligence of driver—Damages.

In *SILSBY v. THE MICHIGAN CAR CO.*, 95 Mich. 204 (April, 1893), judgment for plaintiff was *reversed* where plaintiff was seriously injured in a collision between his buggy and a truck of defendant, which struck the near hind wheel of the buggy, whereby plaintiff was thrown out of the buggy and his knee and arm injured. The negligence charged was that of the driver of defendant's truck. Judgment was reversed for error in permitting plaintiff

to show as an element of damage loss of profits in being compelled to close his furniture shop by reason of the injury sustained.

Servant leaving horse standing unhitched in street — Collision with wagon — Master liable.

In *SCHULTE v. HOLLIDAY*, 54 Mich. 73 (1884), where plaintiff was injured by defendant's horse running away and colliding with plaintiff's wagon in which she was riding, defendant's servant having left the horse standing in the street unhitched, defendant was held liable for the reckless conduct of his servant.

Runaway team — Horses unhitched — Evidence — Question for jury.

In *DOYLE v. THE DETROIT OMNIBUS LINE COMPANY, LIMITED*, 105 Mich. 195 (April, 1895), judgment for plaintiff in the Wayne Circuit Court was reversed. The syllabus to the official report states the case as follows:

"1. The declaration in a case brought to recover for injuries received by being run over by the defendant's runaway team averred in one count that defendant carelessly and negligently allowed its team to be insecurely fastened, and in the second count that the horses were left unguarded and improperly fastened. No objection was made to the testimony of the plaintiff tending to show that the horses were left unhitched, the question of variance being raised for the first time by an assignment of error. And it is held that, had the question been raised on the trial, an amendment, if necessary, would have been granted, and the assignment cannot be sustained.

"2. The testimony of the driver of the team, and that of other witnesses, was positive that the team was hitched by means of a strap and a weight. The plaintiff testified on direct examination that she passed by the team while they were standing by the depot platform, and that they were not fastened. On cross-examination she testified that the only reason why she knew they were not hitched was because the horses stood with their faces towards her; that she meant that they were not hitched to some post or object, and her reason for so stating was that she did not see any post or object to which the horses could have been hitched. And it is held that plaintiff was in a position to see, and that her testimony elicited upon cross-examination is not such as to justify the court in holding that there was no evidence to show that the team was unhitched.

"3. To leave a horse unhitched is to be judged as negligence by considering the temper of the horse and the particular circumstances under which he was left, and the question is for the jury."

Person injured by act of employee of contractor loading goods on sidewalk in front of warehouse.

In *RIEDEL v. MORAN, FITZSIMONS COMPANY, LIMITED*, 103 Mich. 262 (December, 1894), the facts are stated in the syllabus to the official report as follows: "Plaintiff was struck by a barrel of sugar, which was suddenly and without warning rolled out of the defendant's warehouse upon the sidewalk in front by a truckman in the employ and under the control of a cartage company, which was under contract with the defendant to furnish it trucks, teams, and men to do all its cartage at a certain price per year. The defendant simply pointed out the goods that were to be carted, and their destination, and did not control the manner in which they should be trans-

ferred to the trucks, nor the route that should be taken in taking them to their destination. And, in affirming the action of the trial court in directing a verdict in favor of the defendant, it is held that the case is governed by *De Forest v. Wright*, 2 Mich. 368, in which the question is well considered, the authorities discussed, and the correct rule adopted." Opinion by McGRATH, Ch. J.

IN *DE FOREST v. WRIGHT ET AL.*, 2 Mich. 368 (1852), referred to in the preceding paragraph, it was held that "where an employee is exercising a distinct and independent employment, and is not under the immediate control, direction, or supervision of the employer, the latter is not responsible for the negligence or carelessness of the employee. Thus, where a public licensed drayman was employed to haul a quantity of salt from a warehouse, and deliver at the store of the employer at so much per barrel, and while in the act of delivering the salt, one of the barrels, through the carelessness of the drayman, rolled against and injured a person passing on the sidewalk, it was held the employer was not liable for the injury."

Liability for obstruction of river highway by servant.

IN *MOORE v. SANBORNE ET AL.*, 2 Mich. 519 (1853), an action on the case to recover damages for an alleged obstruction of Pine river, claimed to be a public highway, it was held, among other points in the case, that "to render an employer responsible for the fault or negligence of his employee, the injury complained of must arise in the course of the execution of some service lawful in itself but negligently or unskillfully performed; for the wanton violation of law by a servant, although occupied about the business of his employer, such servant is alone responsible." In this case "an employer made a bargain with his employee to cut all the logs the employer had on certain land, and to deliver them to the employer at a place named, the employer having no interest in the running of the logs, until they reached the point of delivery, nor to render any assistance, pecuniary or otherwise, in the cutting or running of the logs. Held, that the relation of master and servant did not exist, and that the employee alone was liable for any injury occasioned to others by his conduct in performing his contract."

Liability for trespass by servant.

IN *SMITH ET AL. v. WEBSTER ET AL.*, 23 Mich. 298 (1871), plaintiffs sued defendants in trespass, for the destruction of trees upon their lands. The alleged trespass was not committed by the defendants in person, but by others in their employ, who were engaged in cutting trees and gathering bark for defendants on their own lands, and went to plaintiffs' lands, as they claim, by mistake. The Jackson Circuit Court held there was no liability, but the Supreme Court *reversed* the judgment, holding that "a master may be liable for the trespasses of his servant done honestly in the course of his employment."

Liability for alleged assault upon servant.

IN *MCCALLUM v. DAVIDSON*, 95 Mich. 382 (April, 1893), the case is stated in the syllabus to the official report as follows: "A charge which permits the jury in a negligence case to infer malice on the part of the defendant towards plaintiff's employer in setting a car in motion on defendant's own

land, which ran against one which plaintiff was unloading, and injured him, from the fact that defendant believed at the time of the accident that plaintiff's employer was owing him for rent, to recover which he afterwards commenced a suit, cannot be sustained." Judgment for plaintiff in the Bay Circuit Court *reversed*.

CHICAGO AND NORTHWESTERN RAILWAY COMPANY V. BAYFIELD, ADM'X.

Supreme Court, Michigan, October Term, 1877.

[Reported in 37 Mich. 205.]

PRACTICE — EVIDENCE — REVIEW. — The Supreme Court will not notice evidence where the verdict below shows that the jury must have found against it.

REFUSAL TO OBEY ORDERS. — An employee who refuses to obey all lawful orders is liable to be deprived of his place and required to pay damages.

SAME. — A master is estopped from insisting that his servant is in the wrong in not refusing to obey an unwarranted order.

SAME. — The orders of a master are so far presumptively lawful that the servant has the burden of showing a lawful reason for refusing to obey them.

ASSUMPTION OF RISK. — The only risks which a servant assumes are those which properly belong to his employment.

EXTRA HAZARDS — LIABILITY OF MASTER. — A master is liable for injuries to his servant resulting from the master's negligence in exposing the servant to risks which the latter is incapable of appreciating.

CONCURRING NEGLIGENCE. — Where a servant in obeying his master's orders incurs the risk of machinery which it is reasonably probable may be safely used by extraordinary caution and skill, he is not guilty of concurring negligence.

TORT OF SERVANT. — A master is not responsible for a positive wrong intentionally or recklessly done by his servant, beyond the scope of his business: that is the personal trespass or tort of the servant.

SAME — SCOPE OF EMPLOYMENT — MASTER'S LIABILITY. — A master is responsible for acts of his servant done within the scope of his business and in furtherance of his interests, but done in excess, or even in disobedience, of his orders, express or implied; in employing the servant, the master takes the risk of his disobedience. He is therefore liable for injuries resulting from such acts not only to outsiders, but to subordinate fellow-employees.

DAMAGES — PECUNIARY INJURIES — DEATH — STATUTE. — Under a Michigan statute (Comp. Laws, §§ 2350-2351) allowing the widow or next of kin of a person killed by the negligence of a railroad company to recover damages measured by the "pecuniary injuries" resulting to them: *Held*, that their actual pecuniary circumstances are not to be considered; nor defendant's wealth.

RAILROAD EMPLOYEE KILLED — FEEBLE INTELLECT OF DECEASED — EXCESSIVE DAMAGES. — Damages in the sum of \$3,400 were awarded against a railway company for the killing of an employee of feeble intellect, hired at \$1.40 a day. *Held*, excessive, under a statute (Comp. Laws, § 2351) measuring the damages by the "pecuniary injuries" inflicted on the widow or next of kin, inasmuch as the interest on this amount would enable them to realize a perpetual income amounting annually to more than three-fourths of his annual earnings.

(*Syllabus to official report.*)

ERROR to Marquette. Defendant brings error. The case is stated in the opinion. *Judgment reversed.*

BALL & OWEN, for plaintiff in error.

GEORGE W. HAYDEN and WM. H. PARKS, for defendant in error.

Cooley, Ch., J. — The case of the plaintiff in the court below was substantially the following:

In May, 1875, Williams, the intestate, a young man between seventeen and eighteen years of age, was living with his mother, the plaintiff, and his sister. He was a little lame, and not strong intellectually. He was employed by the railway company and set at work as a common laborer with a construction train at one dollar and forty cents per day, which were then the customary wages of common laborers. Brakemen at the same time were paid two dollars a day. It was not shown that in hiring Williams anything was said regarding the particular service to be required of him, but it was claimed by the plaintiff that the wages to be paid sufficiently indicated the service, and we think there was some evidence tending to show that service as a common laborer alone was bargained for. One Smith was in charge of the construction train and of the laborers employed therewith, and though there were regular brakemen, he sometimes directed Williams to perform that service on particular occasions, though he had previously had no experience as brakeman. On a certain day in June, 1875, Williams was on a flat-car near the engine, assisting in unloading ties, when Smith ordered him to go back to the caboose and help stop the train. He started back, and was not seen again until it was discovered that he had fallen between the cars and been run over, receiving injuries which speedily resulted in his death. On these facts it was claimed that the sending of Williams forward to act as brakeman was wrongful, and, in view of the dangerous character of the service, was negligent, and that as

the railway company had put Williams under the direction and control of Smith, and subjected him to Smith's orders, it was responsible for Smith's wrongful conduct, and the death of Williams was consequently a death caused by the wrongful act, neglect, or default of the railway company, for which an action would lie under the statute. It was to recover damages for thus causing his death that the suit was brought. As bearing upon the question of liability, special stress was placed by the plaintiff on the youth, weakness, and inexperience of Williams, and the case was submitted to the jury under the following instruction: "If you find that the deceased at the time he was employed by the defendant was a lad of seventeen or eighteen years of age, inexperienced in the handling of brakes, on a train of cars, such as that in question, and that he was unfitted for that work by reason of his unskilfulness, inexperience, and youth, and this was known to Smith; that he was employed by defendant at the time of his death and for some months previous thereto in the capacity of a common laborer only, and was ordered by Smith, the foreman and conductor of the construction train in question, acting for and as the agent of said defendant within the scope of his authority, to brake on said train out of the line of his duty as such common laborer, and that while attempting to obey such order he fell from the cars and was killed, without negligence on his part, and by the negligence of the defendant or its agent, Smith, the case of the plaintiff is established, and she is entitled to recover."

Evidence was given on the part of the defense to show that common laborers with construction trains were accustomed on occasion to assist with the brakes, and that Williams had requested the privilege of doing so in order that he might learn the business; but in finding as they did for the plaintiff the jury must necessarily have found against this evidence, and we must assume in reviewing the case that the facts were as the plaintiff claimed.

The principal question of law which the record presents is whether, on the hypothesis stated in his instruction, the conclusion drawn by the judge lawfully follows. In discussing this question it has been assumed by counsel on one side and conceded on the other that in general the employer is not liable to one of his servants for an injury suffered by him in consequence of the negligence or wrongful act of another servant in the same general employment, and that, as between himself and

his employer, each servant takes upon himself all the risks of the employment. But, while conceding this, it is claimed on behalf of the plaintiff that if the master wrongfully sends his servant into a dangerous place or exposes him to a risk not connected with the service, and in consequence he is injured, the rule which exempts the master from responsibility has no application, because the risk is not one which the servant has assumed. It is also contended that if, instead of being sent by the master in person, the servant is thus wrongfully exposed to danger by one whom the master has placed over him, and to whose orders he is subjected, the responsibility is the same, the wrongful act of this superior being in law the wrongful act of the master himself. These positions are met on the part of the defense with two propositions, either of which, if sustained, is fatal to the action. These we state in our own language, as follows:

1. That on the plaintiff's theory of the facts Williams was under no obligation to obey the order of Smith, and if he did obey it, his doing so must be regarded as his own voluntary act. If there was negligence in sending him to stop the train, there was negligence on his part in going, and therefore, conceding that in giving the command Smith stood in the position of the railway company, and that the company must assume his act, the case is the ordinary one of contributory negligence, and the action must fail on that ground.

2. That if Smith, when he sent Williams to stop the train, was putting him to a service he was not engaged to perform, the act was not within Smith's authority as conductor, but in excess of his powers, and if wrongful was the tort of Smith alone, as much so as if he had committed an assault upon Williams; and neither morally nor legally can the railway company be held responsible.

The fact that Williams was under no obligation to obey the order of Smith is not, in our opinion, sufficient to sustain the first proposition. When one person engages in the employment of another, he undertakes to obey all lawful orders, and he subjects himself for any failure to do so to the double liability of being expelled from the employment and of being required to pay damages. It is true the master had no right to direct him to do anything not contemplated in the employment, but when one thus contracts to submit himself to the orders of another, there must be some presumption that the orders he receives are

lawful, the giving of the orders being of itself an assumption that they are lawful; and the servant who refused to obey would take upon himself the burden of showing a lawful reason for the refusal. This of itself is sufficient reason for excusing the servant who declines the responsibility in any case in which doubts can possibly exist; he should assume that the order is given in good faith and in the belief that it is rightful; and if in his own judgment it is unwarranted, it is not for the master to insist that the servant was in the wrong in not refusing obedience. Respect for the master as well as a consideration for his own interest may very properly induce him to waive his own judgment for that of his superior, and, instead of engaging in disputes and being perhaps ejected from his employment, to leave questions of doubt for future settlement. Now, although we think on the facts as the jury has found them there was no authority to send Williams to handle the brakes, yet the point was not so clear but that serious question was made of it on the trial, and it would be grossly unjust to compel the servant at his peril to decide correctly on the validity of an order presumptively lawful when the consequences of even a correct decision might be apparent insubordination and perhaps difficulty and litigation. It is perfectly just under such circumstances to leave upon the master the responsibility he assumed in giving an unwarranted order, and to hold that the servant is not blamable in yielding obedience to his superior.

It may still be said that in thus yielding obedience he accepts the risks which accompany it, for the same reasons that he accepts the risks of the employment in which he actually engaged. But the risks the servant actually assumes are only those which are properly incident to the employment; and he may always require the master to respond for injuries resulting from his personal negligence. Cases of this sort occur where the master exposes the servant to unsafe machinery or sends him into places where there are risks of which he is ignorant. *Marshall v. Stewart*, 2 Macq. H. L. 20, 33 Eng. L. & Eq. 1; *Mellors v. Shaw*, 1 B. & S. 437 (1); *Ryan v. Fowler*, 24 N. Y. 410; *Chicago*

1. The case of *MARSHALL v. STEWART*, 2 Macq. H. L. 20, 33 Eng. L. & Eq. 1, was an appeal heard in the House of Lords, from a judgment of the Court of Session in Scotland, in an action by the representatives of a

miner killed by injuries arising from the shaft of the pit being in an unsafe state, owing to the negligence of the defendant, his employer. The law of Scotland was, throughout the case, treated as the same with the law of

& N. W. R'y Co. *v.* Swett, 45 Ill. 197, 14 Am. Neg. Cas. 358; Schooner *Norway v. Jensen*, 52 Ill. 373, 14 Am. Neg. Cas. 327*n*; *Snow v. Housatonic R. Co.*, 8 Allen, 441, 15 Am. Neg. Cas. 417; *Walsh v. Peet Valve Co.*, 110 Mass. 23, 15 Am. Neg. Cas. 614; *Perry v. Marsh*, 25 Ala. 659, 13 Am. Neg. Cas. 109*n*; *Strahlendorf v. Rosenthal*, 30 Wis. 674. This principle may be applicable even where the risks are apparent and fully open to observation, provided the servant from his youth, inexperience, or other cause is incapable of fully understanding and appreciating them. *Grizzle v. Frost*, 3 Fost. & Fin. 622;

England. The servant, in that case, was killed while leaving his master's employment, without proper cause. "A master," says Lord Cranworth, "by the law of England and by the law of Scotland, is liable for accidents, occasioned by his neglect, to those whom he employs. I quite adopt the argument of the solicitor-general, that he is duly responsible while the servant is engaged in his employment, but then we must take a great latitude in the construction of what is being engaged in his employment;" and he further adds that the liability of the master continues "whatever he does in the course of his employment, according to the fair interpretation of the words, *eundo*, *morando*, *redeundo*, for all that the master is responsible, and it does not, in my opinion, make the slightest difference that the workmen had, according to the finding of the jury, no lawful excuse for going out, no lawful excuse for leaving their work." "The master," remarks Lord Brougham, in the same case, "who let them down, is bound to bring them up, even if they come up on their own business and not on his; he is answerable for the state of his tackle by which this lamentable accident was occasioned."

In *MELLORS v. SHAW*. 1 B. & S. 437, the declaration stated that the

defendants were owners of a coal mine, and that the plaintiff was employed by them as a collier in the mine, and in the course of his employment it was necessary for him to descend and ascend through a shaft constructed by them; that by their negligence the shaft was constructed unsafely, and was, by reason of not being sufficiently lined or cased, in an unsafe condition, which they well knew; and by reason of the premises, and also by reason, as they well knew, of no sufficient or proper apparatus having been provided by them to protect the plaintiff from injuries arising from the unsafe state of the shaft, a stone fell from the side of the shaft on his head, and he was dangerously wounded. At the trial it was proved that S., one of the two defendants, was manager of the mine, and that it was worked under his personal superintendence, and that the plaintiff was not aware of the state of the shaft. The jury found that the defendants were guilty of personal negligence. *Held*, first, that on the finding of the jury S. was liable, and therefore the other defendant was liable also. *Held*, also, in arrest of judgment, that the declaration must be taken to allege personal knowledge in the defendants of the state of the shaft, and therefore the action was maintainable.

Bartonshill Coal Co. v. McGuire, 3 Macq. 300 (1); *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506. Now, in this case, the servant was inexperienced, and though, perhaps, it would be apparent to him that the service on which he was sent was more hazardous than that he had engaged for, yet this must have been still better understood by Smith, and we think in this particular, as well as in respect to sending him upon the service at all, the risk was not fairly upon the servant's shoulders. We are, therefore, of opinion that if Smith can be regarded as standing in the place of the railway company in giving the order he did give, the company must be held responsible for the injury. We agree with the Supreme Court of Pennsylvania that "where a servant in obedience to the orders of his superior incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable that it may be safely used by extraordinary caution or skill," the case is not to be regarded as one of concurring negligence. *Patterson v. Pittsburgh, etc., R. Co.*, 76 Pa. St. 389, 394.

Nor do we think it follows that because Smith at the time was exceeding his authority, the company is not responsible for his action. It is in general no excuse to the employer that an injury which has occurred was caused by disobedience of his orders, whether they be express orders or implied orders. He assumes the risk of such disobedience when he puts the servant into his business, and the reasons for holding him responsible

1. In *GRIZZLE v. FROST*, 3 Fost. & Finl. 622, a girl under sixteen years of age, who had never been in such employment before, entered into defendant's service to attend to machinery. She testified that she received no particular instructions; that a few days after employment the defendant's foreman, observing that some of the hemp dropped from the machine, told her to pick it up and put it between the rollers without having them stopped, in a manner which he showed her, and which made it necessary to bring the fingers very close to the rollers, which was admitted to be very dangerous; and that two or three days afterwards, while doing

exactly as she had been directed, her fingers were caught by the revolving rollers. *COCKKURN*, Ch. J., instructed the jury that "if the owners of dangerous machinery, by their foremen, employ a young person about it quite inexperienced in its use, either without proper directions as to its use, or with directions which are improper and which are likely to lead to danger, of which the young person is not aware, and of which they are aware, as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery."

1. In *BARTONSHILL COAL CO. v. MC-*

for the servant's conduct are the same whether the injury results from a failure to observe the master's directions, or from neglect of the ordinary precautions for which no specific directions are deemed necessary. It will be conceded that for a positive wrong beyond the scope of the master's business, intentionally or recklessly done, the master cannot be held responsible, this being very properly regarded as the personal trespass or tort of the servant himself. But when the wrong arises merely from an excess of authority, committed in furthering the master's interests, and the master receives the benefit of the act, if any, it is neither reasonable nor just that the liability should depend upon any question of the exact limits of the servant's authority. The master fixes these, and it is his duty to keep his servant, in what is done by him, within the limits fixed. An act in excess would still have the apparent sanction of his authority; the occasion for it would be furnished by the employment, and the injured party could not always be expected to know or be able to discover whether it was or was not without express sanction.

In this case Smith had charge of the train and of the men employed with it. In what he did he was not purposely committing any wrong outside the employment, but his wrong was committed while acting in the very capacity in which he was employed, and had for its manifest purpose not to injure Williams, but to advance the interests of the railway company. As between the company and any other fellow-servant, there could be no question that his act should be deemed the act of the

GUIRE, 3 Macq. H. L. 300, an action arising out of the same accident as in *Bartonshill Coal Co. v. Reid*, 3 Macq. H. L. 266, it appeared that plaintiff's intestates in the two cases were miners in defendant's employ; that they were let down and taken into the mine in a cage operated by the engine; that while they were being drawn up in the cage it went up with such force, through the carelessness of the engineer in not stopping it at the top of the shaft, that it struck the scaffold and overturned it, and the two miners were dashed to the ground and instantly killed. The court *held* that, as the deaths oc-

curred by reason of the negligence of a co-servant, no recovery could be had.

In the *McGUIRE* and *REID* cases, *supra*, Lords Cranworth and Chelmsford cite, with apparent approbation, the Scotch case of *O'Byrne v. Burn*, 16 Ct. of Sess. Cas. 1025, in which a girl employed in defendant's clay mill was injured while attempting to remove, by direction of defendant's foreman, some waste clay while the rollers of machinery were in motion, she having been only a few days in the service and unaware of the risks. The court held that she could maintain the action.

company. *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180. But we also think that where the superior servant, by means of an authority which he exercises by delegation of the master, wrongfully exposes the inferior servant to risks and injury, the master must respond. It is only where the risks properly pertain to the business and are incident to it, that the master is excused from responsibility, and a risk of this nature not being one of the kind, the general rule applies, and he must answer for the misconduct of his agent. This was expressly held on facts similar to the present in *Lalor v. Chicago, etc., R. Co.*, 52 Ill. 401, 14 Am. Neg. Cas. 391*n*; and the cases of *Louisville, etc., R. Co. v. Collins*, 2 Duv. (Ky.) 114, 15 Am. Neg. Cas. 13; *R. R. Co. v. Fort*, 17 Wall. 553, and *Frost v. Union Pac. R. Co.* 11 Am. Law Reg. N. S. 101, sustain the same views.

A subordinate question is made on the evidence introduced to show the poverty of the mother and sister of the intestate, and the instruction of the court based upon such evidence, which was as follows:

“In making your estimate of damages it is proper for you to consider all the circumstances in the case, and take into consideration from the evidence, whether family of deceased were, at the time of his death, and are now in poor and needy circumstances, and looked to the boy when alive for at least partial support, and whether he gave his earnings when alive to his mother's and sister's support; whether he was able and willing to work for their benefit; and also the evidence as to the value of his services at the time of his death.” We do not understand that any part of this instruction is objected to except that which permitted the jury to consider, as bearing upon the question of damages, the poverty of the family.

The damages recoverable in a case of this nature are by the statute to be assessed with reference “to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person.” Comp. Laws, § 2351. They have no regard to the needs of the persons designated, or to any moral obligation which may have rested upon the deceased to supply their wants. If the moral obligation to support near relatives were to be the criterion, we might take their poverty into account as bearing upon the extent of this obligation; but as this may or may not have been recognized, and, if recognized, may have been very imperfectly responded to, it is manifest that it can be no measure of the pecuniary injury the family received

or was likely to receive from the death. What the family would lose by the death would be what it was accustomed to receive or had reasonable expectation of receiving in his lifetime; and to show that the family was poor has no tendency towards showing whether this was or was likely to be large or small. One man contributes liberally in aid of his poor relatives; another delights in contributing luxuries where comforts are already abundant; but when the contribution is cut off in either case the extent of the loss is not measured by the wealth or poverty of the recipient, but by the contribution itself. A dollar lost, whether by poor man or rich man is neither more nor less than a dollar, and a reasonable expectation of benefit to a certain amount, must, when lost, be compensated to the same extent whether the loser be rich or poor.

A *dictum* in *Potter v. Chicago, etc., R'y Co.*, 21 Wis. 372, 375, 7 Am. Neg. Cas. 157, implies that the pecuniary circumstances of the family may properly be taken into account by the jury. But if this is so, and their poverty should increase the damages, so should their wealth diminish them; and this would establish a rule of damages unknown to the statute and repugnant to the one named by it. There are, it is true, some cases in which, perhaps, such evidence must be received, because it tends to establish a moral obligation to demand assistance in the future from one at the time incapable of giving it: as where the person killed was a very young child, and at present contributing nothing in aid of anyone. *Ewen v. Chicago, etc., R'y Co.*, 38 Wis. 613; *Barley v. Chicago, etc., R'y Co.*, 4 Biss. 430; *Chicago v. Powers*, 42 Ill. 169. But it is a sort of evidence that, when necessarily received, should be used with caution.

In *Dalton v. S. E. R'y Co.*, 4 C. B. N. S. 296, to which we are referred, the damages appear to have been measured, not by the circumstances of the family, but by an estimate very properly based on the customary contributions of the deceased. The same remark is substantially true of *Franklin v. S. E. R'y Co.*, 3 H. & N. 211 (1). The wealth of the defendant, it is very justly held, can be no measure of the loss sustained (Co-

1. In *DALTON v. SOUTH EASTERN R'Y CO.*, 4 C. B. N. S. 296, and *FRANKLIN v. SOUTH EASTERN R'Y CO.*, 3 H. & N. 211, it was held that damages of a pecuniary nature must be shown; that damages are not to be given

merely in reference to the legal liability, but for the loss of such pecuniary benefit occasioned by death of injured party; and that compensation for funeral expenses or family mourning is not recoverable.

nant *v. Griffin*, 48 Ill. 410); though it would seem to be quite as suitable for the consideration of the jury as the poverty of the next of kin. See *Penn. R. Co. v. Zebe*, 33 Pa. St. 318, 6 Am. Neg. Cas. 232. His wealth and their poverty would make the like appeal to his generosity, but the response to the appeal would indicate the extent of the loss, not the appeal itself.

As the verdict awarded to the plaintiff, \$3,400, it would seem very manifest that the instruction misled the jury into giving damages for something besides the pecuniary injury. As the plaintiff's showing was that Williams was feeble in body and mind, and earned the wages of a common laborer only, from which his own support must be derived, it is difficult to understand any estimate which would place the loss of the family at such a sum. The annual interest on it at the customary legal rate for money borrowed would be more than three-fourths the whole annual earnings, even supposing Williams to have had steady employment, and to have lost nothing from sickness or other contingencies; and at the lowest statute rate, it would have been more than half. It seems incredible that the family could have had reasonable expectation of receiving an annual sum to either amount from such a source, but if they had, they could at most have realized it only for his lifetime, while this award of the sum in gross would enable the family to realize the income, not for his life merely, but in perpetuity.

In this opinion we have not attached importance to any mental weakness of the deceased as bearing upon the right of action. It was enough that he was inexperienced as brakeman, but whether even this was important may fairly be a question. The fact existed in this case, and we need inquire no further.

The judgment must be reversed, with costs, and a new trial ordered. The other justices concurred.

**ANDERSON, ADM'X V. MICHIGAN CENTRAL
RAILROAD COMPANY.**

Supreme Court, Michigan, December, 1895.

[Reported in 107 Mich. 591.]

BRAKEMAN CRUSHED BETWEEN CARS—DERAILMENT—DEFECTIVE TRACK—SAFE PLACE TO WORK—INSPECTION—REPAIRS—INSTRUCTION—WITNESS—CREDIBILITY—COURT—COUNSEL—REMARKS—CONTRIBUTORY NEGLIGENCE—CONTRACT RELEASING FROM LIABILITY FOR NEGLIGENCE—PUBLIC POLICY.—In an action to recover damages for death of plaintiff's intestate, a brakeman in defendant's employ, who was crushed between two cars while engaged in setting a brake on the way car of a freight train, another car having left the track, due to alleged defective track, judgment for plaintiff was *reversed* for error in charge to the jury as to duty of defendant in respect to inspection and repairs. The points discussed in the opinion rendered by MONTGOMERY, J. (in which McGRATH, Ch. J., and HOOKER, J., concurred), and also in the opinion by GRANT, J., are set out in the syllabus to the official report as follows:

- “The duty to provide a reasonably safe place for the employee to perform his services rests upon the master, and this duty is one that cannot be shifted or evaded by any attempt to delegate it to one who happens to be, as regards some of his duties, a fellow-servant of the employee whose safety is involved and to be provided for. This duty is also a continuing one, to the extent that the master is required to provide reasonably for the inspection, and, if need be, for the repair, of premises or appliances.
- “It is no defense, therefore, to an action against a railroad company by a brakeman for injuries sustained by reason of a defect in a track (*e. g.*, an abrupt depression in one of the rails), that the immediate cause of the accident was the neglect of the sectionmen, who were charged with the duty of keeping the track in repair. (GRANT, J., *dissenting*.)
- “In such case, an instruction that, if the defendant allowed its track to become out of repair, it is liable for the resulting damages, is erroneous, since, if the track was reasonably safe as originally constructed, the measure of defendant's duty was the exercise of reasonable watchfulness and inspection to see that it continued in such condition.
- “It is error for the court to express an opinion, in the presence of the jury, as to the weight of the testimony introduced as bearing upon the credibility of a witness. (Per GRANT, J.)
- “A witness is not discredited merely because he is an employee of the party on whose behalf he testifies, and counsel should not be permitted to advance that theory in argument to the jury. (Per GRANT, J.)
- “Where a car immediately preceding that upon which a brakeman was riding left the track, and the brakeman, while responding to a signal for brakes,

was crushed between the two cars, it was held, by GRANT, J., that the brakeman was not, as a matter of law, guilty of contributory negligence in going to the front of the car, rather than to the rear, for the purpose of applying the brake, it appearing that, although the course taken exposed him to greater danger, he could thereby render more effective service.

"A railroad company cannot, by contract with its employee, relieve itself from liability for its own negligent acts. (Per GRANT, J.)"

ERROR to Bay Circuit Court. The facts are stated in the opinion.

Case by Olive Anderson, administratrix of the estate of William Anderson, deceased, against the Michigan Central Railroad Company for negligently causing the death of plaintiff's intestate. From a judgment for plaintiff, defendant brings error. *Judgment reversed.*

H. H. & C. H. HATCH, for appellant.

JULIAN G. DICKINSON, for appellee.

Montgomery, J. — Plaintiff's intestate, William Anderson, was a brakeman in the employ of the defendant company on what is called the "Vanderbilt Branch." On September 16, 1892, the train upon which the decedent was employed consisted of about ten cars and a caboose. There were two Blue Line cars, so called, — one ahead of the engine, and the other (the last car but one) being next to the caboose or way car. When the train reached a point at the top of a grade, and was just beginning to increase its speed, the Blue Line car that was next to the caboose ran off the track. The wheels ran along the ties for some distance, when the forward truck turned sideways, and began to plow up the ties. The forward end of the Blue Line car was depressed, and the rear end was raised so that it cleared the rail of the platform on the way car, crushing Anderson, who was engaged in setting the forward brake of the way car; the engineer having, before this, whistled for brakes. The negligence complained of was that the company failed to maintain its track in reasonably safe condition. The testimony offered by plaintiff tended to show that the point in the track where the car left it was the central point in a reverse curve; that at the point where the two curves came together there was a depression in the south rail of the track; that up to this point, as one goes west, this rail had been the outside rail of the curve, and had been considerably higher than the north rail; a short distance further west it became the inside rail, and lower than

the north rail. It is claimed that it should have shaded gradually from the superior elevation to the inferior elevation, but that in fact there was a sudden and sharp drop in the elevation of this rail, which had the effect of causing the car to leave the track. The plaintiff recovered a verdict, and defendant appeals. It is claimed by the defendant that those having charge of this track were fellow-servants of the deceased, and defendant is not responsible for their neglect of duty, and, furthermore, if the duty to inspect and repair the tracks was the duty of the master, the circuit judge erred in his instructions to the jury, in that he, in effect, laid down a rule which would make the company an insurer of its track.

It appeared that, prior to this accident, there had been two other accidents at or near the place of the injury. One Burns was roadmaster, and one McMahon assistant roadmaster. The latter had authority to direct sectionmen. After one of the prior accidents, McMahon sent the sectionmen to repair the track, but the defect in question was not remedied. Defendant requested the court to charge the jury that, if the car in question ran off the track because the south rail was not sufficiently elevated, the neglect to elevate and repair the same was the neglect of the section foreman in charge of that part of the track, and, the section foreman being a fellow-servant of the deceased, William Anderson, plaintiff could not recover; and, further, that the undisputed testimony showed that the depression referred to was not the result of any fault in the original construction of the track, but was caused by the ordinary use of the track, and that, there being such depression existing, it was the duty of the sectionmen to repair it; and, further, that the section or trackmen were fellow-servants of the brakeman. If the master had any duty to inspect the premises to see that they continue in reasonably safe condition, or if, having notice of defects, he is bound to repair them, and cannot delegate the duty and escape the responsibility, it would seem that these instructions were inappropriate, for it would appear that, McMahon having general charge of these tracks, and notice that an accident had occurred at the point where the injury resulted to deceased, it was his duty, as representative of the master, to see that the track was in proper condition.

It is very clearly the law in Michigan, and most other jurisdictions, that the duty to provide a reasonably safe place for the employee to perform his services rests upon the master, and that

this duty is one that cannot be shifted or evaded by any attempt to delegate it to one who happens to be, as regards some of his duties, a fellow-servant of the employee whose safety is involved and to be provided for. This doctrine is enunciated and recognized in both opinions in *Beesley v. F. W. Wheeler & Co.*, 103 Mich. 196, 16 Am. Neg. Cas. 75 *ante*, and in *Dewey v. Railway Co.*, 97 Mich. 329, and is fully discussed by Mr. Justice Hooker in *Balhoff v. Railroad Co.*, 106 Mich. 606 (1). See also *Van Dusen v. Letellier*, 78 Mich. 492, 16 Am. Neg. Cas. 50, *ante*. This duty is also a continuing one, to the extent that it is re-

1. In *DEWEY v. DETROIT, GRAND HAVEN & MILWAUKEE R'y Co.*, 97 Mich. 329 (November, 1893), brakeman in defendant's employ attempting to couple car received from another company to a flat car, stepping between the cars, and arm crushed, judgment for defendant in the Wayne Circuit Court was *affirmed*. It was held that "a brakeman on a freight train, and a car inspector, charged by the common employer with the duty of inspecting cars received from other companies for transportation, and to see that they are properly loaded and in good condition, are fellow-servants."

In *BALHOFF, ADM'X, v. MICHIGAN CENTRAL R. R. Co.*, 106 Mich. 606 (October, 1895), judgment for plaintiff in the Bay Circuit Court was *reversed*. The case and points are stated in the syllabus to the official report as follows:

"Plaintiff's intestate, a brakeman in defendant's employ, was killed by the derailment of a car that was being backed upon a side track, caused by the formation of ice on the tracks at a point where there was a slight depression in the roadbed. *Held*, that it was the duty of defendant to provide a track which, measured by the standard of good railroading as actually conducted, could be said to be reasonably safe, and that whether it had complied with such duty, or

whether it should have foreseen the danger of water freezing over the tracks, and adopted sufficient measures to prevent it, was under all of the circumstances a question for the jury.

"It was also for the jury to say whether the decedent knew or should have known of the existence of the depression in the track, and should therefore be held to have assumed the incident risks, the fact not being undisputed.

"The fact that a box drain, which had been constructed to carry off the water, had frozen up, thus permitting the water to accumulate and freeze over the rails, cannot be said to have been the proximate cause, as distinguishable from a defective construction of the track, since the adequacy of the drain in view of probable conditions was one of the questions entering into the determination as to whether a reasonably safe place had been provided.

"The duty to furnish a safe place was one that could not be delegated by the defendant so as to relieve itself from responsibility, and therefore, though it may have been within the employment of the sectionmen to remove the ice from the track, they were not fellow-servants of the deceased with respect to the performance of such duties. GRANT, J., *dissenting*.

quired that the master shall provide reasonably for the inspection, and, if need be, for the repair, of premises or appliances. 7 Am. & Eng. Ency. Law, 830, and cases cited.

In *Tangney v. J. B. Wilson & Co.*, 87 Mich. 455, 16 Am. Neg. Cas. 52, *ante*, Mr. Justice Morse, speaking for the court, said: "It was the duty of the defendant to provide a safe place for plaintiff's work, and to furnish safe and suitable appliances to be used in and about his work. And its duty did not end here. It was also its duty to see that the appliances so furnished should be kept safe, so far as reasonable and proper watchfulness and inspection would enable it to do so."

See, also, *Bailey, Mast. Liab.* p. 36; *Roux v. Lumber Co.*, 94 Mich. 607, 16 Am. Neg. Cas. 16, *ante*; *Baltimore & Ohio R. Co. v. Baugh*, 149 U. S. 368; *Louisville & N. R. Co. v. Ward*, 10 C. C. A. 166.

The cases that are claimed to establish the rigid doctrine that sectionmen are in all cases fellow-servants of the trainmen are considered and distinguished, perhaps sufficiently, by Mr. Justice Hooker, in *Balhoff v. Railroad Co.*, *supra*. It will be found on examination that in *Michigan Central R. Co. v. Austin*, 40 Mich. 250, the doctrine was not necessary to the result reached. In the case of *Loranger v. Railway Co.*, 104 Mich. 80, the opinion shows that the injury resulted from the dumping of ashes on the track by a fireman of the defendant. The ashes were fresh, and it is plainly to be implied that no fault of failing to inspect occurred; and well might the case have rested upon this ground, or upon the ground of contributory negligence. In *Schaible v. Railway Co.*, 97 Mich. 318, the injury resulted, not from fault in the appliances, but from neglect in their use. *Piquegno v. Railway Co.*, 52 Mich. 40, is a case in which Mr. Justice Cooley distinguishes between the responsibility of the company for obstructions to the track caused by use, and defects in the track itself (1).

"Whether a brakeman, in sitting upon a flat car between two tiers of logs while backing upon a side track for the purpose of making a coupling, was guilty of contributory negligence precluding a recovery for injuries sustained by being crushed between the logs on the cars leaving the track, is a question for the jury, the evi-

dence being conflicting as to the danger of the position."

1. In *MICHIGAN CENTRAL R. R. Co. v. AUSTIN*, 40 Mich. 247 (January Term, 1879), judgment for plaintiff was *reversed*, the case being stated in the syllabus to the official report as follows: "A switchman while standing on the foot-board of a

The charge of the court was in part as follows: "The plaintiff requests me to charge you that 'it was the duty of the defendant to provide a reasonably safe track and equipments and to keep the same in repair; and if it did not do so, but allowed its track to become out of repair in the particulars claimed on behalf of the plaintiff, and if that was the cause of the accident in which William Anderson lost his life, then you will return a verdict for the plaintiff.' That is all right, with the qualification, — and I give it with this exception, — excepting the deceased himself contributed to the injury."

And again: "In answer to some of these requests, perhaps I should state that the railroad company must furnish a place for its employees to work upon that is reasonably safe."

If the road was reasonably safe as originally constructed, the duty of the company was to exercise reasonable watchfulness and inspection to see that it continued in a reasonably safe condition. *Tangney v. J. B. Wilson & Co.*, 87 Mich. 455, 16 Am. Neg. Cas. 52, *ante*. This is conceded by plaintiff's counsel to be the measure of the defendant's duty; but it is claimed

tender that was backing on a side track, let go the hand rail to shift his lantern from one hand to the other, and was thrown off by a jerk caused by a worn rail left there by his fellow-employees, the trackmen. He had full means of knowing the condition of the track, and the custom of the road as to using worn rails for side tracks. *Held*, that the risk was one of the ordinary risks of his employment, and that he had no ground of recovery." Opinion by CAMPBELL, Ch. J., in which GRAVES and COOLEY, JJ., concurred. MARSTON, J., *dissented*, holding that the evidence tended to support plaintiff's case, which was properly submitted to the jury.

In *LORANGER v. LAKE SHORE & MICHIGAN SOUTHERN R'Y Co.*, 104 Mich. 80 (February, 1895), judgment for plaintiff in the Monroe Circuit Court was *reversed*, the case and points being stated in the syllabus to the official report as follows:

"An experienced freight brakeman, after turning a switch to allow the engine and tender to pass onto another track for the purpose of running out some cars, ran past the engine and tender, which were backing up "as fast as a fast walk," and when within about two car lengths of the cars and without signaling the engineer, who was bound to obey his orders, to slacken speed, stepped in front of the tender for the purpose of reversing a crooked link, and thereby enabling him to make the necessary coupling. While walking sideways upon the track, in his attempt to reverse said link, the brakeman stubbed his toe against a pile of ashes and cinders, lately dumped upon the track from a passing engine, fell, and was seriously injured. The brakeman had passed over the track on his way from the cars to the switch, but did not notice the ashes and cinders. The rules of the railroad company, and his contract with it, required the

that under the facts of the case, this neglect of reasonable inspection conclusively appeared, and also that the jury could not have interpreted the charge above quoted as imposing on the company a duty to see, at its peril, that the track was continued safe. We think the question of whether the defendant's employees used reasonable care in inspection was, under the proofs, a question for the jury, and we are not able to say that the other portions of the charge cured the error in this instruction. It is true, the court charged that there must be negligence on the part of the company, but he did not, otherwise than as shown by the quoted portions of the charge, define what that negligence must be. We are not prepared to say that the jury may not have been misled.

Judgment reversed, and a new trial ordered.

MCGRATH, CH. J., and HOOKER, J., concurred with MONTGOMERY, J. LONG, J., did not sit.

Grant, J.—The accident which resulted in the death of the plaintiff's intestate occurred on what was called the "Vanderbilt Branch" of the defendant's railroad, which was between

brakeman to look before entering upon the track in front of a moving train, to see that the track was clear. And it is held that the brakeman was guilty of such negligence as would bar a recovery for the injuries sustained.

"The usual and proper place to dump the ashes and cinders was at the turntable. And it is held that the fireman who dumped the ashes and cinders onto the track, and the sectionmen whose duty it was to remove them, were fellow-servants with the brakeman, and for their negligence the railroad company is not liable, unless it had actual notice of the obstruction, or the same had existed for such a length of time that the law will imply such notice."

In *SCHAIBLE v. LAKE SHORE & MICHIGAN SOUTHERN R'y Co.*, 97 Mich. 318 (October, 1893), section-hand working on side track in railroad yard, injured by a car which had been "kicked" or shunted, judgment

for plaintiff was *reversed*, on the ground of contributory negligence in not looking out for such cars, plaintiff being aware of the custom of "kicking" cars.

In *PIQUEGNO v. CHICAGO & GRAND TRUNK R'y Co.*, 52 Mich. 40 (1883), it was held that "a railroad company is not negligent in omitting to clear snow and ice from the ground alongside its track even in the neighborhood of depot platforms; and a brakeman who is injured in consequence of slipping on it has no remedy against the company. A sudden call to supper, addressed by a conductor to a brakeman, is not such an improper or negligent command that the brakeman can recover for any injury sustained in hastily obeying it. Whoever hires out for any service takes the risk of it." The foregoing syllabus to the official report of the Piquegno case sufficiently states the nature and disposal of the action.

eleven and twelve miles long. It was a logging road, and had been used for several years, doing a large amount of business. The business had fallen off, and the defendant was proceeding to dismantle the road. For this purpose one Sargeant, the assistant roadmaster, was gathering up the cars, preliminary to removing the track. He had picked up nine or ten cars, with which he was returning at the time of the accident. A Blue Line car was ahead of the engine, and another in front of the caboose, the rear car of the train. Upon reaching the top of the grade, and while on a slight reverse curve, the Blue Line car in front of the caboose jumped the track. The engineer whistled for brakes, and the train stopped after running 400 feet. The deceased was rear brakeman, and was seen in the cupola of the caboose (his proper place) at the time the car jumped the track. The front end of the Blue Line car had dropped down upon the track, and the rear end was raised up so that the bottom of it was about a foot and a half higher than the top of the brake of the way car. The deceased was caught between the ends of the two cars, and instantly killed. The declaration contains eight counts, alleging various acts of negligence. All but one was abandoned upon the trial, and the case was left to the jury on the theory that the accident was caused by the depression of the outside rail of the curve.

One Hutton was the principal witness for the plaintiff, and at the time of the accident was a section foreman on the defendant's main line. One Asselyn was the section foreman on the branch. Hutton had testified that he went in on the following morning in obedience to instruction, to repair the track. On cross-examination he was shown a book kept by him, in which he made entries of the work performed by him and the man under him, and in which it was claimed by the defendant that no entry was made of his being at the place, or doing any work, repairing the track, after the accident. This was for the purpose of attacking the credibility of the witness. On redirect examination, counsel for plaintiff asked a question for the purpose of explaining the reason why such entries were not made. To this counsel for defendant objected. A colloquy arose between counsel of the court, during which the court said: "Well, I don't think the question is very material. Because he did not account for an hour or two in the morning, in an exact manner, don't reflect any question of the honesty of his bookkeeping." The remark was uncalled for, and was outside

the province of the judge. The explanation called for was, of course, proper, and, if the book contradicted his parol statement, the entire subject was for the consideration of the jury. The remark would naturally tend to prejudice them, and cannot be excused by the fact that counsel had made a remark reflecting upon the witness.

The attorney for the plaintiff, in his final argument to the jury, said: "Every one of their witnesses knows that if he testified anything to the injury of the Michigan Central Railroad—every one of those witnesses is interested, to the extent that he wants to keep his job. Every one of those witnesses knows that, if he testifies anything to the injury of the Michigan Central Railroad Company, he puts that job in jeopardy."

We think circuit judges should promptly condemn the use of such intemperate language, if there is no evidence to sustain it. It would be a reflection upon employees to hold that they are discredited as witnesses simply because they are employees. There is no presumption that they can testify falsely, or warp their testimony, to keep their jobs, or that employers are inhuman enough to discharge them for telling the truth. It is entirely competent for attorneys to argue to juries bias and interest on the part of the witnesses who are relatives or employees of litigants. But, in the absence of evidence to sustain them, counsel should not be permitted to make charges like those contained in the above language.

The defendant alleges error in the refusal of the court to instruct the jury that the deceased was guilty of contributory negligence because he went to the front, rather than the rear, of the caboose, to apply the brake. The theory is that the front platform was more dangerous than the rear, and that the deceased chose the more dangerous place. The court left the question of contributory negligence to the jury. We think he might properly have instructed them that there was no evidence of contributory negligence. The deceased was at his post in the cupola when the car ran off. It became necessary to stop the train as soon as possible. The engineer signaled for brakes. The conductor of the train, in response to questions of defendant's counsel, testified that the use of the front brake was more effectual than the rear one, in stopping the train. There is no evidence to the contrary. With a car off the track, there was more or less danger in both places, and the deceased cannot be held guilty of contributory negligence for going to that

place where he could render the most effective service. The instruction was more favorable than the defendant was entitled to.

The court instructed the jury as follows: "It was the duty of the defendant to the plaintiff's intestate to provide a reasonably safe track and equipments, and to keep the same in repair; and if it did not do so, but allowed its track to become out of repair in the particulars claimed on behalf of the plaintiff, and if that was the cause of the accident in which William Anderson lost his life, then you will return a verdict for the plaintiff."

The court also repeated the statement "that the railroad company must furnish a place for its employees to work upon reasonably safe."

It is contended that this is error, and that the true rule is that the employer is bound only to the exercise of reasonable care and diligence in endeavoring to provide the employee with a safe place in which to work, and that if the employer has exercised such care, he is not responsible for consequences, though the place where the employee is to work becomes unsafe. The expression used by the circuit judge is found in many decisions, and is applicable to the facts of those cases, and must be so construed. The rule of the learned circuit judge, applied to the present case, would result in making the employer the insurer of a reasonably safe place in which to work, notwithstanding he may have exhausted all reasonable care and diligence to make it so. No claim is made, nor is there any evidence tending to show, that the defendant did not properly construct its road. The sole claim is that the ties at the outer side of the curve became depressed, by use, from one to two and one-half inches, for a distance of seven to eight feet, and that the sudden dropping of the car from the higher to the lower ground caused it to jump the track. The original construction of the road is therefore not before us for consideration. The road having been properly constructed, the sole duty of the defendant was to exercise reasonable care and diligence to keep it in a proper and safe condition. Plaintiff's counsel cites a large number of authorities to sustain the rule laid down by the circuit judge, and to show that the duty to supply a reasonably safe place is absolute. An examination of those cases will show that the language used was applied to places shown by the plaintiff's testimony to be unsafe *per se*. *Swoboda v. Ward*, 40 Mich. 420, 16 Am. Neg. Cas. 1, *ante*, and *Huizega v. Lum-*

ber Co., 51 Mich. 272, 16 Am. Neg. Cas. 4, *ante*, were cases of uncovered machinery, where inexperienced persons were employed, and no caution given. Parkhurst v. Johnson, 50 Mich. 70, 16 Am. Neg. Cas. 5, *ante*, was a case where an inexperienced laborer was not warned against the danger. In James v. Mining Co., 55 Mich. 335, 16 Am. Neg. Cas. 65, *ante*, an inexperienced laborer, not a miner, was not warned that there was danger the mine would cave in. In Smith v. Peninsular Car Works, 60 Mich. 501, 16 Am. Neg. Cas. 42, *ante*, the deceased, a molder, was directed to carry a ladle of molten iron over ice with water standing on it, — a work which was outside the obvious scope of his employment. The negligence consisted in not informing him of his latent danger from explosion if the molten iron came in contact with the water and ice, and in instructing the molders to carry it over an unsafe place. The instruction should have been that it was the duty of the defendant to use reasonable care and diligence in inspecting its track, and keeping it in safe condition. Wood Mast. & Serv., 410; Fosburg v. Phillips Fuel Co., 93 Iowa, 54, 14 Am. Neg. Cas. 587*n*; Lindstrand v. Delta Lumber Co., 65 Mich. 261, 16 Am. Neg. Cas. 7, *ante*.

It is next contended that the deceased, under his contract, assumed all the risks of his employment as brakeman. The contract recited that his duties had been explained to him, and that the performance thereof would expose him to great danger, the risk of which he would assume for himself, and that he would use a constant and proper care to avoid injury to himself and others. This contract cannot be construed to relieve the defendant from the consequence of its own negligent acts. If that were its intent, it would be contrary to public policy, and void. He assumed all the risks and dangers incident to a dangerous business. The testimony on the part of the defendant tended to show that the track was in proper condition, and the cars oftentimes jump the track when it is in good condition, and it is impossible to detect the cause. The jury should have been instructed that, if this was the case, the deceased assumed the risk, and no liability attached to the defendant. This rule is too well established to require the citation of authorities.

The defendant requested the court to instruct the jury as follows: "1. The undisputed testimony is that the depression in the south rail of the track, described and referred to

in the testimony, was not the result of any error or fault in the original construction of the track, or its plan, but was caused, if there was any such depression, by the ordinary use of the track by trains running over it. There being such depression existing, it was the duty of the sectionmen to repair it." "2. Sectionmen or trackmen are fellow-servants of the brakemen and, if the accident was the result of, or was caused by a depression in the track, the existence of the depression was the negligence of the trackmen, and therefore the plaintiff cannot recover." These requests were refused.

The theory of the plaintiff was that it was the duty of the defendant, at all events, to keep its track in reasonable repair, and she rested her case upon evidence of the depression of the rail. She requested the following instruction: "The railroad company could not delegate to employees the duty of keeping its track in reasonable repair, so as to relieve itself from responsibility therefor to plaintiff's intestate."

The judge read this request to the jury, and said: "I have got to refuse that, in the form in which it is presented, but on that subject I will say that if it was the duty of this man Asselyn and his hired man, Scott, to keep that track in repair, and they were merely the hired men of the company, in the ordinary — I will not say what I was going to — and they failed to keep it in repair, why, the injury in that case might arise from the act of the co-employee, and the railroad company is not liable. But the testimony in that connection shows that Mr. Burns was superintendent over that branch of the subject, and the care of the road with Mr. McMahon, and then other parts of the road with the division superintendents. If the matter was in charge of Mr. Burns, in that sense, the blame would fall on his misconduct, and the railroad company might be liable. * * * Now, having passed the first question of the decedent's carelessness, then on the question of the defendant's negligence, then you will take up the third, — why it was caused, who caused it, was it a co-employee, or was it one of the principal officers of the company, whose duty it was to see that the road was in proper condition? If it was a co-employee, the plaintiff cannot recover; and if it was the head road-master, or manager above that, as a representative of the company, you may hold the road liable for it."

Counsel, in his brief, says: "It was perfectly proper for the

court to say to the jury, 'If you find there was a depression in the rail, so sudden and sharp that it threw this car from the track, under the circumstances of this case, I charge you that the condition was the result of negligence on the part of the defendant company, or some of its agents.' " We do not find this language in the charge of the court, as printed in the record, and probably counsel intended to say that the court would have been justified in so instructing them. Such is his theory upon which he bases his right of action.

It is established by numerous decisions of this court that trainmen and sectionmen are fellow-servants, and neither can recover against the master for the negligent acts of the other. The defendant's roadbed was properly constructed. It had furnished properly constructed and equipped engines and cars, and had employed competent servants, both as trainmen and sectionmen. If the engineer failed to properly manage or inspect and repair his engine, thereby causing injury to a sectionman, the defendant would not be liable. If the sectionman failed to perform his duty, legally and properly imposed upon him, by reason of which a trainman is injured, can the latter recover? Why should there be any difference between the negligent act of the engineer, in not properly inspecting, repairing and managing his engine, and the negligent act of a sectionman, in failing to properly inspect and repair his track? The place is rendered unsafe by the negligent act of each. There is as much necessity for proper inspection, care, and diligence in the one case as in the other.

About three weeks before this accident, a car jumped the track at or about the same place. Three section gangs, of one of which Mr. Hutton was foreman, were sent to repair it. No question is raised as to their competency. Mr. Hutton testified that he then saw there was a slight depression, but he did not raise the rail, and gave no instructions in regard to it. Probably he did not consider it dangerous. One Scott, then a sectionman on this branch testified that they then put in seventy-one or seventy-two ties. " Q. Did you do anything to the track itself, at the very spot where that car went off at the time? A. We lifted it in some places, but not quite through. We thought, may be, it was the right place." About seven days previous to the Anderson accident, another car jumped the track at or about the same place, damaging the track. This also was repaired by the sectionmen. Hut-

ton is the only witness who testified to any depression prior to the Anderson accident. He testified, "The defect was not in the original construction of the track, but the use of the track had made it lower at this spot."

It is agreed by all the witnesses that it was the duty of the sectionmen to put the track in proper condition after these accidents, if one rail was too low, it was therefore their duty to raise it. If they failed to repair it properly, such failure was the negligent act of a fellow-servant, for which the defendant is not liable, provided it was proper to commit the inspection and repair to sectionmen; and there is no evidence that this duty is not properly committed to them. If it were made the duty of the roadmaster, a division superintendent, or other higher official, to inspect the track and see that it is in proper condition, another question would arise, which we need not now discuss. The present record is destitute of any evidence tending to show that good and careful management of a railroad requires the inspection and repair of tracks to be committed to other than sectionmen, or that any such duty was imposed upon Burns or McMahan. The doctrine of a fellow-servant and a safe place will be found discussed, and authorities cited in *Beesley v. F. W. Wheeler & Co.*, 103 Mich. 196, 16 Am. Neg. Cas. 75, *ante*, and *Schroeder v. Railroad Co.*, 103 Mich. 213 (1). See, also, *Loranger v.*

1. IN *SCHROEDER v. FLINT & PERE MARQUETTE R. R. Co. and CHICAGO & GRAND TRUNK R'Y Co.*, 103 Mich. 213 (December, 1894), judgment for plaintiff in the St. Clair Circuit Court was *reversed*. The syllabus to the official report states the case as follows: "One of a gang of men at work for a railroad company under the charge of a foreman, unloading and leveling dirt hauled upon its premises by another railroad company, was injured by the backing of the engine against the loaded cars, from which it had been detached. The foreman kept the time of the men, counted the number of cars, directed the men where and how to work, saw that they did their work properly, directed the place where the train should stop for unloading, noti-

fied the men when to cease leveling and commence unloading, and then assisted in doing the work. He was under the immediate and direct control of the division roadmaster, from whom he received instructions to keep the time and number of cars, and directions in relation to the work. In a suit against the company by the injured employee to recover for injury sustained, the sole act of negligence alleged as ground for recovery was that the foreman failed to give notice to the men under his charge that the train was about to move. And it is held that the foreman and the plaintiff were fellow-servants." Opinions by GRANT, J., and MONTGOMERY, J., who reviewed the Michigan authorities on the fellow-servant doctrine.

Railway Co., 104 Mich. 80, 16 Am. Neg. Cas. 103, *ante*; Dewey v. Railway Co., 97 Mich. 329, 16 Am. Neg. Cas. 101, *ante*.

The first request should have been given, because it correctly stated the facts and the legal duty of the sectionmen. The second request should have been given, because it correctly states the law, but should have been followed by the instructions that, if the defendant had either actual or constructive notice of the defect, the negligence of the fellow-servants would be no defense. The oral charge of the court, while recognizing the doctrine of fellow-servant, is not sufficiently clear and explicit to correct the error.

Since writing the above, two other cases have been submitted involving various phases of the doctrine of fellow-servant. McDonald v. Michigan Cent. R. R. Co., 108 Mich. 7, and Perry v. Michigan Cent. R. R. Co., 108 Mich. 130 (1). In both these and the present case this court is urged to adopt the rule, which appears to have been adopted by the courts of some of the States, that the duty of inspection is imperative upon the master, and cannot be delegated. The principle is the same in each case, and a further discussion of the subject seems appropriate. Stability is of the utmost importance

1. In McDONALD v. MICHIGAN CENTRAL R. R. Co., 108 Mich. 7 (December, 1895), judgment for plaintiff in the Bay Circuit Court was *affirmed*, the case being stated in the syllabus to the official report as follows:

"The duty which the master owes to his servants to provide a reasonable safe place in which to work, and machinery in a reasonably safe condition, is not discharged for all time by providing machinery or premises safe in the first instance, nor can it be discharged by providing for an inspection by a fellow-servant.

"The duty of diligence in maintaining machinery in a reasonably safe condition necessarily involves the duty of the master to take such reasonable measures to inform himself from time to time of its condition as common prudence dictates.

"Where a railroad company makes no provision for inspection of its

engines except by the engineers in charge, who are expected at all practicable times to perform that duty and report defects, they must be held to be the representatives of the company. (GRANT, J., *dissenting*.)

"Where, in such a case, an engineer, before starting upon a trip, discovers that the pushbar upon the front of his engine is cracked, but, thinking that it will answer for the trip, which would otherwise be delayed, he does not report the defect, and, in attempting to make a coupling, the pushbar is broken and the brakeman injured, the question whether it was negligent to use the engine in its defective condition is for the jury. (GRANT, J., *dissenting*).

"An action will lie by an employee against his master for injuries sustained by reason of the concurring negligence of the master and of a fellow-servant.

in judicial decisions. A rule adopted and followed by a long line of decisions in this court should not be set aside, unless it is plainly contrary to common sense and reason, notwithstanding that many other courts have adopted the opposite rule. But in other courts the opinions upon the subject are by no means uniform. I am of the opinion that the judgments in these three cases cannot be sustained without overruling nearly all the decisions of this court exempting the master from liability for the negligence of a fellow-servant.

The difficulty in determining whether the negligent act complained of is the negligence of the fellow-servant, as to relieve the master from liability, is recognized by both courts and text writers. The decision of the New York Court of Appeals (*Flike v. Railroad Co.*, 53 N. Y. 549), states a general rule, which is recognized by many authorities; but still the question remains, in every case, is the servant charged with the performance of a duty which belongs absolutely to the master, and of which he cannot be relieved by delegating it? The duty to run an engine or manage any machinery with care and skill is as imperative upon the master as the

"The negligence of a brakeman, if any, in riding upon the pilot of an engine to the place where the coupling was to be made, cannot be said to have contributed to injuries sustained by him in consequence of the breaking of the pushbar while he was standing upon the crossbar of the pilot attempting to make the coupling, it appearing that it would have been necessary for him, in any event, to get upon the crossbar in order to perform such service.

"A locomotive engineer may properly testify whether, in his opinion, apparatus which broke in making a coupling would have been able to withstand the shock if free from defects."

The opinion in the McDONALD case (preceding paragraphs) was rendered by HOOKER, J., in which McGRATH, Ch. J., and MONTGOMERY and LONG, JJ., concurred. GRANT, J., dissented, stating that he had expressed his

views of the question of fellow-servant, in *Anderson v. R. R. Co.*, 107 Mich. 591 (the case at bar).

In *PERRY v. MICHIGAN CENTRAL R. R. Co.*, 108 Mich. 130 (December, 1895), the syllabus to the official report states the case as follows: "In an action by a brakeman for injuries received while making a coupling, alleged to have been due to the defective condition of the draught-iron apparatus on one of the cars, evidence that such apparatus was found to be defective after the accident is insufficient to justify a finding that it was in the same condition when the car was put into the train, there being other evidence tending to show that the defect may have been caused by the force with which the cars came together at the time of the accident. McGRATH, CH. J., and MONTGOMERY, J., dissenting)." Judgment for plaintiff in the Jackson Circuit Court reversed.

duty of inspection. If the master himself were in charge of a railroad train, as either engineer or conductor, he would be liable for any negligence resulting in injury to any of his employees. Only when he may delegate that duty is he relieved from responsibility. If there is any sound principle upon which is based the doctrine of the non-liability of the master for injury to one fellow-servant caused by the negligence of another, courts should determine that principle, and apply it to each case presented. As already remarked, it has no application where the master himself is personally superintending the work. The reason arises from the necessities of the case. The master cannot give personal attention to all operations of an extensive business, carried on at different places, and extending, as in the case of railroads, over hundreds of miles. The law in the operation of railroads imposes three duties upon the master: 1. To use reasonable care in the construction of its roadbed, so as to make it safe; 2, to use reasonable diligence and skill in furnishing engines, cars, and machinery to operate its road; 3, to use reasonable care to employ competent servants in all departments.

In *Michigan Central R. Co. v. Leahey*, 10 Mich. 193, 199 (1),

1. In *MICHIGAN CENTRAL R. R. CO. v. LEAHEY*, 10 Mich. 193 (1862), the syllabus to the official report states the case as follows: "H. contracted with the railroad company to draw, saw, and pile for them certain wood at one of their stations, and the plaintiff was employed by him by the day in piling wood as it came from the saw. While thus employed he was injured by the cars being thrown from the track, and running against the woodshed, and in some way causing his hand to be crushed. For this injury he brought action against the company. The company, on the theory (which there was some evidence to establish) that the cars were thrown from the track by means of a plank which H. had placed between the rails to aid in his work under the contract, asked the court to charge the jury: 1. That the plaintiff and H. while working on the premises were

bound to use the same ordinary care against accidents to themselves as was incumbent on the company, and that if the neglect of plaintiff or of H. in the course of their work under the contract contributed proximately to the accident, the plaintiff could not recover, unless the conduct of the company's servants was wanton or wilful. 2. That if H., in the course of his work under the contract, placed the plank on the track, and thereby the cars were thrown off and ran against the woodshed, this was neglect on the part of H. which contributed proximately to the accident, and that plaintiff could not recover unless the conduct of the company's servants was wanton or wilful. There was no evidence that plaintiff knew of the plank being placed on the track, but it was proved to have been seen there by the station agent. Whether the company were entitled

Justice CAMPBELL used this language: "The law may now be regarded as settled that a master is not liable to a servant for the neglect of his fellow-servants in doing or omitting to do their portion of the common work. He is only liable where his own personal neglect has directly contributed to the injury, or where he has not used ordinary diligence in employing competent servants. [Citing a large number of authorities.] The reason of the rule appears to be that the master or employer for whose benefit work is undertaken cannot be regarded as contracting for anything more than his own personal care and diligence, and, if he acts in good faith, the servant must run all those risks which may arise from others neglecting their duty. It must always be assumed that a master gives proper directions to his servants. His own interests would usually remove any contrary presumption. And there is no want of equity in requiring a servant to assume these risks. He has equal means of observing and guarding against impending danger with the master, and usually better opportunities."

In *Smith v. Potter*, 46 Mich. 264 (1), it is said: "As we have frequently held, in accordance with what we conceive to be the legal rule, such actions as the present are based on actual negligence of the defendant sued, or of some representative who is held in law to personate him. And in such a business as requires the employment of a multitude of persons, beyond the possible constant supervision of either the ultimate or representative principal there can be no negligence without the failure to use such precautions in choosing agents and guarding against perils as diligent prudence and foresight require. When the principal has done all that can be reasonably required of him to prevent risks to his servants, he has done all that he owes them."

That case involved the duty of inspection, and, in all its essential features, is identical with the case of *Perry v. Railroad Co.*, 108 Mich. 130, 16 Am. Neg. Cas. 113, *ante*, the only

to this charge, or not, *query*; the court being equally divided on the question." Judgment for plaintiff below accordingly *affirmed*.

1. In *SMITH v. POTTER*, RECEIVER OF THE FLINT & PERE MARQUETTE R'Y Co., 46 Mich. 258 (1881), brakeman, coupling freight cars, having arm

crushed by a loosened deadwood on a car which had come from another road, judgment for defendant was *affirmed*, plaintiff having assumed the risks of the negligence of a car inspector, the latter being a fellow-servant of plaintiff.

difference being that in the latter case the car belonged to the defendant. It is neither claimed nor charged that the original construction was defective, nor that it was not in good condition when sent out on its journey by the defendant. The sole contention is that the coupling apparatus was injured while in transit over another road; that it was returned to the defendant for transportation over its road in a defective condition, which the car inspector should have discovered. There is no pretense, nor can there be, that the master was actually at fault.

In the case of *McDonald v. Railroad Co.*, 108 Mich. 7. 16 Am. Neg. Cas. 112, *ante*, an engineer, whose duty it was to take care of and inspect his engine, to see that it was in proper condition, and to report any defects which he could not remedy himself, took out a defective engine, knowing it to be defective, but in his judgment he considered it safe for that trip. Undoubtedly, it would have been, if he had used it in the usual manner. In consequence of his negligence a brakeman was injured. No one but the engineer was negligent.

When the above decisions were rendered from which I have quoted, the court was composed of eminent jurists. The reason for the rule is there perhaps sufficiently stated. Is there anything unjust or unreasonable in the rule that where the master is engaged in a business whose multitudinous operations he cannot personally superintend; has, in the first instance, furnished a safe place, safe appliances, tools, and machinery, and competent men to use them, and to see that they are kept in reasonably safe condition, — he shall be relieved from liability where injury results from the negligence of one of his fellow-servants to another, both of whom are engaged in the same common employment?

I can think of no better illustrations than three cases (the present case, *McDonald v. Railroad Co.*, *supra*, and *Perry v. Railroad Co.* *supra*), afford. It is impossible for a master to inspect daily the entire bed of a railroad. Consequently, the roads were divided into sections, of a few miles each. Each section is placed in charge of a section gang, with a foreman, whose duty it is to daily inspect the section committed to their charge, and to keep the roadbed in safe condition. Why should the master be held liable for an act over which he has not, and in the very nature of things cannot

have, any control? He must delegate the authority. He has done all it is possible for him to do. His own interests prompt him to do all in his power to secure proper inspection and proper repair of the roadbed. If it is not kept in proper repair, he becomes liable in immense damages for injuries to both passengers and freight, as well as the destruction of his own property. Such is this case. *Michigan Central R. Co. v. Austin*, 40 Mich. 250, 16 Am. Neg. Cas. 102, *ante*; *Henry v. Railroad Co.*, 49 Mich. 496 (1).

The master owns hundreds of cars and engines, running daily over various portions of his road. Personal inspection by him is impossible. He must delegate it. He employs a competent engineer; places his engine in his charge, with instructions to inspect it, to take care of it, and to see that all defects are repaired, and not to use it when it becomes unfit for use. The engineer is the proper person to be intrusted with this duty. He finds the push bar of his engine cracked, and a defect in the brake apparatus. His judgment, however, is that it is safe for use. He violates the instructions of his master, neglects his express duty, and thereby injury results to a fellow-servant upon the train. Is there any reason why the master should be responsible? He did all within his power to prevent it. Such is the case of *McDonald v. Railroad Co.*, 108 Mich. 7, 16 Am. Neg. Cas. 112, *ante*.

1. In *HENRY v. LAKE SHORE & MICHIGAN SOUTHERN R'Y Co.*, 49 Mich. 495 (October, 1882), judgment for plaintiff was *reversed*, the case being stated in the syllabus to the official report as follows:

"The fact that the plaintiff in an action for a railway injury was hurt without his own fault or negligence does not of itself entitle him to recover, as it must further appear that the defendant is legally chargeable with the injury.

"A railway company whose track is broken without any fault of its own, is under no obligation to its employees to repair it within any specified time, if it duly warns them so that they shall not be injured in consequence thereof.

"A railroad company is not liable to an employee for an injury caused by the negligence of a fellow-employee; as where the fireman on a freight train was hurt in consequence of the train being ditched through the engineer's neglect to obey signals which he saw and was bound, by the company's rules, to observe.

"A railway company owes a duty to the public to keep its tracks in safe and suitable condition and run its trains with regularity and dispatch for the carriage and transportation of passengers and freight. But an employee cannot have a right of action against the company on this obligation."

Hundreds of freight cars are received from other roads at various stations along the line. They must be inspected to see whether they are in a safe condition, both as to the manner of loading and their own fitness for use. The master cannot inspect them. He must delegate it. He employs competent inspectors, and gives them explicit instructions. The inspector errs in judgment or wilfully passes an unsafe car. The result is an injury to a trainman. The negligence of a fellow-servant engaged in the same common employment is alone responsible for the injury. Why should the master, who has done all within his power to prevent it, be held responsible? Such is the case of *Perry v. Railroad Co.*, 108 Mich. 130, 16 Am. Neg. Cas. 113, *ante*.

I will now consider some of the numerous decisions of this court upon the question. *Smith v. Potter*, 46 Mich. 264, 16 Am. Neg. Cas. 115, *ante*, was decided in 1881. For nine years it was accepted as the established rule in this State by both the profession and the people, and has never been overruled. It was never doubted until after the decision of *Van Dusen v. Letellier*, 78 Mich. 492, 16 Am. Neg. Cas. 50, *ante*. In the majority opinion it was, however, expressly recognized as the law, and that case distinguished from it. Justice LONG concurred in the opinion rendered by Justice MORSE; Justice SHERWOOD concurred in the result; Justice CAMPBELL dissented, and Justice CHAMPLIN concurred in reversing the judgment, saying: "I do not think the duty of inspection, when such inspection is required by the circumstances of the case, can be delegated by the master, in such manner as to avoid responsibility." This expression of the learned justice still leaves open the question as to what circumstances require an inspection by the master. This court has always and unanimously held that an inspector of the loading of cars is a fellow-servant, for whose negligence the master is not held responsible. Clearly, Justice CHAMPLIN did not intend to cover such a case by his sweeping statement, but his language must be construed with reference to the facts of that case. There is nothing, however, in that opinion which can be fairly construed as impairing the rule in *Smith v. Potter*, *supra*, and other like decisions of this court. It is not in conflict with it; yet it is cited by counsel in these three cases, and in many others which have been presented to this court, as the principal authority against the rule theretofore established and

uniformly adhered to. No occasion existed for delegating the duty of inspection. The defendants were mill owners. Their business was in a narrow compass and at one place, where personal supervision and inspection were practical. They were seldom present at their mill, and delegated their entire business to agents, who, it was claimed, were competent. I concur in the conclusion reached by the majority of the court, — that the defendants could not have relieved themselves from liability, under such circumstances, by the delegation of authority and the control of their business. The agents were not fellow-servants, but the *alter ego* of the defendants. That case is on all fours with *Ryan v. Bagaley*, 50 Mich. 179, 16 Am. Neg. Cas. 62, *ante*, where the defendant sought to relieve himself from liability by appointing a competent agent to control and manage the business of mining. Those two cases have no bearing whatever, in my judgment, upon those now under consideration. They could not have been decided in favor of the defendant without abrogating entirely the doctrine of *alter ego*, and relieving the master in every case where he has appointed a competent agent. They go no further than to hold that the master cannot surrender the entire control of his business to another, so as to avoid responsibility for those acts which he could and ought to have controlled. This court has gone further, and held that, where the master has surrendered a large branch or portion of his business, the party to whom he intrusts it is his *alter ego*. Such are the cases of *Hunn v. Railroad Co.*, 78 Mich. 513, and *Harrison v. Railroad Co.*, 79 Mich. 409 (1). In the former

1. In *HUNN, ADM'X, v. MICHIGAN CENTRAL R. R. Co.*, 78 Mich. 513 (October Term, 1889), fireman on defendant's locomotive fatally injured in collision, judgment for plaintiff in the Jackson Circuit Court was *reversed* for erroneous admission of evidence as to pecuniary means of the deceased at time of his death. The point mentioned in the *ANDERSON* case (the case at bar) is stated in paragraph 1 of the syllabus to the official report (as per opinion rendered by *CHAMPLIN, J.*) as follows: "A train dispatcher who has absolute control over a division of a railroad, so far

as the running and operating of trains is concerned, is not a 'fellow-servant' with other employees acting under his orders."

In *HARRISON v. DETROIT, LANSING & NORTHERN R. R. Co.*, 79 Mich. 409 (January Term, 1890), sectionhand injured by being thrown from car by engine colliding with it, judgment for plaintiff in the Kent Circuit Court for \$9,000 was *reversed*, for failure to give certain charges to the jury. In this case it was held that: "An assistant roadmaster who has general charge of a division of a railroad, and of the work of the sectionhands

case a train dispatcher has the absolute control over a division of the railroad several hundred miles in length, and the charge of running all trains over it. In the latter case a road-master had charge of a division of a road 150 miles in length. I especially call attention to the language of that opinion, rendered by Mr. Justice LONG, found at pages 420 and 421, expressly recognizing the rule as laid down in *Michigan Central R. Co. v. Leahey*, 10 Mich. 193, 16 Am. Neg. Cas. 114, *ante*.

In *Miller v. Railway Co.*, 90 Mich. 230 (1), an engineer was held a fellow-servant of a switchman; the negligence being a defective step, which it was the duty of the engineer to repair. In *Michigan Central R. Co. v. Austin*, 40 Mich. 247, 16 Am. Neg. Cas. 102, *ante*, a defective rail upon the side track was the alleged cause of the accident. The negligence,

thereon which control is absolute as far as their employment and discharge are concerned, is not a fellow-servant with them," but represents the railroad company. The reference to the LEAHEY case referred to in the ANDERSON case (the case at bar) is stated by Mr. Justice LONG in the HARRISON case (79 Mich. 409, 420) as follows:

"In this State [Michigan] in 1862, in the case of *Mich. Cent. R. R. Co. v. Leahey*, 10 Mich. 199 [16 AM. NEG. CAS. 114, *ante*], the general doctrine was laid down that the master is not liable to a servant for the neglect of his fellow-servant in doing or omitting to do their portion of the common work. This rule has been followed and approved in numerous cases, which have been so often cited that a repetition is unnecessary. This rule grew out of the English doctrine laid down in *Priestley v. Fowler*, 3 Mees. & W. 1, in 1837, and which has since been adhered to in England [see 15 AM. NEG. CAS. 410]. The Massachusetts court, in *Farwell v. Railroad Corp.* 4 Metc. 49, 15 Am. Neg. Cas. 407 (decided in 1842), adopted the rule of the English courts. Other States

followed this rule, until it has become the general doctrine in all the American States." * * *

I. In *MILLER v. CHICAGO & GRAND TRUNK R'y Co.*, 90 Mich. 230 (February, 1892), brakeman injured while attempting to climb upon a moving engine, due to alleged defective step, judgment for defendant in the Calhoun Circuit Court was *affirmed*. The syllabus to the official report states the case as follows: "A railroad company which is not shown to have had any knowledge that an engine step, upon which one of its brakemen stepped in attempting to mount a moving engine, and was injured, was out of repair, is not liable for negligence; it not appearing how long the step had been out of repair, and hence that the defect had existed for such a length of time as to raise a presumption of knowledge on its part, or that the engineer, whose duty it was to see to the step, was incompetent, or not supplied with the proper tools to repair it; he being a fellow-servant of the brakeman, and the company not being liable if the step became loose by reason of his neglect." Opinion by GRANT, J.

if any, was that of the trackmen, who were held to be fellow-servants with the switchmen. A depression in the rail was there alleged to be the cause of the accident, the same as in this. In *Morton v. Railroad Co.*, 81 Mich. (1), the defect was in the original construction of the brake chain. The responsibility for inspection was not involved. The learned author, Mr. Bailey, in his work on Master's Liability, at page 134, misstates that decision, when he says: "It was held to be the master's duty to inspect chains to be used, and for a lack of such inspection by the person whose duty it was so to do, whereby injury was sustained by the servant, the master was responsible." In *Loranger v. Railway Co.*, 104 Mich. 80, 16 Am. Neg. Cas. 103, *ante*, the fireman who dumped the ashes upon the track, and the sectionman whose duty it was to remove them, were fellow-servants with the plaintiff, a brakeman, and the company was not liable for their negligent act.

In the three cases now under discussion, no knowledge of the defect was brought home to the master. They all involve acts performed in one common employment. In neither could the master have done any more than he did to prevent the accident. The negligence of the co-employee properly charged with the duty, and competent to perform the duty, was alone

1. In *MORTON, ADM'R, v. DETROIT, BAY CITY & ALPENA R. R. Co.*, 81 Mich. 423 (June, 1890), judgment for plaintiff in the Alcona Circuit Court was *affirmed*. The case and the principal ruling is stated in paragraph 1 of the syllabus to the official report as follows:

"The rule may be considered settled in this State that a master is bound not only to use all reasonable care in providing safe tools and appliances for the use of workmen in his employ, but that this is a duty which cannot be delegated to another so as to relieve the master from personal responsibility. *Johnson v. Spear*, 76 Mich. 139; *Adams v. Iron Cliffs Co.*, 78 Mich. 272; *Van Dusen v. Letellier*, 78 Mich. 492; *Hunn v. R. R. Co.*, 78 Mich. 513; *Harrison v. R. R. Co.*, 79 Mich. 409; *Brown v. Gilchrist*, 80

Mich. 56. *So held*, where a brakeman on a logging train was thrown from a car and killed by reason, as alleged, of the breaking of the break-chain, which was of insufficient size or strength to be used with safety; and in a suit to recover damages for his death the railroad company claimed that its duty was fully performed when it procured chains in the usual and customary way, and employed a competent person to inspect its cars, to see that they were in good condition before starting out on a trip, which duty it performed, and that it was not responsible for the negligence of such inspector, if he was guilty of any, he being a fellow-servant of the deceased." * * * [The cases cited are reported with the Michigan cases in this volume of AM. NEG. CAS.]

the cause of it. If there is any sound reason for the adoption of the doctrine of fellow-servant it is, in my judgment, in these three cases. If no reason exists here, the rule may as well be abrogated entirely.

I have deemed it important to refer to the decisions of other courts, whose decisions are in irreconcilable conflict. I have aimed to show the rule established by this court in the beginning, and consistently followed, and from which I see no reason for now departing. I think it is founded in good sense, sound reason, and justice.

Judgment reversed, and new trial ordered.

ENGINEER INJURED IN COLLISION — ENGINE COLLIDING WITH FLAT CAR AND THROWN FROM TRACK — SAFE MACHINERY — DEFECTIVE TRACK — KNOWLEDGE OF DEFECT — ASSUMPTION OF RISK — NEGLIGENCE — INSTRUCTION — DUTY OF RAILROAD COMPANY — RULES AND REGULATIONS — EVIDENCE — ERROR. — In **HEWITT v. FLINT & PERE MARQUETTE R. R. CO.**, 67 Mich. 61 (*October, 1887*), verdict and judgment for plaintiff for \$22,000 in the Saginaw Circuit Court was *reversed*. WILLIAM L. WEBBER (WISNER & DRAPER, of counsel), appeared for appellant (defendant); CAMP & BROOKS (HANCHETT & STARK, of counsel), for plaintiff. The case is very fully stated and the points discussed at length in the opinion rendered by SHERWOOD, J., in which CAMPBELL, Ch. J., and CHAMPLIN, J., concurred, but MORSE, J., while concurring in the reversal, did not assent to all the propositions stated by SHERWOOD, J. The facts of the case are set out in the opinion as follows:

“The plaintiff in this case resides at East Saginaw. He is an engineer, about fifty-three years of age, and for many years had been in the employment of the defendant. On the evening of April 10, 1883, he was in charge of an engine running a passenger train from Wayne Junction to East Saginaw, on the defendant's road, and this had been his route during the previous eight years. In passing County Line station on that evening his engine collided with a flat car which had, within about half an hour previous, by some means left the side track at the station, and run down onto the main line, and there stood, partly off the track, when the plaintiff's engine struck it. By the collision the locomotive was thrown off the track, and the plaintiff was permanently injured. The collision occurred between 9 and 10 o'clock in the evening. After the accident occurred, the plaintiff remained in the employment of the company, working a part of the time, after he recovered from the shock

received in the collision. He regularly called for and received his monthly pay of \$100 until October 1, 1885. The sum paid from the time he was hurt until he brought this suit amounted to about \$3,000. On May 27, 1886, this suit was brought to recover for his injuries, basing his claim upon the ground that the car with which his engine collided was on the main track at the time through the negligence of the defendant or its servants. The declaration sets out the negligence claimed fully, and states the damages at \$50,000. The defendant pleaded the general issue, with notice that, if plaintiff had any such claim, he settled and compromised it with defendant for the sum of \$2,966.67 in full satisfaction thereof. The cause was tried at the last January term of the Saginaw circuit, and resulted in a verdict and judgment for the plaintiff for the sum of \$22,000. The defendant brings error. Sixty-nine exceptions are relied upon to reverse the judgment.

" In the court below before the jury the plaintiff submitted that the defendant was liable for its claimed negligence in the premises for the following reasons:

" 1. Because the defendant left this flat car, being without brakes, standing upon this side track.

" 2. Because there were no stop-blocks upon this side track to prevent cars left thereon running out onto the main track.

" 3. Because there was no agent in charge of the station to see that the road was kept clear and free from obstructions.

" 4. It was negligence upon the part of the defendant to allow the car to get upon the main track.

" The defendant's contention upon the trial was that the company was guilty of no negligence in the premises; that its road, main line, and siding were properly constructed and in good condition and had been long used; that its side track was a safe and proper place for receiving and keeping cars when not disturbed by trespassers; that the engine and cars used by the defendant, and the flat car with which the collision occurred, were all sound and in good repair; that the duty which the defendant owed to the plaintiff was only that of master toward servant in his capacity of engineer, and which had always been well discharged by the company; and that the plaintiff approached the station under too high a rate of speed.

" In addition to the general verdict, the jury made special findings to the following questions:

" Q. Do you find from the evidence in this case that the flat car with which plaintiff collided passed from the side track onto the main track by means of motion imparted to it by the special freight train which backed onto the side track the night of the accident? A. Yes.

" Q. Do you find from the evidence in this case that the flat car

mentioned in the preceding question passed from the side track to the main line track by reason of motion imparted to it by the wind? A. Yes.

“Q. Do you find from the evidence in this case that said flat car was intentionally put upon the main track by some person or persons unknown, for the purpose of causing a collision? A. No.

“Q. If you say no to the foregoing three questions, state what you find from the evidence in this case it was that set the flat car in motion, and caused it to run onto the main track? (No answer).

“Q. Do you find from the evidence in this case that the plaintiff was duly observing defendant's rule requiring him to observe care in approaching stations (being rule 84 read in evidence) at the time he collided with the flat car? A. Yes.

“The record contains all the evidence in the case, and counsel for the defendant rely upon all the exceptions taken. In the view I take of the case as presented by the learned counsel upon both sides, it will be unnecessary to consider all of them. It is unnecessary now to decide whether or not the case is a proper one for the jury upon its facts, if that question alone were to arise, as some were improperly brought into the case, and I think we may very properly omit the discussion of the exceptions which relate to the subject of damages.

“The principles of law involved in the consideration of the questions raised are mainly those relating to the duty of the company towards the plaintiff in the capacity in which he was engaged. These have been so frequently under consideration by this court that a simple statement of them is all that will be attempted on this occasion.” * * *

The several rulings of the court are well set out in the syllabus to the official report as follows:

“1. It is the duty of a railway company to use due care to provide materials, machinery, and other means by which its employees are to perform the work for which they are employed, safe for their use, and to keep the same in repair and in good order, so as not to unnecessarily expose them to danger; and when it has done this, said employees assume the risks and dangers incident to the company's business, including those originating from the negligence of their fellow-servants.

“2. While it is the duty of a railroad company to use reasonable care in the proper construction of its roads and side tracks, yet, if it fails so to do, and one of its engineers is injured in consequence of such default, he ought not to recover for such injury if he had equal means of knowledge with the company of such defect and failed to protest against its negligence in the premises.

“3. Where, in a suit against a railway company for injuries sus-

tained by a collision with a flat car which had by some means run out from a side track onto the main line, there was no testimony tending to show that the side track was not in proper condition, or in such condition that, in the use made of it by the company, exercising ordinary care, a flat car standing upon the siding was in danger of coming out upon the main line, nor that ordinary care was not observed by the company in placing the car where it did upon the side track, and which it had been accustomed to do, with an experience of safety, for more than sixteen years: *Held*, that the jury should have been instructed, as requested by the defendant, that it was not its legal duty towards the plaintiff, an engineer in its employ, to provide said side track with stop-blocks, and that its omission so to do was not actionable negligence; and that a modification of such request by leaving it for the jury to find whether such car was liable to get out onto the main line by reason of any peculiar construction or condition of the side track was error.

" 4. Negligence, when relied upon, must be proved. It may be inferred from facts proved, but never from mere conjecture.

" 5. A railway company is under no legal obligation to maintain station agents at flag stations for the protection of its employees.

" 6. Under the facts in this case, it was not the legal duty of the defendant to provide its flat car which it left standing upon the side track at County Line station with brakes; and if the jury find that it had no brakes at time of the accident, this does not establish the negligence alleged in that regard against the defendant, nor entitle the plaintiff to recover.

" 7. Suggesting or assuming the existence of a fact, not conceded in the case, in the charge to the jury, is damaging error.

" 8. A railway company is not bound to change its manner of using its side tracks, nor adopt the most approved ways or appliances in business; and if one of its servants, knowing, or having ample means of knowing from long-continued employment, the way and manner in which the side tracks are used, continues in the employment without complaint, and if from such way and manner is subjected to risks or accident, he is presumed to assume such risks, and, if injured thereby, cannot recover.

" 9. It is the duty of an engineer to know the duties of a station agent, along the line of the road he is running upon, so far as they relate to the proper discharge of the engineer's duty.

" 10. Negligence in a servant may consist, and often does, in failing to know as well as in failing to do; and such is always the case where it is his duty to inform himself and to know.

" 11. The jury must receive the law and the testimony in open court, and they should not be allowed to take to the jury room the requests to charge given by the court.

“ 12. In a case where the proof tended to show, in so far as it bore upon the subject, that no agent was kept at a railway station where an accident occurred, evidence of the railway company's rules relating exclusively to the duty of such agent is improperly admitted.”

CONTACT WITH RAILROAD BRIDGE — BRAKEMAN ON LADDER OF CAR THROWN TO TRACK AND KILLED — RISK OF EMPLOYMENT — SAFE PLACE TO WORK — ROADBED — BRIDGES — SAFE MACHINERY — KNOWLEDGE OF DANGER. — In **ILLICK, Adm'r v. FLINT & PERE MARQUETTE R. R. CO.**, 67 Mich. 632 (*January Term, 1888*), verdict directed for defendant and judgment thereon in the Wayne Circuit Court was *affirmed*. It appeared that plaintiff's intestate was a brakeman on defendant's cars, and while attending to his duties on the car and in an effort to reach ladder of car he threw his body out so far as to come in contact with a railroad bridge as the car reached it and was struck with such force as to throw him from the ladder to the track, where he was run over and killed. It was held to be one of the risks of the employment. F. A. BAKER appeared for appellant (plaintiff); WISNER & DRAPER (H. M. CAMPBELL, of counsel), for defendant. The opinion was rendered by SHERWOOD, J., in which CHAMPLIN, J., concurred, in which it was held that the negligence of the deceased was such as to preclude recovery by his administrator. MORSE, J., agreed that there was no evidence tending to show negligence on part of defendant, but he preferred not to express any opinion as to negligence of the deceased. All the justices concurred in affirming the judgment for defendant:

After stating the facts of the case, SHERWOOD, J., said:

“ The space between the side of the bridge and the ladder upon the car where the brakeman was injured, as shown by the record, was two feet and three inches wide. The danger in going up the ladder at that place was before him, and was as plain to his observation as to any person connected with the train, or whose duty it was to run upon the road. It was not his duty, on the signal for brakes, to go up the ladder when the service was fraught with such danger. There was no special request from those in charge of or controlling the train for him to make the perilous ascent; and, when he did so, it was at his own peril. The duties of his employment did not require him to go upon the box car until he had passed the bridge. It did, however, require him to observe and take knowledge of the danger, if any, in crossing the bridge, if such knowledge could be obtained by his own observation. He had crossed the bridge 200 times before he was injured; and each time he crossed furnished him an opportunity of observing the very danger which overtook him and caused his death. The bridge was sound, and safe for the passage

of trains, without defect, and in good repair. Whether it was fourteen or twenty-four feet wide was a matter of no concern to the brakeman, so long as he was not required to occupy a place of danger in the discharge of his duties while passing over it, and this he was not required to do.

"A railroad company cannot be required to condemn and remove a bridge which is without fault in its plan or defect in its structure, while it is in good repair, and safe for the passage of trains, simply because some engineer shall pronounce it not as good or convenient as some other kind. Railroad companies must be allowed to use their own discretion as to the kind of bridges they will use, and when and under what circumstances they will remove or replace them, while they are safe. Any other rule would be both unjust and oppressive.

"As between the employers and employed, it is unquestionably the duty of a railroad company to provide a track and equipments which shall be reasonably safe; but this does not oblige the company to make use of the latest improvements, or to change the structures upon its road so as to conform to the most recent and advanced improvements and ideas upon such subjects; neither does good rail-roading require any such thing (1). Cooley, Torts, 551, 552; Won-

1. See the following notes of the Michigan authorities, cited in the case at bar, the references to the cases previously reported in this volume of AM. NEG. CAS, being added to the citations in the opinion:

In FORT WAYNE, JACKSON & SAGINAW R. R. Co. v. GILDERSLEEVE, 33 Mich. 133 (1876), action by administratrix for alleged negligent killing of plaintiff's intestate, an employee of defendant engaged in coupling two cars, one of which was lower than the other, judgment for plaintiff below was *reversed*, on the ground of assumption of risk.

In BOTSFORD v. MICHIGAN CENTRAL R. R. Co., 33 Mich. 256 (1876), brakeman injured coupling freight cars, judgment for defendant below was *affirmed*, the Supreme Court holding that the case was ruled by Fort Wayne, J. & S. R. Co. v. Gildersleeve, 33 Mich. 133 (preceding paragraph).

In MCGINNIS (by next friend) v.

CANADA SOUTHERN BRIDGE Co., 49 Mich. 466 (October, 1882), judgment for defendant in the Wayne Circuit Court was *affirmed*, plaintiff having assumed the risks of employment. Defendant operated a railway and plaintiff, a young man twenty years and six months old, engaged in defendant's service as switchman. He was inexperienced at the time and the yardmaster explained his duties to him. In a little less than two months from time of such employment, plaintiff's foot was caught in a "frog" and before he could extricate it an engine ran upon him inflicting serious injury. He understood the danger from frogs before this accident took place, knew that persons sometimes got their feet caught in them, and testified that he tried to avoid the danger. COOLEY, J., rendered the opinion: "An employer is not bound to make use of the newest mechanical appliances for the purpose of insuring the safety of his employees."

der *v.* Balt. & O. R. R. Co., 32 Md. 411, 15 Am. Neg. Cas. 352; Coombs *v.* New Bedford Cordage Co., 102 Mass. 572, 15 Am. Neg. Cas. 506; Railroad Co. *v.* Gildersleeve, 33 Mich. 133; McGinnis *v.* Bridge Co., 49 Mich. 466; Batterson *v.* Railway Co., 49 Mich. 184; R. R. Co. *v.* Huntley, 38 Mich. 537, 9 Am. Neg. Cas. 472; Smith *v.* Potter, 46 Mich. 258, 264, 16 Am. Neg. Cas. 115, *ante*; Hathaway *v.*

The court in speaking of the attempt made by plaintiff in the McGINNIS case to distinguish the case from the GILDERSLEEVE case (preceding paragraph), after showing that both complaints were similar, and that both plaintiffs voluntarily assumed the risks, said: "In one particular this case falls short of that made by Gildersleeve. It was made clearly apparent in his suit that the coupling apparatus ought to be on the same level, and the only excuse of the railroad company for making use of a car whose coupling apparatus was not on a level with that of others, was that they had the car on hand. It seemed plain that it would be desirable to discard it if the defendant could afford to do so. But in this case the evidence falls short of making a *prima facie* case that it would be desirable to adopt the device of blocking the frogs."

In BATTERSON *v.* CHICAGO & GRAND TRUNK R'y Co., 53 Mich. 125 (January Term, 1884), judgment for plaintiff in the Ingham Circuit Court was reversed. Plaintiff was a brakeman in the employ of the Northwestern & Grand Trunk R'y Co., for a few months, and was injured while coupling cars. The present defendant is a company formed by consolidating that road with others a few months after the accident to plaintiff. The case was before the Supreme Court in the October Term, 1882, and is reported in 49 Mich. 184. The judgment for plaintiff was there reversed for variance between the proofs and the declaration. On the present ap-

peal it was held that the consolidation of the companies made the defendant liable to the same extent as its predecessor. The accident happened to plaintiff at daybreak while he was coupling cars on the side track, when his foot went into a hole between the ties and his hand caught the link and was crushed. The court (per CAMPBELL, J.) reviewed the facts and held there was no case to be submitted to the jury. The learned judge said:

"In our opinion the case comes within the same principle with Michigan Central R. R. Co. *v.* Austin, 40 Mich. 247 (16 Am. Neg. Cas. 102, *ante*), where a switchman, while standing on the foot-board of a tender on a side track, was shaken off, while shifting hands, by a defect in the track, and hurt. It was held in that case that a railroad company owed no duty to its employees to make its side tracks perfect, and that the risk of such imperfections was one of the risks of the business. It is not shown or claimed that this track was unsafe for any of the ordinary uses of side tracks, and the accident did not arise from any such defect. The lay of the land was such as to be readily seen by any one who passed along the track at ordinary times. The plaintiff knew that the roadbed there was not ballasted, and was bound to know that there might be irregularities of surface anywhere. The chances of such an accident were not such as to suggest danger as very likely. There was, of course, a probability that cars might have to

R. R. Co., 51 Mich. 253, 262; *Hewitt v. R. R. Co.*, 67 Mich. 61, 16 Am. Neg. Cas. 122, *ante*.

"While it is the duty of the company to furnish sufficient and safe material, machinery, and other means by which the work of the employed is to be performed, and keep the same in order and repair, and his contract implies that, in regard to these matters, the em-

be coupled at one place as well as another, and sometimes when there was not much daylight. But the company had a right to expect that every brakeman would use reasonable care in examining his footing and surroundings, and we think they cannot be regarded as at fault for not guarding against an occurrence which was as likely to happen in any place where the ground was uneven, and to completely insure against which would require a side track to be as expensively built as a main track. Their duty to plaintiff was not to see that he actually did know what the exact condition was at this point. They had a right to rest on the probability that any one would know what was generally to be seen by his own observation, or by information from those who were on the spot working with him, and who might fairly be expected to do their duty."

* * *

In *HATHAWAY v. MICHIGAN CENTRAL R. R. Co.* 51 Mich. 253 (October, 1883), judgment for plaintiff for \$9,000 in the Jackson Circuit Court was *reversed*. Plaintiff was a brakeman and while making a coupling of cars, as directed by conductor of defendant's freight train, his arm was caught between the bumpers and crushed so as to require amputation. He alleged negligence of defendant in not informing him of the dangerous nature of the coupling he was required to make, the cars being those of another railroad where double deadwoods were used instead of single deadwoods as on defendant's cars. The opinion was rendered by

SHERWOOD, J. The ruling is stated in the syllabus to the official report as follows: "The omission of a railroad company to warn an inexperienced brakeman of the specific danger of coupling cars that are furnished with double deadwoods does not make the company liable for an injury received by him in so doing, if the risk is such as to be manifest to any person, and if, on being employed, he was warned in general terms of the perils of coupling cars of different construction, and was told not to take any chances."

In connection with the *HATHAWAY* case, see *MICHIGAN CENTRAL R. R. Co. v. SMITHSON*, 45 Mich. 212 (1881), switchman injured by having his hand crushed while coupling a freight car furnished with double deadwoods and received from another road where such a contrivance was generally used, where judgment for plaintiff was *reversed*, on the ground of assumption of risk.

In referring to the *SMITHSON* case the court (in the *HATHAWAY* case) said: "This court decided in the *SMITHSON* case that it was not negligence in the defendant to take over its road the double deadwood cars by which the plaintiff was injured; that the business of the road itself is the best notification; that many differences requiring attention in coupling are to be encountered by brakemen; 'that every man of ordinary intelligence in the employment of the company knows that the Michigan Central Railroad is a great common way for all the railroad companies in the country, and that the cars of

ployer will make adequate provision against negligence on the part of the company, and that no danger shall ensue to him therefrom, it is well settled that the employed assumes all the risks and perils usually incident to the employment, and that included in such risks and perils are those which it is a part of the duty of the employed to take knowledge of by observation. 2 Thomp. Neg., 983; Cooley, Torts, 551; R. R. Co. v. Austin, 40 Mich. 247, 16 Am. Neg. Cas.

the several railroads and transportation companies differ, and that all their differences may appear at some time in the cars he may be called upon to couple or uncouple; that every train is likely to have several kinds of cars in it; and he cannot assume, as he passes from one car to another, that the two will be alike, much less that the whole train will be.' " * * *

In *BREWER v. FLINT & PERE MARQUETTE R'Y Co.*, 56 Mich. 620 (1885), the syllabus to the official report states: "A brakeman, whose business it also was to couple cars, had his arm crushed in trying to couple to another car a caboose the drawbar of which was some six inches below that of the other car and of cars generally. The caboose had been in that condition for a month, as the brakeman himself knew, and it had been reported for repairs, but the fact that the drawbars were not on the same level must have been apparent to any one attempting to couple the cars, if he used his eyes. *Held*, that he could not recover against the railway company."

In *DAVIS v. DETROIT & MILWAUKEE R. R. Co.*, 20 Mich. 105 (1870), an action by plaintiff for injuries received by him while in the employ of defendants as "head yardman" at Detroit, alleged to have been occasioned by the incompetency and carelessness of an engine driver, also in defendants' employ, whose business it was to run a "pony engine" used for training cars, at the depot in Detroit,

and by whose carelessness a collision occurred, judgment for defendants was *affirmed*. Where general reputation of an employee's unfitness is alleged by another employee, the burden of proof and the employer's knowledge thereof is upon plaintiff. Where one employee having knowledge of the unfitness of another employee, does not inform his employer thereof, he assumes the risks arising from such unfitness.

In *GARDNER v. MICHIGAN CENTRAL R. R. Co.*, 58 Mich. 584 (January Term, 1886), judgment for plaintiff for \$5,000 in the Berrien Circuit Court (the injury resulting in amputation of leg), was *reversed*, the ruling by SHERWOOD, J., being stated in the syllabus to the official report as follows: "A switchman who had been strictly cautioned against having anything to do with coupling cars tried to uncouple some while the train was moving, and had his foot caught where the planking had been for some time slightly broken, though the defect had not been seen by him as yardman and the railroad company had no notice of it. *Held*, that he could not recover for the injury resulting to him."

"A railroad employee takes the ordinary risks of the work for which he hires; and if the company has used proper diligence in choosing competent servants it is not liable in damages for an injury to one of them caused by the carelessness of another."

102, *ante*; Swoboda *v.* Ward, 49 Mich. 420, 16 Am. Neg. Cas. 1, *ante*; Henry *v.* Railway Co., 49 Mich. 498, 16 Am. Neg. Cas. 117, *ante*; Batterson *v.* Railway Co., 53 Mich. 128, *supra*; Brewer *v.* Railway Co., 56 Mich. 620; Hewitt *v.* R. R. Co., 67 Mich. 61, *supra*; Davis *v.* R. R. Co., 20 Mich. 126; Gardner *v.* R. R. Co., 58 Mich. 584; Gibson *v.* Railway Co., 63 N. Y. 449; Owen *v.* R. R. Co., 1 Lans. 108; Ladd *v.* R. R. Co., 119 Mass. 412, 15 Am. Neg. Cas. 491*n*; Lovejoy *v.* R. R. Co., 125 Mass. 79, 15 Am. Neg. Cas. 475." * * *

BREIG *v.* CHICAGO AND WEST MICHIGAN RAILWAY COMPANY.

Supreme Court, Michigan, October Term, 1893.

[Reported in 98 Mich. 222.]

EMERY WHEEL BREAKING—FLYING FRAGMENTS INJURING MACHINIST — DEFECTIVE WHEEL — NOTICE — ASSUMPTION OF RISK.—Where plaintiff, while attending and operating an emery wheel used in defendant's car shops for polishing and sharpening tools, etc., was injured by the breaking of the wheel, some of the pieces flying into his face, defective material in the wheel being alleged, and it appeared that he had worked for four years as a machinist, it was held that he assumed the risks arising from the use of the machinery and from such defects as were known to him.

NOTICE OF DEFECT—PROMISE TO REPAIR—EVIDENCE—INSTRUCTION.—Where plaintiff alleged that he had complained to defendant of the defective nature of the wheel and that defendant promised to remedy the same, but there was no evidence of such promise to repair, it was error to submit to the jury the question of defendant's liability on that point.

ERROR to Muskegon. Defendant brings error. The case is stated in the opinion. *Judgment reversed, and no new trial ordered.*

SMITH, NIMS, HOYT & ERWIN (SMILEY, SMITH & STEVENS, of counsel), for appellant.

TURNER, TURNER & TURNER, for plaintiff.

Montgomery, J.—This is an action of negligence. Plaintiff was in the employ of defendant in its foundry and car shops. The declaration avers that plaintiff's duties consisted in attending and operating an emery wheel, which wheel was used for the purpose of polishing and sharpening tools used in said shop and for gumming saws; that while the plaintiff

was gumming a saw, using the emery wheel for that purpose, the wheel broke, and he was injured by some of the pieces flying into his face, cutting his lips, and doing other serious injury. The negligence charged against the defendant was:

1. That the wheel was not properly encased.
2. That an inferior kind of stone was used; that the stone used was not filled with copper wire, or wire of any kind.
3. That the wheel was run at an improper rate of speed.
4. That the stone furnished to be used in said wheel would not properly fit in such manner that it could be made secure.
5. That there was no rest or guard connected with said wheel.

The declaration also averred that plaintiff had called the attention of the foreman of the shop to the fact that the shaft was too loose, and he had promised to remedy the defect. The circuit judge charged the jury as follows:

"If an employee, knowing that a machine is unsafe, works upon it, consents to work upon it, has pre-knowledge, understands its condition, understands that it is in an unsafe condition, and knowingly continues to work with it, he assumes the risks that are liable to follow. If he does that without finding any fault, he assumes them the more; and he also assumes them even if he does find fault, unless, as a result of his finding fault, some promise is made to him by his employer to repair or correct, and there is a failure to do it within the time promised, or within a reasonable time."

This is, in the abstract, a correct statement of law. *Sjogren v. Hall*, 53 Mich. 274, 16 Am. Neg. Cas. 25, *ante*; *Prentiss v. Mfg. Co.*, 63 Mich. 478, 16 Am. Neg. Cas. 26, *ante*; *Kean v. Rolling Mills*, 66 Mich. 277, 16 Am. Neg. Cas. 10, *ante*; *Melzer v. Car Co.*, 76 Mich. 94, 16 Am. Neg. Cas. 10, *ante*. But the defendant complains, and justly, that the facts of the present case did not justify the submission of the questions covered by the instruction to the jury; that the instruction left the jury to find that the defects were complained of by the plaintiff, and that there was a promise to remedy them. The record contains no evidence to justify any such charge. On the contrary, the plaintiff testified: "I remember calling the attention of Mr. Steinroose, the foreman, to the condition of the wheel. I cannot tell exactly the day. It was the same week before I got hurt, I think. I called his attention to it. I told him to see Mr. McKinley; the machine had got to be

looked over or somebody would get hurt, may be get killed right there. He said he was busy, and he said the shaft is too loose in the box; that is all he said, and he went. He didn't stop to look it over. He looked just a little. He had no time for going around."

The record also discloses that the other alleged defects were not only open to the plaintiff's inspection, but that he actually knew of them. He testified: "I knew there was no solid rest there, and never had been. I knew before the accident happened that the shaft was loose in the box, and getting worse all the time; and I knew it didn't have any guard or cover; that it never had had. I knew that it run fast. I had seen it a great many times, almost daily."

The testimony further showed that the plaintiff made use of a block of wood for a rest, which he sometimes fastened solidly to the frame, but on the occasion in question did not. This was a block which he had made himself. He testified that nobody told him to make it; that he made it of his own accord; that the reason he did so was because he could not hold the saw and not have any rest; that he had used the rest a couple of months anyhow.

Plaintiff had worked in the shop for four years as a machinist, and must be held to have assumed the risks arising from such defects as were known to him. *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, 16 Am. Neg. Cas. 129, *ante*, and cases above cited.

The evidence as to the material used in the wheel failed to establish that it was a defect to use a wheel not filled with copper wire. One manufactory had adopted this method of making emery wheels, but it was not general. The wheel in question was manufactured by a reputable company, and any defect in it would not be apparent to observation. The plaintiff testified: "I found out that the emery wheel that bursted was too soft right there on the work, gumming the same saw. I didn't know it was too soft before. I hadn't used that stone before. I found that the wheel was too soft at the first tooth, but I couldn't help it; I didn't have any other stone."

He continued to use the wheel until the accident occurred. It would appear that, if the stone was defective for the reason that it was too soft, the plaintiff was the only one who knew of the defect, and he assumed the risk.

There was no case for the jury. The circuit judge should, in response to defendant's request, have directed a verdict for the defendant.

The judgment will be reversed, and no new trial ordered. The other justices concurred.

FIREMAN KILLED IN COLLISION — TRAIN DISPATCHER — FELLOW-SERVANT — CONTRIBUTORY NEGLIGENCE — RULES AND REGULATIONS — DAMAGES — MORTALITY TABLES — PECUNIARY MEANS — EVIDENCE — LAW OF MASTER AND SERVANT.— In **HUNN, Adm'r v. MICHIGAN CENTRAL R. R. CO.**, 78 Mich. 513 (*October term, 1889*), fireman on defendant's locomotive fatally injured in collision, judgment for plaintiff in the Jackson Circuit Court was *reversed*. GIBSON & PARKINSON (H. M. CAMPBELL and ASHLEY POND, of counsel), appeared for appellant (defendant below); HAMMOND, BARKWORTH & COBB (THOMAS A. WILSON, of counsel), for plaintiff. The judgment was reversed for erroneous admission of evidence as to pecuniary means of the deceased at time of his death. Mr. Justice CHAMPLIN discussed the case at length, a summary of the points decided being fully set forth in the syllabus to the official report as follows:

" 1. A train dispatcher who has absolute control over a division of a railroad, so far as the running and operating of trains is concerned, is not a 'fellow-servant' with other employees acting under his orders.

" *So held*, where, by reason of the failure of a train dispatcher to notify one of two engineers of the meeting point established for two engines, and to order one of them held at such point, a collision occurred, and a fireman on one of the engines was killed; and in a suit to recover damages under the statute the railroad company defended on the ground that the train dispatcher and fireman were fellow-servants.

" 2. Contributory negligence to defeat a right of action must be that of the party injured.

" *So held*, where the court was requested to charge the jury that although they might find the defendant guilty of negligence, yet, if the fellow-servant of the deceased contributed to produce his death, the plaintiff could not recover, which request is held to have been rightly refused.

" 3. Where in a railroad negligence case the defendant claims contributory negligence of the fellow-servant of the deceased in running the trains in violation of the rules of the company as to speed, testimony is admissible on the part of the plaintiff tending to show that a strict compliance with the rules was impracticable, and

that they were obeyed as nearly as possible and run the trains on the schedule time fixed by the company.

" 4. The mortality tables contained in How. Stat. § 4245, show the probable life expectancy of a healthy person, whose age is given, but are not conclusive evidence; and when offered in connection with proof of the physical condition of the deceased at time of his death, and all testimony which may reasonably affect his duration of life, the jury must determine from *all* of the testimony before them such probable duration of life had the deceased not died as a result of the injury complained of.

" 5. Whether damages found by a jury are excessive or not, does not present a question of law. If no improper testimony affecting the subject of damages has been admitted, and the court has given to the jury proper instructions to guide them in reaching a conclusion, the amount of damages awarded is beyond the reach of a writ of error.

" 6. Evidence of the pecuniary means of the husband at time of his death is inadmissible in a suit to recover damages for the loss sustained by such death, alleged to have been caused by the negligence of the defendant.

" 7. A declaration which states a cause of action and is not demurred to is sufficient after verdict.

" 8. The following propositions are summarized from the opinion of Mr. Justice Champlin:

" *a.* This court long ago announced and has steadily adhered to the doctrine that a master is not liable to a servant for injuries received through the negligence of a fellow-servant while engaged in a common employment. *R. R. Co. v. Leahey*, 10 Mich. 193; *Davis v. R. R. Co.*, 20 Mich. 105; *R. R. Co. v. Dolan*, 32 Mich. 510; *R. R. Co. v. Austin*, 40 Mich. 247; *Quincy Mining Co. v. Kitts*, 42 Mich. 34; *Day v. R'y Co.*, 42 Mich. 523; *R. R. Co. v. Smithson*, 45 Mich. 212; *R. R. Co. v. Gilbert*, 46 Mich. 176; *Smith v. Potter*, 46 Mich. 258; *Henry v. R'y Co.*, 49 Mich. 495; *Greenwald v. R. R. Co.*, 49 Mich. 197; *Ryan v. Bagaley*, 50 Mich. 179; *Gardner v. R. R. Co.*, 58 Mich. 590.

" *b.* Perhaps no satisfactory rule has yet been formulated by which it may in all cases be determined *who* are fellow-servants, in such sense as to shield the master for the negligence of his servant. We may start, however, where the rule is clear, that a master is liable to his servant for an injury caused by his own negligence.

" *c.* The master may not choose to give his personal attention to his business, and may desire to put another in his place, to manage and control it for him as fully as he might do if personally present. Such person is his *alter ego* (another self), and the master is as responsible for his acts of omission and commission, while engaged in the business intrusted to him, as if he did such acts himself.

"d. It is the duty of the master to supervise, direct, and control the operations and management of his business, so that no injury shall ensue to his own employees through his own carelessness or negligence in carrying it on, or else furnish some person who will do so, and for whom he must stand sponsor. This is true of natural persons, and it is especially true of corporations, who can only act through natural persons.

"e. Whenever the business conducted by a person selected by the master is such that he is invested with full control (subject to no one's supervision except the master's) over the action of the employees engaged in carrying on a particular branch of the master's business, and, acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employees to obey, then he stands in the place of the master, and is not a fellow-servant with those whom he controls. *Quincy Mining Co. v. Kitts*, 42 Mich. 39.

The cases cited in the HUNN case (preceding paragraphs) are reported with the Michigan cases in this volume of AM. NEG. CAS.

GAVIGAN v. LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY.

Supreme Court, Michigan, July, 1896.

[Reported in 110 Mich. 71.]

SECTIONHAND INJURED BY FREIGHT CAR PUSHED AGAINST ANOTHER CAR — SECTION BOSS — FELLOW-SERVANT — SCOPE OF EMPLOYMENT — ASSUMPTION OF RISK. — In an action to recover damages for injuries sustained by plaintiff, an experienced sectionhand in defendant's employ, it appeared that plaintiff was engaged, with other men of two section gangs, in relaying a spur-track with rails that had been unloaded on the track, and it became necessary to move two freight cars standing on the track. Plaintiff attempted to climb upon one of the cars to set the brake, in obedience to the orders of the section boss in charge of the work, and while climbing up the ladder at the end of the car, the other car was pushed against him. *Held*, that if there was negligence, it was that of the section boss and those working under him, all of whom were fellow-servants of the plaintiff. *Held*, also, that the fact that plaintiff was directed by a superior servant to perform a service outside of the scope of his employment, and was injured in its performance, did not give him a right of recovery against defendant where the danger of the service was apparent and was performed without objection by plaintiff.

ERROR to Hillsdale. The facts are stated in the opinion.

Case by Andrew J. Gavigan against the Lake Shore and Michigan Southern Railway Company for personal injuries. From a judgment for plaintiff, defendant brings error. *Judgment reversed.*

C. E. WEAVER (GEORGE C. GREENE and O. G. GETZEN-DANNER, of counsel), for appellant.

C. M. BARRE, E. J. MARCH, and WATTS, BEAN & SMITH, for appellee.

Hooker, J. — The plaintiff was a sectionhand upon a railroad, and had many years' experience in such capacity, and as foreman of such gangs. On the day that he was injured, the section gang of which he was a member, and a gang of an adjoining section, were engaged in relaying a spur-track with rails that had been unloaded at a point upon said track. In order to distribute such rails, it was necessary to move two freight cars standing upon the track, and the plaintiff attempted to climb upon one to set the brake. While climbing up the ladder at the end of the car, the other car was pushed against him by the other man engaged in the work, and he was injured. He testified that he was ordered by the section boss in charge to climb upon the car, and that he supposed that he would have lost his place if he had refused, and that it was part of the duty of sectionmen to move cars, or climb upon them to manipulate the brakes. The uncontradicted evidence shows that the plaintiff and all of his co-laborers obeyed, without protest or question, the direction to move the loaded car, and by pushing and the use of bars they had moved it for a distance, and to a point where the dust and dirt of the highway made the work difficult. Then they resorted to bumping the loaded car with an unloaded one, all uniting in pushing it with force against the loaded car several times, thereby moving it to a point in close proximity to the main track. It was to prevent its being run into the switch and upon the main track that the direction to climb the car and put on the brake was given.

We have so often held that the section boss is a fellow-servant with the men under him, and pointed out the distinctions applicable to the question of fellow-service, that we deem it unnecessary to repeat them here. We have no doubt that, in running the car back and forth, all of those engaged were fellow-servants. The important questions are:

1. Was the plaintiff asked to perform an extraordinary service, outside of the scope of his employment, in moving the cars, and in climbing the ladder for the purpose of setting the brake?

2. If so, does it follow that the act of the section boss in requesting such service was the act of the master and is the master liable for the injury under such circumstances?

Counsel for the plaintiff appear to contend for the broad propositions that, in directing a service outside of the scope of the employment, the boss represented the master, and that, by consenting to perform the service, the plaintiff did not assume the risk, inasmuch as he might be discharged by the boss if he refused to perform the service. In other words, the master is to be considered an insurer of the servant performing extraordinary service by direction of one in charge for fear of discharge. If the master is to be charged with neglect, it is for a failure to perform a duty, and, had he himself given the command in this case, the only possible negligence would be the request to perform extraordinary service, unless there was some hidden danger from the service. Many cases hold, that where an employee of mature years and of ordinary intelligence and experience is directed by the employer himself to do temporary work, outside of the business he has engaged to do, and enters upon its performance without objections on account of his want of skill, knowledge or experience in doing such work, no negligence can be predicated upon such act alone. *Bailey Mast. Liab.* 220, and cases cited. The master who asks a servant to perform some hazardous service outside of his employment, the danger of which is not apparent, and of which the master is advised is under an obligation to inform the servant of such danger; but where the danger is obvious, or equally known and apparent to both, the case is different. The analogy is close between such a case and one where one employs an infant or inexperienced person. In such case the master owes a duty to point out the danger; but, where the danger is obvious or known to such person, there is no such duty. *McGinnis v. Bridge Co.*, 49 Mich. 466, 16 Am. Neg. Cas. 127, *ante*; *Welch v. Brainard*, 108 Mich. 38, 16 Am. Neg. Cas. 74, *ante*.

Counsel for defendant cite us to the cases of *Chicago, etc. R. Co. v. Bayfield*, 37 Mich. 205, 16 Am. Neg. Cas. 87, *ante*,

and *Jones v. Railway Co.*, 49 Mich. 573 (1), in support of their contention. A quotation from Bailey, Mast. Liab. pp. 222-225, is in point here: "While great stress is laid in some cases upon the fact that the risk has been increased, as well as, in other cases, that the servant was injured while in the performance of a hazardous act outside of his general employment, yet it is difficult to ascertain that any special importance is to be attached to that fact alone, any further than that of the risks of the general employment, thus increased, are not assumed as risks incident to the employment, and therefore knowledge thereof, actual or presumed, must be shown by the

1. In *JONES v. LAKE SHORE & MICHIGAN SOUTHERN R'Y Co.*, 49 Mich. 573 (January, 1883), passenger-brakeman while engaged in yard duties, outside the scope of his employment, struck by projecting lumber from defectively loaded car which he was attempting to couple to a box car, judgment for plaintiff in the Lenawee Circuit Court was *affirmed*, the points decided in the opinion rendered by MARSTON, J., being stated in the syllabus to the official report as follows:

"In an action by a brakeman against a railway company for an injury received while doing dangerous work for which he had not been hired, he can show what he said on being ordered to perform it, and that he protested against the requirement.

"A party can always show by his own testimony that he did not enter into an agreement relied on against him, or voluntarily enter upon the performance of work which had been imposed upon him, but for which he had not been engaged; and he may show this by testimony of what he said at the time he was directed to do such work.

"In an action by a brakeman by his employer for injuries received while engaged in more dangerous work, which he had been required to do, it is proper to allow a competent wit-

ness to show what the actual duties of a brakeman were in practice, in order to find how the additional duties differed therefrom. But where the witness himself was hired as train baggageman, and, like plaintiff, had been ordered to take part in the extra work, a question as to whether, in his opinion, the order called him out of the line of his duty, was immaterial.

"Where a railroad employee is injured while in the performance of work to which he was wrongfully assigned and which he had never agreed to do, he is entitled to recover damages from the railroad company.

"Where a brakeman, on going into the employment of a railroad company, signs a contract binding him to obey all orders, rules, and regulations, but in which the general language applies equally to all classes of employees, the agreement to obey all orders must be construed to apply to all which are issued to him in the line of duty in which he is employed; and it does not empower the company to assign him to other duties wholly disconnected therewith and differing therefrom. And while the clause binding him to use care and caution applies to anything he may undertake to do, it is for the jury to decide whether he has violated it."

master, unless they are such as are obvious, requiring no special knowledge or skill to understand or appreciate. If such dangers are not obvious, and the employee may not be presumed to understand or appreciate them, then he may be warned and instructed. I know of no rule that, where the servant fully understands and comprehends the dangers of an increased risk, or of a risk attendant upon a temporary or occasional act of service, and he performs the act, or attempts to do so, the master is liable for the injury he may sustain, merely upon the ground of such increased risk, or risk attending such temporary employment. The liability in these as in other respects is made to depend upon the knowledge and experience of the servant, and the warning and instructions given, where any such are by law required. The rule has been stated that if, while in the performance of such a temporary service, the servant's opportunity for observing the danger was equal to that of the company, or if he was required to perform an unusually dangerous service for good reason, as for the safety of passengers, then the master cannot be said to have been negligent.

"In *Jones v. Railway Co.*, 49 Mich. 573, *supra*, from the report of the case, it might be understood that the mere fact of being required to perform other duties than such as were properly embraced in his contract would impose a liability upon the master to respond in damages for injury he might sustain while so engaged. Yet such could not have been intended by the court, but, rather, the ground for recovery was within the principles stated in *Chicago, etc., R. Co. v. Bayfield*, 37 Mich. 205, *supra*. In fact, the court so state. There the recovery proceeded upon the ground of directing an inexperienced lad, who did not comprehend the danger, to perform the hazardous duty of applying brakes to moving cars.

"The same position was taken by counsel in *Cole v. Railway Co.*, 71 Wis. 114, to wit: That the mere direction of the master to perform such temporary and dangerous work is negligence on the part of the master sufficient to sustain the action of the employee so injured in the performance of such work while he is using ordinary care on his part. The court say: 'We are very clear that the broad rule contended for by the learned counsel for the respondent is not sustained by the authorities, nor by the general rules of law which define the relations of the employer and employee. Some of the cases cited may have some general statements which give some countenance to the

rule as stated by counsel; but when the facts of each case are considered, it will, we think, be found that no such broad rule was ever intended to be sanctioned by the courts.' The court further state that negligence of the master cannot be predicated simply on the fact that he directed his employee to do the work; that in every case of negligence the evidence must show some violation of duty on the part of the master. No case can be found where it can be held that the mere fact that the employer requested his employee to perform a temporary work outside of his ordinary employment was a violation of any duty which he owed to his employee. If the particular work ordered to be done is of a dangerous character, and one which requires peculiar skill in its performance, and the servant so directed has not the requisite knowledge or skill for doing the work with safety, and such want of skill is known, or might be reasonably supposed to be known, to the employer, in that case the direction of the master to do the work might be justly held to be a violation of duty which he owes to his employee, even though the employee undertook to do the work without objection or protest upon his part. The Wisconsin court reviews many leading cases upon the subject, including those relied upon by the respondent's counsel, and asserts that none sustain the position contended for by such counsel. The court further say they are not called upon to decide what the rule would be if the employee, when ordered to do such temporary work, objected on account of his want of experience and knowledge, and, notwithstanding such declaration, his employer insisted upon it, and thereupon he undertook to do the work, after such protest, rather than subject himself to the risk of being discharged from his employment. They neither approve nor disaffirm the rule stated in *Leary v. R. R. Co.*, 139 Mass. 587 (15 Am. Neg. Cas. 490¹¹). The weight of authority, as stated in note to *Cole v. Railway Co.*, 71 Wis. 114, *supra*, is that the mere fact of objection and protest by the employee, the conduct of the master not amounting to coercion, does not change the rule; and many cases are cited." See, also, *Keenan v. R. R. Co.*, 145 N. Y. 190.

In *Wheeler v. Berry*, 95 Mich. 251. 16 Am. Neg. Cas. 16, *ante*, it was held that: "The claim that a master negligently put a servant at dangerous work, against his protest, and outside of the scope of his employment, is sufficiently answered by proof that the servant was thoroughly instructed in the use of

the saw by which he was afterwards injured; that whatever danger there was was apparent; that he had full and complete knowledge of the risk; that he was strong in body and mind, and in the full possession of all his faculties; and that he had frequently performed the same work for a year, and knew that he was liable to be called upon to do it."

The evidence shows that the section hands were engaged in track work, and without objection, or apparent thought upon the part of any of them that it was out of the line of their duty, proceeded to move a car which was an obstacle to the prosecution of their work. While it may be said that the scope of their employment was a question of fact, and therefore for the jury, the same might be said in a case involving the removal of a rock or other *debris* that had fallen been placed upon the track, or a train or car that had been derailed; and if the jury could be found to sustain such claim, we might not be justified in holding it error to submit the question to the jury, though satisfied from common observation that the work of the section gang is supposed to include nearly all kinds of labor that may be imposed upon them by the roadmaster which relates to or facilitates the maintenance of the track; in short, that they are emergency men, so far as the track is concerned. A section boss who should not require his gang to push a car onto a sidetrack, thereby averting a possible disaster, would be properly subject to severe condemnation, if nothing more; and while we are not disposed to say that it was improper to submit this case to the jury inasmuch as witnesses were found to imply by their testimony that, according to the usages of the road, the boss should have suspended operations until an engine could have been procured to move the car, and a brakeman to climb the car and manage the brake, we think, under the proof in the case, that a verdict of that kind might properly be set aside by the trial court as contrary to the evidence. But, however that may be, we think that it conclusively appears that the plaintiff had as much information as to the character of the work and its possible dangers as any one, and that there is nothing that can appropriately be called coercion. He admits that he was familiar with his duties, and railroad affairs generally, and there was no special danger in climbing the car. It consisted in the act of his fellow-servants, who, negligently or otherwise, pushed the car down against the loaded car before he got to the top of the ladder, and this risk is obvious. This was a risk he as-

sumed when he entered upon the service required, and, under the authorities cited, there is nothing to show breach of duty upon the part of the employer. If the boss was careless in causing the car to be pushed, it was the negligence of a fellow-servant.

The judgment is reversed. No new trial will be ordered. GRANT and MOORE, JJ., concurred with HOOKER, J. MONTGOMERY, J., concurred in the result. LONG, Ch. J., did not sit.

SECTION BOSS CUTTING DOWN TROLLEY WIRE FATALLY INJURED BY RECOIL OF THE WIRE — SCOPE OF EMPLOYMENT — ROADMASTER — FELLOW-SERVANT — DAMAGES — INSTRUCTIONS — ERROR. — In **WALKER, Adm'r, v. LAKE SHORE & MICHIGAN SOUTHERN R'Y CO.**, 104 Mich. 606 (*April, 1895*), action for damages for negligent killing of section boss in defendant's employment, judgment for plaintiff in the Kalamazoo Circuit Court was *reversed*. BOUDEMAN & ADAMS and C. E. WEAVER, appeared for appellant (defendant below); OSBORN, MILLS & MASTER (E. S. ROOS, of counsel), for appellee (plaintiff below). The facts of the case and the points decided are set out in the syllabus to the official report as follows:

"In a suit against a railway company for negligence resulting in the death of one of its section foremen, it appeared that, acting under the special instructions of the roadmaster of a division of the defendant's road to cut a trolley wire which a street-railway company had strung over defendant's track, the decedent climbed upon a box car which had been run underneath the wire, and, while standing upon a stepladder which he had placed on top of the car, drew the wire down by placing one arm over it, and, with a pair of nippers, cut it until it parted, and, by force of the recoil, threw him to the ground, and caused his death. It further appeared that the wire was about one-third of an inch in diameter, that it was stretched across the track at a tension of about 2,000 pounds; that its breaking strength was about 3,000 pounds; that the outer portion of the wire was copper, while the inside was soft.

"1. Mr. Justice MONTGOMERY filed an opinion, concurred in by McGRATH, Ch. J., holding:

"a. That the contention of the defendant that the roadmaster and the decedent were fellow-servants, and that, therefore, the instructions given by the roadmaster, if they led the decedent into danger, were the instructions of a fellow-servant, for which the defendant is not liable, cannot be upheld; that, in determining whether a servant is called upon to do work outside the scope of his employment, the question does not turn upon that of whether the master would be

liable for the personal negligence of a superior servant; that it becomes a question of authority, and, if one having authority over the servant directs him to do an act outside of the scope of his employment, the servant, in its performance, assumes the risk only of such danger as is apparent; that in order to bring the injured servant within the protection of the rule that, when called upon to perform a service outside of the scope of his employment, the master owes the duty of warning him against all dangers, except those which are obvious to a person of his capacity, skill, and experience, it is not necessary that the order to engage in the outside service be given by the *alter ego* of the master, but it is enough if the superior servant has, in this respect, *controlling* authority; *citing* Chicago & N. W. R'y Co. *v.* Bayfield, 37 Mich. 205, 212; Jones *v.* L. S. & M. S. R'y Co., 49 Mich. 573 (1).

"*b.* That it cannot be held, as matter of law, that the danger was as apparent to the decedent as it was to any one, and that, therefore, in consenting to engage in this work without objection, the defendant assumed the risk of the employment,—it appearing that the decedent was wholly unskilled in the work, and that trolley wires were new in the city where the work was done, and it not being shown that the decedent knew anything about the amount of tension which the wire was sustaining, or the probable result of cutting the wire in the manner it was cut, and it further appearing that the work was done under the eye of one of the defendant's line-men, and that the decedent was given no warning, but that, under the circumstances, it was a question for the jury as to whether the danger was obvious to the decedent; *citing* Smith *v.* Peninsular Car Works, 60 Mich. 501 (2).

"*c.* That it was competent on the cross-examination of the road-master, who had been sworn as a witness for the plaintiff, to ask him if he ever instructed the decedent to cut the wire, and whether he ever stated to the decedent or requested him to cut the wire.

"*d.* That it was competent to ask the same witness, on his cross-examination, as bearing upon the question whether the removal of the obstruction caused by the stringing of the wire was within the line of the decedent's duties as section foreman, how high above the top of one of the high cars an ordinary man's lantern would be when giving certain signals, and if the witness was able to state whether, if the brakeman, an ordinary-sized man, happened to be on one of the high cars, and was required to give and did give a certain sig-

1. CHICAGO & N. W. R'y Co. *v.* BAYFIELD, 37 Mich. 205, 212, is reported on page 87, *ante*; and JONES *v.* L. S. & M. S. R'y Co., 49 Mich. 573, is reported on page 139, *ante*.

2. SMITH *v.* PENINSULAR CAR WORKS, 60 Mich. 501, is reported on page 42, *ante*.

nal, which had been described to the jury, his lantern would go as high as 22 feet.

"e. That it was error for the court, after stating to the jury that they were at liberty to take into account the *data* furnished by the proof consisting of the earnings of the decedent and his life expectancy, and to determine the amount which he would probably have contributed to the family if he had lived, to instruct them further that they were not bound to award any particular, fixed, and definite sum as the exact product of figures based upon such life expectancy, and the life expectancy of decedent's wife, and the period of the minority of his children, and that these figures were given to the jury to enable them to have an intelligible basis for their computation, and not as an absolute rule which they must follow in arriving at a verdict in case they should award damages to the plaintiff, but that they should, however, take such figures into account in making up their verdict, in order that they might not render a verdict for an excessive amount; there being no testimony in the case which would furnish a basis for any other damages than the loss of such contributions to support as the decedent would have been able to make from his earnings, which fact the jury evidently disregarded, and reached the result evidenced by their verdict without any computation, and the court not being prepared to say that the jury may not have construed the language so used as authorizing them to do so. [Decedent was forty years old at the time of his death. He was receiving \$46 per month, and left a widow whose life expectancy was thirty-one years, and three children, aged respectively, fifteen, thirteen and nine years. Plaintiff recovered a verdict for \$7,000.]

"f. That the declaration is defective in not stating the facts as to the existence of the wife and children of the decedent, who would be entitled to damages by reason of his death; *citing* *Hurst v. Railway Co.*, 84 Mich. 539; *Charlebois v. R. R. Co.*, 91 Mich. 59

"2. Mr. Justice GRANT filed an opinion, in which he concurred with Mr. Justice MONTGOMERY on the question of damages, but held that there was no evidence in the case on which to base a charge of negligence against the defendant, and that the judgment should be reversed, and no new trial ordered.

"3. Mr. Justice HOOKER filed an opinion in which he concurred in the reversal of the judgment, coupled with an order for a new trial, and held that it was a question for the jury to determine whether the service performed by the decedent was of so extraordinary a character involving latent danger, as to impose upon the defendant the duty of warning the decedent, if defendant was

aware of the danger, and whether the defendant was negligent in failing to discover and warn the decedent of such danger, if it existed."

BLAIR V. GRAND RAPIDS AND INDIANA RAILROAD COMPANY.

Supreme Court, Michigan, January Term, 1886.

[Reported in 60 Mich. 124.]

PERSON NOT EMPLOYEE INJURED WHILE ATTEMPTING TO BOARD MOVING TRAIN IN ORDER TO SIGNAL TRAIN AT REQUEST OF RAILROAD EMPLOYEE—SCOPE OF AUTHORITY—VOLUNTEER—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.—Where plaintiff, who was not in the employ of the defendant, was seriously injured in attempting to board a moving construction train, which attempt was made in order to signal the train and inform its conductor of a defect in the track, as requested by defendant's watchman, although the latter did not request him to board the moving train, and it did not appear that the watchman had authority to make the request, it was held that the service was voluntarily assumed by the plaintiff and, therefore, at his own risk, and that the facts showed gross negligence on the part of plaintiff (1).

1. In *BRESNAHAN, ADM'X, v. MICHIGAN CENTRAL R. R. Co.*, 49 Mich. 410 (October, 1882), judgment for defendant was *affirmed*, the case being stated in the syllabus to the official report as follows: "A laborer employed by a contractor who had been engaged by a railroad company to lay water-pipes along its right of way, in going home after his day's work was done, made his way along the tracks to a point where trains were constantly passing in both directions, and although there was enough room between the tracks, he was run over by one train while apparently trying to avoid another. He was not employed upon the road and might have gone home without going along the track, but his employment enabled him to know the locality, the risk and the need of watchfulness to avoid injury. *Held*, that no action would

lie for his death." *GRAVES*, Ch. J., said:

"The case on its facts is almost identical with that of *MICH. CEN. R. Co. v. CAMPAU*, 35 Mich. 468, and in principle there is no difference, and the observations there of Mr. Justice COOLEY are strictly applicable: 'The decedent had voluntarily placed himself in a position of great danger. He was making a highway of a railroad track, where he had no lawful right to be, and upon which dangerous vehicles were constantly liable to pass. Under such circumstances he was called upon to exercise more than ordinary care and caution to protect himself against danger which was constantly imminent. Instead of this, he seems not to have availed himself of any precaution whatever. If the plaintiff can recover in a case like this, it is plain that the negli-

BOARDING MOVING TRAIN — CONTRIBUTORY NEGLIGENCE. —

It has always been regarded as negligence for a stranger or passenger to attempt to enter a car in a running train; and especially must such be the case where the attempt is made when the train is running across the country, at a distance from a station or depot, with all the surroundings plainly visible and forbidding in their character.

SIGNAL GIVEN BY STRANGER. — An engineer is not required to heed a signal or stop his train, given by a stranger, when no danger is in sight or reasonably to be apprehended.

DEMURRER — APPEAL — REVIEW — PLEADING AND PRACTICE.

— In passing upon the questions raised in this case [by a special demurrer to a declaration], the court can only consider the statements of fact made by the plaintiff and from them, upon a proper application of the law, determine whether or not the plaintiff has a cause of action against the defendant; and can draw such conclusions only, from the facts stated, as would have come strictly within the province of the jury. The court cannot consider any conclusion stated by the pleader, based upon the facts, or the circumstances surrounding them, which would not naturally and necessarily result therefrom, and these alone are the proper facts to be pleaded.

CASE from Superior Court of Grand Rapids. Plaintiff alleges error. The facts are stated in the opinion. *Judgment affirmed.*

BIRNEY HOYT, for appellant.

T. J. O'BRIEN and J. H. CAMPBELL, for defendant.

gence of the injured party must be held immaterial in any conceivable case.'

"An attempt is made to distinguish the case before us from the case cited on the ground that decedent was a laborer for Brooks, who was executing the contract for laying the water-pipe. This was not an employment upon the road nor in connection with the track and there was nothing in the service of decedent which implied any right or privilege to regard the track as a foot-way, and he had no more warrant than any others to travel up and down upon it." * * *

In COOPS, ADM'R, v. LAKE SHORE & MICHIGAN SOUTHERN R'Y Co., 66 Mich. 448 (1887), judgment for plaintiff in the Superior Court of Detroit for \$5,287, for negligent killing of his intestate by defendant, was reversed,

on the ground that deceased was guilty of such negligence as would preclude recovery. It appeared that Uhlenberg, plaintiff's intestate, was employed by the Peninsular Car Company at Detroit to make brakes at one of its shops. The company's shops were contiguous to the tracks of defendant, but defendant had no interest in the car company's works. The car company manufactured freight cars and it was while some new cars were being switched into defendant's track by defendant's switching crew, that the accident to plaintiff's intestate occurred. When he was killed he had crawled between the wheels of a truck under the hind car and attempted to put a nut lock thereon, by going in at the side of the car, and was run over by the wheels and crushed.

Sherwood, J. — This is a case made coming from the Superior Court of Grand Rapids. It calls for a review of the action of that court in sustaining a demurrer to the plaintiff's declaration and entering final judgment against him.

The declaration contains three counts, which are quite lengthy. The plaintiff's case as stated in the first two counts is substantially as follows:

That the said defendant before and at the time of the committing of the grievances complained of, was conducting and operating its railroad in the State of Michigan, through the township of Plainfield in the county of Kent, through which Rogue river runs, which is crossed in two places by defendant's road on bridges, one of which is called "Bridge No. 1," and the other "Bridge No. 2." These bridges are about half a mile apart, No. 1 being about fourteen feet above the water. That the defendant had in its employ, on the day the injury complained of occurred, one George S. Powell, as a watchman, whose duty it was to watch the said bridges and the track between and near the same between trains, and give notice at once to the defendant of any defects in the bridges or track, and especially to stop locomotives and trains on their approach, and give the necessary signals for that purpose, and thus prevent injuries and accidents to persons and property.

The declaration then avers that the plaintiff, who was not connected with defendant's company in any way, was, on the twenty-first day of August, 1878, requested by the said Powell to go north from Bridge No. 1 to Bridge No. 2 and stop the construction train which was soon to arrive, and inform the conductor of a broken rail in the road a short distance above Bridge No. 1, while he, the watchman, went south to stop trains coming from that direction. Plaintiff was instructed as to the signals to make, and told to stop the train at all hazards, as there was imminent danger of the loss of the lives of some thirty men on the train, and great loss of property. Plaintiff, before starting, saw the broken rail, which was a piece about one foot long broken entirely out of the rail and fallen down at both ends. Plaintiff was only twenty-one years of age, but believing that such imminent danger existed, and that there was no other person who could avert it, undertook to stop the train, and, knowing that such danger did exist, he went to Bridge No. 2, and when the train came in sight running backwards, with the conductor on the nearest car, he made the proper

signal for the train to stop, and repeated such signal a number of times in plain view of the conductor, who saw all of the signals. The train slacked, but when opposite plaintiff it appeared that the conductor and the train were going on to the place of danger, and the plaintiff, having but an instant to consider what he should do, as the train was going by him running slowly, acted on the impulse of the moment and undertook to get on the forward platform of the caboose car for the purpose of giving information of the danger; that this action on the part of the plaintiff was not rash or reckless, and only such chances of injury were taken as a prudent man would take under such circumstances to save life. The conductor did not obey the signal, and did not stop the train; whereby the plaintiff was violently thrown down and injured by the manner stated in the declaration, substantially disabling him for life.

The third count, in addition to what is stated above, avers that gravel had been permitted to be piled up by the defendant at the side of the track, which contributed to the plaintiff's injury by causing his footing to be insecure when attempting to get on the train, and by causing him, when thrown down, to roll down against the oil boxes.

The demurrer was special, and the substance of the grounds is fully stated in the following paragraphs:

1. Ordinary care on the part of said defendant did not at the time and place in said counts mentioned, require, and it did not there and then become, and was not the duty of, the said defendant, on said signals being made, to stop the said train at once or at all, for the purpose stated in said count or otherwise.

2. The defendant did not disregard any duty, at the time and place in said count mentioned, in not stopping the said train at once or at all, and in not regarding or complying with the said signals.

3. The said defendant, by its agents and servants, did not in continuing to run said train along said road, act wilfully, recklessly, wrongfully, or negligently.

4. The alleged injuries of the plaintiff were not caused by the fault, neglect, or wrong of the defendant, its agents or servants, in any respect.

5. No relation existed between the defendant and the plaintiff which imposed upon the defendant, its agents, or servants, any duty to the plaintiff with respect to the running or the

conduct of its said train at the time and place, and under the circumstances, alleged in said count, nor with respect to which any negligence or wrong can be imputed to the defendant.

6. It does not appear that the watchman, Powell, had any authority to direct plaintiff to perform the service in question.

7. The plaintiff was under no obligation to perform the service alleged to have been undertaken by him.

8. It does not appear but that the conductor, or persons having charge of said train, were in the act of stopping said train, or intended to stop, when plaintiff attempted to board said train, and sustained the alleged injury.

9. It does not appear that said train did not stop.

10. No relation existed between the plaintiff and the defendant whereby any duty was imposed on the defendant, its agents or servants, to have the roadbed of said road clear of obstacles, and not to have gravel and earth piled near its track at the time and place in said count stated; or any duty in regard to the condition of its roadbed and track at said time and place, or to stop said train, or any duty in relation to the conduct of said train, or to regard any signals made by the plaintiff.

11. Ordinary care and prudence on the part of the defendant, at the time and place in said third count mentioned, did not require, and it did not become and was not the duty of the defendant to have the roadbed of said road clear of obstacles, and not to have gravel and earth piled near its track, so that persons whose duty it might be to go on said track or near the same, should not be subject to any unusual danger thereby.

12. It was not the duty of the plaintiff to go onto said track, or near the same, at the time and place and under the circumstances in said count stated.

13. Ordinary care and prudence on the part of the defendant did not, at the time and place in said count stated, require, and it did not there and then become and was not the duty of the said defendant to stop the said train at once or at all, on said signals being made for the purpose stated in said count, or for any other purpose whatever.

In passing upon the questions raised in this case we can only consider the statements of fact made by the plaintiff, and from them, upon a proper application of the law, determine whether or not the plaintiff has cause of action against the defendant. The demurrer admits the facts properly stated in the declaration to be true.

We are permitted to draw such conclusions only, from the facts stated, as would have come strictly within the province of the jury. We cannot consider any conclusion stated by the pleader in the declaration, based upon the facts or the circumstances surrounding them, which would not naturally and necessarily result therefrom, and these alone are the proper facts to be pleaded.

Keeping these rules in view, we proceed to consider the averments made in the declaration, upon which the decision of the case is made necessarily to depend.

The plaintiff was not in the employ of the company, and it owed no duty to him on that account. It is true he had been requested to go north and signal the train to stop, by Powell, and, in making the request, he was told just what to do, and how to do it; but no part of the instructions given included a request that the plaintiff should make the attempt to board the train under any circumstances.

It does not appear that Powell had any authority to make the request. Be this as it may, however, it certainly appears the plaintiff exceeded the instructions given, and he was under no legal duty to obey them, however strong might be the claims of humanity and his moral obligation so to do. But under no circumstances would the duty springing from these latter obligations require him to imperil his own life, or subject himself to any great danger, however laudable and praiseworthy his efforts might be. *Eckert v. Long Island R. R.*, 43 N. Y. 502, 12 Am. Neg. Cas. 397*n*; 2 Thompson on Negligence, 1174. We must, therefore, regard the case upon the facts stated as one in which the service attempted, and which resulted so disastrously to the plaintiff, was voluntarily assumed upon his part, and, therefore, necessarily at his own risk. Fearing that the signals he had given, though seen by the managers of the train, had not been understood, or, if understood, were to be entirely disregarded, to the great danger and imminent peril of the persons upon the train, which was just then passing him at a rate of speed not exceeding four miles an hour, he rushed over a sandy embankment upon the side of the track to the caboose car and made an attempt to get upon its platform, and, failing in his effort, was knocked down by the cars, and in this manner received the injury of which he complains, and for which he seeks to recover damages of the company. Upon

these facts the circuit judge sustained the demurrer, and we think his ruling was correct.

It is claimed on the part of the plaintiff:

1. That it was the duty of this plaintiff to make every effort he could to stop the train without being wantonly reckless.

2. That he was guilty of no contributory negligence in his attempt to enter the car in the running train.

3. That it was the duty of the defendant to have stopped its train when signaled by the plaintiff.

4. That defendant was guilty of wanton and wilful negligence in not stopping the train, and in such case the contributory negligence of the plaintiff cannot be urged to prevent recovery.

5. That, in any event, as the effort of the plaintiff was to save human life in immediate peril, whether the act of the plaintiff was rash or reckless, was a question for the jury and not for the court.

The first point made by plaintiff's counsel we have already considered.

The second point is not well taken. It has always been regarded as negligence for a stranger or a passenger to attempt to enter a car in a running train, and, we think, rightly so; and especially must such be the case where the attempt is made when the train is running across the country at a point not in near proximity to a station or depot, and when all the surroundings are plainly seen, and forbidding in their character, as in this case: *Knight v. Pontchartrain R. R. Co.*, 23 La. Ann. 462, 3 Am. Neg. Cas. 510; *Hubener v. New Orleans & Carrol. R. R. Co.*, 23 La. Ann. 492, 3 Am. Neg. Cas. 514; *Phillips v. Rensselaer & Saratoga R. R.*, 49 N. Y. 177, 5 Am. Neg. Cas. 166; *Chicago, B. & Q. R. R. v. Hazzard*, 26 Ill. 373, 2 Am. Neg. Cas. 543; *Damont v. New Orleans & Carrol. R. R.*, 9 La. Ann. 441, 3 Am. Neg. Cas. 504; *Penn. R. R. Co. v. Aspell*, 23 Pa. St. 147, 6 Am. Neg. Cas. 225; *Ill. Cent. R. R. Co. v. Able*, 59 Ill. 131, 2 Am. Neg. Cas. 591; *Gavett v. Manchester & Lawrence R. R.*, 16 Gray, 501, 3 Am. Neg. Cas. 742; *Jeffersonville R. R. Co. v. Hendricks' Adm'r*, 26 Ind. 228, 3 Am. Neg. Cas. 70; *Jeffersonville R. R. Co. v. Swift*, 26 Ind. 459, 3 Am. Neg. Cas. 75; *Ill. Cent. R. R. Co. v. Slatton*, 54 Ill. 133, 2 Am. Neg. Cas. 583; *Lambeth v. North Car. R. R. Co.*, 66 N. C. 494, 6 Am. Neg. Cas. 93; *Jeffersonville R. R. Co. v. Hendricks*, 41 Ind. 48, 3 Am. Neg. Cas. 106;

Eldridge v. Long Island R. R. Co., 1 Sandf. 89, 5 Am. Neg. Cas. 704; *Mich. Cent. R. R. Co. v. Coleman*, 28 Mich. 440, 4 Am. Neg. Cas. 1.

The fact stated bearing upon the third point show the plaintiff's signals were first obeyed, and that the engineer stopped his train north of Bridge No. 2, and about 125 feet from the plaintiff. Apparently the signal was without cause. Such being the fact, and it coming not from an employee of the defendant, but from a stranger, the conductor or engineer would hardly be expected to heed a second warning emanating from the same person. But an engineer is not required to heed the signal to stop his train given by a stranger, when no danger is in sight or may be reasonably apprehended. *Mobile, etc., R. R. Co. v. Blakely*, 59 Ala. 471; *Pakalinsky v. N. Y. Cent. R. R.*, 82 N. Y. 424, 12 Am. Neg. Cas. 396*n*; *Tanner v. Louisville R. R. Co.*, 60 Ala. 621; *East Tenn. R. R. Co. v. Swaney*, 5 Lea. (Tenn.) 119; *Phila. & Reading R. R. Co. v. Spearen*, 47 Pa. St. 300, 12 Am. Neg. Cas. 532; *Scudder v. Ind., Peru, etc., R. R. Co.*, 1 Ind. Sup. Court Rep. 481; 2 *Rorer on Railroads*, 1032; *Indianapolis & St. L. R. R. Co. v. Horst*, 93 U. S. 291, 7 Am. Neg. Cas. 331; *Balt. & Potomac R. R. Co. v. Jones*, 95 U. S. 439, 7 Am. Neg. Cas. 340; *Lewis v. Balt., etc., R. R. Co.*, 38 Md. 588.

Upon the fourth point, the facts given in the declaration present the evidence relied upon of wantonness and wilfulness in the defendant's management of the train, but nothing of that kind appears therein, and the conclusion stated in the declaration upon these facts is entirely without foundation; consequently, whether the rule stated is correct or not is immaterial, as it certainly cannot be applied to the facts stated in this case.

Upon the fifth and last point, we think the case stated shows not only a want of ordinary care, but gross negligence on the part of the plaintiff, amounting to extreme rashness and recklessness, in his attempt to enter the caboose car in the manner he did. His act was voluntary and utterly uncalled for upon the facts stated. The judgment at the Circuit Court must therefore be affirmed. CAMPBELL, CH. J., and MORSE, J., concurred. CHAMPLIN, J., did not sit.

NOTES OF MICHIGAN CASES ARISING OUT OF INJURIES TO EMPLOYEES IN SERVICE OF RAILROAD COMPANIES.

1. Brakemen.

- a. COUPLING CARS.
- b. COLLISION.
- c. DANGEROUS PLACE ON CAR.
- d. DANGEROUS PLACE ON ENGINE.
- e. FALLING OBJECT FROM CAR.
- f. LOADING AND UNLOADING.

2. Car couplers.

- a. BRAKEMEN.
- b. SWITCHMEN.
- c. OTHER EMPLOYEES.

3. Car inspector.

4. Car repairer.

5. Conductors.

6. Engineers.

7. Firemen.

8. Sectionhands.

- a. BOARDING TRAIN.
- b. COLLISION.
- c. LOADING AND UNLOADING.
- d. TRACK.

9. Switchmen.

- a. COUPLING CARS.
- b. DANGEROUS PREMISES.
- c. EXPLOSION.

10. Minor employees.

Among the numerous Michigan cases relating to injuries to Railroad Employees, not reported elsewhere in this volume of AM. NEG. CAS., are the following:

1. Brakemen injured.

a. COUPLING CARS.

Projecting lumber on car — Brakeman injured while coupling — Risk of employment.

In *DAY v. TOLEDO, CANADA SOUTHERN & DETROIT R'y Co.*, 42 Mich. 523 (January Term, 1880), brakeman injured while coupling cars, verdict directed for defendant and judgment thereon in the Wayne Circuit Court was *affirmed*. The opinion delivered by CAMPBELL, J., states the facts as follows: "Day sued the railway company for injuries received in having his fingers caught in coupling cars on a train of which he was brakeman. The train was a freight train, and the car which he claims caused the damage had been brought a few miles from Grosse Isle to Wyandotte, and the plaintiff was unable to say that he had not himself originally attached it to the train. At Wyandotte a car was to be detached, and then the car in question,

which was loaded with lumber, was ordered by the conductor to be re-coupled to another car on the train. The lumber is said by plaintiff to have projected forward more than usual, so as to make it necessary to stoop down to make the attachment, and while doing so plaintiff delayed a little and his fingers were caught in the coupling-link and hurt. The court below very properly took the case from the jury. The injury was from one of the risks incident to the occupation of plaintiff, and he knew better than the conductor or any one else the precise difficulty to be guarded against." * * *

Projecting logs on car—Contributory negligence of brakeman in coupling cars.

In *BRENNAN, ADM'X, v. MICHIGAN CENTRAL R. R. Co.*, 93 Mich. 156 (October Term, 1892), brakeman fatally injured while attempting to couple two cars load with logs, judgment for defendant in the Jackson Circuit Court was *affirmed*, on the ground of contributory negligence of the deceased. The second paragraph of the syllabus to the official report states the case as follows: "A brakeman who voluntarily enters upon his employment, with notice, from a statement in a rule of the company and from his own observation, of a custom of the company to transport cars loaded with logs which project over the ends of the cars in such a manner as to make the service more or less dangerous, is guilty of such negligence as will bar a recovery for injuries received while attempting to couple two of said cars, by reason, as claimed, of such manner of loading." Opinion by MONTGOMERY, J.

Brakeman injured coupling cars—Conductor acting in place of engineer.

In *RODMAN v. MICHIGAN CENTRAL R. R. Co.*, 55 Mich. 57 (1884), brakeman injured while coupling cars, the syllabus to the official report states the decision as follows: "Whether a brakeman can recover against the railway company for an injury received in consequence of the conductor's managing the locomotive in the engineer's absence: *query*." Judgment denying such liability affirmed by equal division.

Defective coupling apparatus—Brakeman injured.

In *KARRER v. DETROIT, GRAND HAVEN & MILWAUKEE R'Y Co.*, 76 Mich. 400 (1889), head brakeman on defendant's freight train injured by his fingers being crushed while attempting to make coupling, defective drawbar being alleged, judgment for plaintiff was *reversed* on the ground of grossest carelessness on his own part, as shown from his own case.

In *CREGG v. CHICAGO & WEST MICHIGAN R'Y Co.*, 91 Mich. 624 (May, 1892), where brakeman on freight train was injured while attempting to couple to a car upon a siding at a way station, a defective drawbar rendering the act of coupling difficult and dangerous, and the last car being loaded with logs, and a first attempt being unsuccessful he stepped upon snow bank, his foot slipped, and he was thrown back between the cars, judgment for plaintiff in the Muskegon Circuit Court was *affirmed*.

In *SECORD v. CHICAGO & MICHIGAN LAKE SHORE R. R. Co.*, 107 Mich. 540 (December, 1895), plaintiff, a brakeman in defendant's employ, injured while coupling cars, finger and thumb being crushed, judgment for plaintiff for

\$5,000 in the Van Buren Circuit Court was *reversed*, on the ground of assumption of risk and contributory negligence. The drawbar used was imperfect, but plaintiff had used such drawbars daily. Plaintiff could have avoided the injury after he discovered the danger, but failed to do so.

Brakeman crushed between cars — Damages.

In *VAN BRUNT, ADM'R, v. CINCINNATI, JACKSON & MACKINAW R. R. Co.*, 78 Mich. 530 (October Term, 1889), it appeared that William H. Van Brunt, the plaintiff's intestate, while in the employ of the defendant as brakeman on a freight train, was crushed between defendant's caboose car No. 86 and caboose car No. 88, on January 1, 1888, at Marshall, and died from his injuries on the next day, about five hours after the injury. The administrator brought suit to recover damages on account of such injury and death. The court below [Calhoun Circuit] directed a verdict for the defendant. The court based its direction, among other things, upon the ground that no damages were shown. The Supreme Court *affirmed* the judgment for defendant. It was held (as per syllabus to the official report), that "the 'fair and just damages' which the jury are authorized to assess against a railroad company, in a suit under How. Stat. § 3392, must have reference to the *pecuniary* injury resulting from the death which is the basis of the action." Opinion by MORSE, J.

Stepping between ties on siding — Coupling "kicked" car — Caught between deadwoods of cars.

In *MUELLER v. LAKE SHORE & MICHIGAN SOUTHERN R'y Co.*, 105 Mich. 487 (May, 1895), judgment for plaintiff in the Wayne Circuit Court was *reversed*, the case being stated in the syllabus to the official report as follows: "The declaration in a personal injury case averred that the plaintiff, a freight brakeman, attempted to make a coupling of a car that had been kicked upon an unballasted siding; that he was ignorant of the condition of the siding, and could not see it, it being a dark and cloudy night; that plaintiff took two or three steps along on the ties, and while in the act of coupling said kicked-off car to another car, he being at the time between the two cars, he stepped with the train between the rails, and, instead of stepping upon the earth or a tie, as he expected, stepped between a couple of ties and was tipped over, his feet falling unexpectedly over a foot, causing him to lose his balance, his control over his equilibrium and his body and limbs, and his right arm was caught between the two deadwoods of said cars, and crushed. The testimony of the plaintiff showed that the cause of the injury was his act in placing his arm between the deadwoods, where it could be and was caught when the moving car came back against the stationary car; that the movement by which his arm was so placed was not involuntary; that he was not thrown and did not stumble into this position; that he stood with his arm against the stationary car, in a position at that time discovered by him, and waited for the moving car to come against it, and the instant it did so his arm was caught. And it is held that plaintiff's own testimony fails to show either that he was in the exercise of due care, or that the unballasted condition of the track caused the injury in the manner complained of." Opinion by MONTGOMERY, J.

Caught between deadwoods of cars.

In *DYSINGER v. CINCINNATI, SAGINAW & MACKINAW R'y Co.*, 93 Mich. 646 (October Term, 1892), judgment for plaintiff in the Shiawassee Circuit Court was *reversed*, on the ground of assumption of risk. It appeared that plaintiff was a brakeman on defendant's freight train, and had his arm caught between two deadwoods while attempting to draw a coupling pin. He stepped in between the cars while the slack was being given in order to enable him to draw the pin. No claim was made that the roadbed or drawbars or deadwoods were defective or out of order. Plaintiff was of mature age, possessed of all his faculties, and did not lack ordinary intelligence. The danger was not concealed, but apparent. Plaintiff held to have assumed the ordinary risk of the employment. Opinion by McGRATH, Ch. J.

In *FENLON v. DULUTH, SOUTH SHORE & ATLANTIC R'y Co.*, 108 Mich. 284 (February, 1896), where brakeman lost an arm while attempting to couple cars supplied with double deadwoods, judgment for plaintiff in the Mackinac Circuit Court was *reversed*, on the ground that the danger was obvious to plaintiff, and that the accident did not happen by reason of defendant's failure to instruct the plaintiff as to the manner of coupling such cars, and that he assumed the risks, having been for some time in service of defendant and the cars being in constant use during such period.

Defective split switch or frog—Uncoupling cars in motion.

In *GRAND, ADM'X, v. MICHIGAN CENTRAL R. R. Co.*, 83 Mich. 564 (December, 1890), brakeman on defendant's freight train killed while coupling cars to a train which was being made up in defendant's yard, a defective split switch or frog being alleged whereby the decedent was caught by his foot in the switch or frog, and run over, verdict directed for defendant in the Jackson Circuit Court was *affirmed*. It was held that the deceased was guilty of contributory negligence in trying to uncouple cars while in motion, and in passing over the switch, in violation of the rules of the defendant.

Defective side track—Switching cars.

In *RAGON v. TOLEDO, ANN ARBOR & NORTH MICHIGAN R'y Co.*, 91 Mich. 379 (April, 1892), brakeman of freight train while switching some cars at a way station injured by reason of defective condition of roadbed of side track, order overruling demurrer was *affirmed*.

On the trial of the Ragon case in the Shiawassee Circuit Court, plaintiff obtained judgment which on appeal by defendant was *reversed*. See *RAGON v. TOLEDO, ANN ARBOR & NORTH MICHIGAN R'y Co.*, 97 Mich. 265 (October, 1893), the first paragraph of the syllabus to which report states the facts as follows:

"Plaintiff, while attempting in the daytime to uncouple a moving freight car from the engine in order that the car might be left on a side track, was injured by stepping into an unfilled space between the ties, near the rail, from two to four inches deep, caused by a failure to ballast the side track the whole width. The side track had been in that condition during the time of plaintiff's employment, and he had passed the place of the injury frequently in the discharge of his duties, but testified that he supposed the

track was smooth. And it is held that there was a failure to show negligence on the part of the defendant; that the plaintiff was, or ought to have been, familiar with the side track, and, if he was not, common prudence dictated that he should not venture between the moving car and engine without first looking under the car to examine the character of the roadbed, all of which the defendant had a right to expect of him. Citing *Gardner v. R. R. Co.*, 58 Mich. 591; *Grand v. R. R. Co.*, 83 Mich. 571."

Brakeman injured on track — Coupling cars.

In *STANLEY v. CHICAGO & WEST MICHIGAN R'y Co.*, 101 Mich. 202 (June, 1894), plaintiff, a brakeman in defendant's employ, while attempting to uncouple cars in obedience to direction of conductor, in order to make a "running" or "flying" switch, thrown onto track and leg injured, the engine having been suddenly started, judgment for defendant was *affirmed*. It was held that the sudden starting of the engine was the proximate cause of the accident, for which the engineer alone was responsible; and that the engineer was a fellow-servant of the brakeman. "It is the established rule in Michigan that employees of freight trains are fellow-servants."

Stepping into cattle guard while uncoupling cars — Risk of employment.

In *FULLER, ADM'X, v. LAKE SHORE & MICHIGAN SOUTHERN R'y Co.*, 108 Mich. 690 (March, 1896), where plaintiff's intestate, a brakeman in defendant's employ, was fatally injured by stepping into a cattle guard while engaged in attempting to uncouple cars, it was held that "a brakeman assumes the risk of coupling and uncoupling cars at a cattle guard, where such guards exist at intervals over the entire road," and judgment on verdict directed for defendant in the Lenawee Circuit Court was *affirmed*.

b. BRAKEMAN INJURED IN COLLISION.

Caboose car on side track used for sleeping purposes struck by other cars — Dangerous place.

In *JACOBS v. LAKE SHORE & MICHIGAN SOUTHERN R'y Co.*, 84 Mich. 299 (December, 1890), judgment on verdict directed for defendant in the Kent Circuit Court was *affirmed*, where plaintiff, a brakeman, while sleeping in a caboose car upon side track which he alleged defendant agreed to furnish and keep in safe place while plaintiff was sleeping, was injured by the car being struck by other cars. It was held that plaintiff, knowing the practice of moving cars upon the side track and against the caboose car, and that it was a dangerous place to sleep in, assumed the risks, and had no cause of action on account of injuries sustained thereby.

Train colliding with tree near track — Brakeman killed.

In *MANNING, ADM'R, v. CHICAGO & WEST MICHIGAN R'y Co.*, 105 Mich. 260 (May, 1895), brakeman killed by alleged collision with tree near track, which threw him from flat car causing him to be run over and killed, judgment for plaintiff in the Kent Circuit Court was *reversed*, the Supreme Court, per LONG, J., holding that there was an utter lack of evidence showing how plaintiff's intestate came by his death; and, also, that the danger was one of the risks of employment.

c. DANGEROUS PLACE ON CAR.

Brakeman crushed between cars — Disobedience of rules.

In *WILSON, ADM'R, v. MICHIGAN CENTRAL R. R. Co.*, 94 Mich. 20 (December, 1892), brakeman killed, judgment for defendant in the Jackson Circuit Court was *affirmed*. The case is stated in paragraphs 2 and 3 of the syllabus to the official report (as per opinion by DURAND, J.), as follows:

"Where an experienced freight brakeman, instead of using side ladders provided by the company for mounting cars, goes between the cars of a moving train, and crawls over or under the bumpers of the cars, in order to reach a foothold or handhold on the opposite side, which he could use as a ladder to enable him to get to the top of the cars, no claim can be sustained for damages on account of the resulting consequences. Citing *Glover v. Scotten*, 82 Mich. 369.

"The contention that, because the defendant must have known that many of its employees, in violation of its rules, were frequently accustomed to go between the cars of moving trains, therefore it cannot be considered negligence for them to do so, can have no force in this case, however conclusively it may be made to apply to strangers, who, seeing repeated violations of known rules, are led into the belief that they are abrogated, or to employees who are compelled by positive orders to violate such rules, or when such a system of timing the trains or conducting the business of the company is adopted as to make it necessary for them to violate known rules of safety in order to do the work required of them. When no such condition exists, employees should observe rules made for their protection as well as for the safety of their fellow-workmen, and failing in this, the fault must be considered their own. Citing *Brennan v. R. R. Co.*, 93 Mich. 156."

d. DANGEROUS PLACE ON ENGINE.

Brakeman riding on tender of engine — Dangerous position — Contributory negligence.

In *BENAGE, ADM'R, v. LAKE SHORE & MICHIGAN SOUTHERN R'Y Co.*, 102 Mich. 72 (September, 1894), it was held (as per syllabus to official report) that: "A brakeman who rides in a standing position on the brakebeam of the tender of an ordinary road engine while backing across a river upon a trestle, at a rate of speed of from five to eight miles per hour, he having no place to hold onto except the drawbar, against which he leans, and being in a position where he cannot see the engineer or fireman or be seen by either of them, is guilty of such negligence as will bar a recovery for injuries received by being struck by the end of a gate which had in some way become unfastened, and swung partly across the track, so as to come in contact with the rear end of the tender, and slide along, and crush the brakeman against the drawbar." * * * Judgment for defendant in the St. Joseph Circuit Court *affirmed*.

Upon the rehearing of the *BENAGE* case, in January, 1895, the former decision was affirmed. The case is ruled by *Glover v. Scotten*, 82 Mich. 369. See *BENAGE, ADM'R, v. LAKE SHORE & MICHIGAN SOUTHERN R'Y Co.*, 102 Mich. 79 (April, 1895).

In *GLOVER, ADM'X, v. SCOTTEN*, 82 Mich. 369 (the case referred to in the preceding paragraph), judgment for plaintiff in the Wayne Circuit Court

was *reversed*, on the ground of contributory negligence. GRANT, J., delivered the opinion of the court, from which the following facts are taken: Plaintiff's decedent was a switchman in the employ of the Wabash, St. Louis & Pacific Railway Company. The engine upon which he was employed ran into a truck owned by the defendant, and driven by his teamster, and resulted in the death of the decedent. Plaintiff sued defendant, claiming that the accident was the result of his employee, for which he was liable. Deceased at time of accident was sitting on the beam of the pilot of the engine, which is next to the "cowcatcher," with his feet hanging down over the cowcatcher. The litigation resulting from this accident is anomalous. Defendant's teamster sued the railroad company for injuries; the company was found negligent, and judgment recovered, which was paid. The railroad company paid defendant for the loss of his team. Plaintiff sued the railroad company in the Circuit Court of the United States for the Eastern District of Michigan, claiming that the death of deceased resulted from the negligence of the company in not ringing the bell, blowing the whistle, stationing a flagman at the crossing, and in obstructing the view of the track. Judge Brown, before whom the case was tried, directed a verdict for the defendant, upon the ground that the deceased was guilty of contributory negligence. Plaintiff then brought this suit. Having recovered verdict and judgment the same was reversed by the Supreme Court, the position of decedent on the engine being clearly negligent.

e. FALLING OBJECT FROM CAR.

Falling of log from car — Derailment — Brakeman injured.

In CONGER *v.* FLINT & PERE MARQUETTE R. R. Co., 86 Mich. 76 (May, 1891), judgment for defendant in the Wayne Circuit Court was *affirmed*. Plaintiff was a brakeman upon a logging railroad train, and was injured by the falling of a log from the center car of the train, which threw the car from the track. *Held*, that if there was negligence, it was that of plaintiff's fellow-servants.

f. LOADING AND UNLOADING.

Loading and unloading cars — Brakeman injured.

In IRVINE, ADM'R, *v.* FLINT & PERE MARQUETTE R. R. Co., 89 Mich. 416 (December, 1891), judgment for plaintiff in the Saginaw Circuit Court was *affirmed*. Plaintiff's intestate was killed while braking upon defendant's road, the cars being improperly loaded, the lumber with which they were loaded being projected over the ends of the cars. Deceased was between two cars which were being "kicked in" on the side track, when the brake-staff broke and deceased fell between the cars and was instantly killed. Defendant held liable for improper loading and failure to inspect the cars. McGRATH, J., delivered the opinion, in which MORSE and LONG, JJ., concurred, affirming the judgment; GRANT, J., and CHAMPLIN, Ch. J., dissented.

In LA PIERRE *v.* CHICAGO & GRAND TRUNK R'y Co., 99 Mich. 212 (February, 1894), brakeman on freight train of defendant unloading freight, injured by gang plank, on which a truck was rolled, slipping from car and precipitating plaintiff to the ground, judgment for defendant in the Calhoun

Circuit Court was *affirmed*, on ground of assumption of risk, and that the conductor of the freight train, under whose direction the brakeman assisted in unloading the freight, was a fellow-servant of the brakeman.

2. Car couplers injured.

a. BRAKEMEN.

See preceding paragraphs in this note relating to cases arising out of injuries sustained by brakemen while coupling cars, etc.

b. SWITCHMEN INJURED COUPLING CARS.

Switching and coupling cars — Caught between cars — Defective track, etc.

In *CATLIN v. MICHIGAN CENTRAL R. R. Co.*, 66 Mich. 358 (1887), where plaintiff, a switchman, was injured while coupling cars, due to alleged failure of defendant's fireman to obey a signal, judgment for plaintiff was reversed for erroneous admission of certain evidence. It was held "that what a helper said after the morning of the accident was not admissible as an admission binding the defendant, or as evidence of any fact stated in the conversation; and that the court erred in refusing to instruct the jury that the testimony of plaintiff's wife as to what was said could be considered *solely* for the purposes of impeachment."

In *THOMPSON v. LAKE SHORE & MICHIGAN SOUTHERN R'y Co.*, 84 Mich. 281 (October Term, 1890), where plaintiff, a switchman in defendant's employ, while on footboard in rear of switch-engine, was directed to couple to and remove a freight car in defendant's yard, had his hand crushed between the draw-bar of engine and bumpers of car, judgment for plaintiff in the Kent Circuit Court was *reversed*. The second paragraph of the syllabus to the official report states the ruling (per Cahill, J.) as follows: "In the absence of any evidence tending to show that a railroad engineer was negligent in allowing the fireman to operate the engine at the time the plaintiff was injured while attempting to couple cars, and which alleged negligence is the gist of plaintiff's action, a verdict should be directed for the defendant."

In *LYTTLE v. CHICAGO & WEST MICHIGAN R'y Co.*, 84 Mich. 289 (December, 1890), switchman while on footboard at rear end of a tank to a locomotive, the engine running backwards, injured in attempt to uncouple the cars, judgment for plaintiff in the Kent Circuit Court for \$4,000 was *affirmed*. The opinion was rendered by MORSE, J., and his rulings are set out in the syllabus to the official report as follows:

"A yardmaster, who has full charge of the yards of a railroad company, and hires and discharges the men employed therein, and assigns them to their labor, is the agent or vice-principal of the company in this respect, as well as in furnishing proper, suitable, and safe appliances and places for their labor; and notice to him of defects in the appliances so furnished is notice to the company, which is chargeable with his negligence, and responsible for his promise to remedy such defects, and to see that an incompetent fireman shall not handle an engine while switching is being done, upon which promise the switchman complaining of such defects and incompetency has a right to rely for a reasonable time, and to a reasonable extent.

"A rule that a servant in entering a service accepts the ordinary hazards

and dangers of his occupation, and that if, with knowledge of defects in the machinery and appliances furnished by the employer, or, of the unusual dangers of the occupation, he continues in the employment, he will be regarded as assuming the dangers, and cannot recover for injuries arising therefrom, does not apply to a case where the employer (a railroad company) is notified by a switchman of the incompetency of a fireman who has been permitted to operate an engine in switching cars, and who refuses to work if the fireman is allowed to continue so to do, and who, in reliance upon the promise of the company that he shall not, continues his work, and is injured while the fireman is running the engine without his knowledge, the immediate cause of such injury being the negligence of the fireman." * * *

In *LEE v. MICHIGAN CENTRAL R. R. Co.*, 87 Mich. 574 (October Term, 1891), switchman employed in defendant's yards injured while assisting in making up a freight train, the injury being caused by alleged negligence and incompetency of the yardmaster who directed the work of coupling the cars, in failing to warn plaintiff of the movement of the train, judgment for defendant was *reversed*, there being evidence as to the incompetency of the yardmaster which should have been submitted to the jury.

In *PENNINGTON, ADM'X, v. DETROIT, GRAND HAVEN & MILWAUKEE R'Y Co.*, 90 Mich. 505 (March, 1892), switchman fatally injured while switching cars in defendant's freight shed, judgment for defendant was *affirmed*, on the ground of assumption of risk, etc. "Where a switchman, who is acquainted with all of the surroundings, attempts to descend a car ladder for the purpose of uncoupling the car, knowing that unless the train is stopped he must strike a post less than twenty feet distant, and without knowing that his signal to stop the train has been received and acted upon, and in order to give which he was obliged to look therefrom, which is alleged in the declaration to have prevented the engineer from seeing the signal, he must be held to have assumed the risk and danger in descending the ladder." Opinion rendered by GRANT, J.

In *ASHMAN v. FLINT & PERE MARQUETTE R. R. Co.*, 90 Mich. 567 (March, 1892), switchman in defendant's yard injured by his foot catching in an unblocked frog while attempting to uncouple cars in a moving train, judgment for plaintiff for \$6,000 was *affirmed*. "The statute, Act No. 174, Laws of 1883, expressly provides, under pecuniary penalty, that frogs like the one which caused the injury to plaintiff shall be adjusted, filled, or blocked, so as to prevent the feet of the employees or other persons from being caught therein. This law was passed upon the urgent demand of the people that such measures be taken to save the constantly recurring danger of life and limb from open frogs. * * * With this statute in force, it was the duty of the defendant to keep its yard reasonably safe in this respect." Opinion by MORSE, J.

c. EMPLOYEES INJURED COUPLING CARS.

Foot caught in switch while uncoupling cars.

In *EASTMAN v. LAKE SHORE & MICHIGAN SOUTHERN R'Y Co.*, 101 Mich. 597 (September, 1894), plaintiff, while engaged in uncoupling cars in defendant's yard, injured by his foot being caught in a stub switch, judgment for plaintiff in the Jackson Circuit Court was *affirmed*.

Caught between deadwoods of cars.

In *HOFFMAN v. MICHIGAN CENTRAL R. R. Co.*, 109 Mich. 251 (May, 1896), judgment for plaintiff in the Wayne Circuit Court was *reversed*, the case being stated in the opinion rendered by HOOKER, J., as follows: "The defendant appeals from a verdict of \$5,000 in an action for injuries suffered by the plaintiff by reason of his getting his arm between double deadwoods upon cars which he was coupling. It was in the evening, and the testimony shows that in coupling such cars, with which he was familiar, it was necessary to reach under the deadwood, to enter the link. This he did, and the cars came together. He stated that the slack in the stationary cars permitted a rebound, and that, when the cars came together again, his arm was caught between the deadwoods, and crushed. The case went to the jury upon the claim that the defendant was negligent in furnishing an inferior grade of oil for the lantern, which plaintiff testified grew dim at the time that he was hurt, rendering it difficult to see. The undisputed testimony shows that the company had investigated the subject of the oil, of which, some weeks before, there had been complaint; and, were the question of fact for us, we should be obliged to find that no negligence was shown, and we think that there is little excuse for a verdict based upon the evidence of negligence contained in this record, as it seems to us to be a palpable disregard of the rule that requires the plaintiff to establish his case by a preponderance of proof. But, aside from this, the testimony conclusively shows that the plaintiff was familiar with this oil, which he says had made him much trouble for the period of two months, yet he continued to use it without complaint. It is obvious that he had a better opportunity for knowing the character of the oil than the company had, and, upon his own theory, was much more negligent than the company was. We have often held that an employee assumes the risks incident to the use of poor machinery and materials, where he knows their quality, and this case seems to fall within that rule. The judgment will be reversed, and, as it is apparent from the plaintiff's own testimony that he has no cause of action, no new trial will be ordered."

Falling between cars.

In *ERICKSON v. MILWAUKEE, LAKE SHORE & WESTERN R'y Co.*, 93 Mich. 414 (October Term, 1892), judgment for plaintiff in the Gogebic Circuit Court was *affirmed*, the third paragraph of the syllabus to the official report stating the facts as follows: "Plaintiff was a shoveler on a gravel train, and was ordered by the foreman, who was his superior servant, to uncouple an empty car from a loaded one, and to jump from it to the loaded car. While in the act of jumping, and without notice to the plaintiff, the foreman let off the brake, and thus suddenly widened the distance between the cars, and the plaintiff fell into the open space, and was injured, without fault on his part; and a judgment in his favor is affirmed." Opinion by LONG, J.

The court (per LONG, J.) referred to the former decision in *ERICKSON v. MILWAUKEE, LAKE SHORE & WESTERN R'y Co.*, 83 Mich. 281 (1890), which overruled the order sustaining a demurrer to the declaration, and stated that it was there said: "If it is true that the plaintiff, while acting under the foreman or boss, was ordered by him to pull the coupling-pin and jump

across to the coupling car, and, without any notice to the plaintiff, the foreman let off the brake, which suddenly accelerated the speed of the car and widened the distance which plaintiff was to jump, and the plaintiff had no knowledge or information that the brake was to be let off, and by that means the plaintiff was injured, without any fault or negligence on his part, he certainly would have the right to recover. These are questions for the jury." The trial resulted in verdict and judgment for plaintiff, which was affirmed. 93 Mich. 414.

In the *ERICKSON* case, 93 Mich. 414 (preceding paragraphs), it was held that the foreman of the gravel train, who had full charge of the train and power to hire and discharge the men, was not a fellow-servant of the men on such train. Following the ruling in *Harrison v. Detroit, Lansing & Northern R. Co.*, 79 Mich. 409 (16 Am. Neg. Cas. 119, *ante*).

3. Car inspector injured.

In *O'DONNELL, ADM'X, v. DULUTH, SOUTH SHORE & ATLANTIC R'Y Co.*, 89 Mich. 174 (November, 1891), engine inspector in defendant's employ, while walking between certain tracks in defendant's yard, on his way home from work, struck and fatally injured by a car of a train which left the track on a coal trestle, judgment for defendant in the Marquette Circuit Court was affirmed. The court (per LONG, J.) said: "On the trial in the court below the circuit judge very properly directed the jury to return a verdict in favor of defendant. There was no evidence in the case showing that any officer of the defendant ever saw the deceased walking between these tracks to and from his home or had actual notice of his doing so. There is no evidence of any beaten path or traveled way along the side of or between these tracks, and there is no evidence that any of the other employees or other persons used this route as a way to reach their homes or to get to Washington street. There were three other ways by which deceased could have gone to his home, and ways which he often used. The diagram [which was presented] shows that had the deceased, in using the yard as a way of reaching his home, kept south of the tracks, he would have been out of the way of the cars, which in the ordinary way of doing the work of the defendant company, were frequently run over these tracks and upon the side tracks and coal trestle." * * * The court in distinguishing the *O'DONNELL* case from the *BOUWMEESTER* case, said: "Counsel for plaintiff contends that this case falls within the ruling of this court in *Bouwmeester v. Grand Rapids & Ind. R. R. Co.*, 63 Mich. 557, 12 Am. Neg. Cas. 117ⁿ. In that case, however, it appeared that the deceased had for months previous to his death been in the habit of going upon the railroad track in returning to his home after his work was done; that it was inconvenient and difficult to go by the ordinary route of travel; that it was almost a necessity for men living where he did to walk upon the track; that these facts were well-known to the defendant company, and the use of the track thus made by the men was permitted. It also appeared in that case that, while the deceased was upon the track, and unaware of the train's approach, the engineer, who saw him there and knew that he was unconscious of the train's approach, failed to check his engine, though he had time so to do; thus showing in that case that the claim was made that the deceased came to his death by the

wilful and wanton negligence of the engineer of the train. No such thing is averred in the present case, and no such principle is here involved." * * *

4. Car repairer injured.

In *PETERSON v. CHICAGO & N. W. R'y Co.*, 67 Mich. 102 (October, 1887), car repairer injured while under car making repairs, judgment for defendant in the Marquette Circuit Court was *affirmed*, the ruling by MORSE, J., being stated in the syllabus to the official report as follows: "By the rule of a railroad company, car inspectors and repairmen were required, before going under or between any cars to inspect or repair the same, to display a red signal at the end of the car or cars in the direction from which a train or engine could approach, which signal they must provide themselves with, and have on hand at all times for use, the same being obtainable from the foreman; and all trainmen were required to carefully observe this signal, and under no circumstances back against or couple on to any car while such signal was displayed. *Held*, that this rule, if enforced, was sufficient for the protection of car inspectors and repairmen, and that with such rule in existence, and with instructions to all employees to observe it, the railway company was not guilty of negligence in not having a watchman or "bumpers" nor in running other cars upon the same track where cars were being repaired, when space was left between them, and the red flag respected according to the rule.

"The negligence of fellow-employees is not chargeable to the employer, unless they are incompetent in such sense as to charge the employer with the results of their negligence."

5. Conductors injured.

Freight conductor killed in collision of trains.

In *ENRIGHT, ADM'X, v. TOLEDO, ANN ARBOR & NORTH MICHIGAN R'y Co.*, 93 Mich. 409 (October Term, 1892), judgment for plaintiff in the Shiawassee Circuit Court was *reversed*, the case being stated in the syllabus to the official report as follows: "A freight conductor, whose train was standing on the main track within the station limits, was killed by a freight train running into his train. A rule of the company required freight engineers, when approaching stations, to have their trains under full control, expecting to find trains using main tracks within station limits. It was conceded that the engineer and conductor, both of whom knew of the rule, were fellow-servants. And it is held that the proximate cause of the accident was the failure of the engineer to obey the rule, and that the company is not liable for the consequent injury to the conductor upon the ground that he was acting at the time under an erroneous order issued by its train dispatcher." Opinion by GRANT, J.

Conductor thrown from car and run over.

In *SHACKELTON, ADM'X, v. MANISTEE & NORTHEASTERN R. R. Co.*, 107 Mich. 16 (October, 1895), judgment on verdict directed for defendant in the Manistee Circuit Court was *affirmed*. The facts, as stated by MONT-

GOMERY, J., were: "The deceased was a conductor on a freight train of the defendant company, and the injuries resulting in his death were caused by his being thrown off the rear end of the way car to the track, and the train passing over him. The car from which he was thrown had hand rails provided on either side of the steps, the rear hand rail extending to the brake, so that a sudden lurch of the car would not result in throwing one attempting to alight from the car. On the occasion in question, however, this rear hand rail had been removed, and the testimony offered by the plaintiff tends to show that while deceased was stepping down from the car he was thrown off because of this defect. There is no room for attributing any negligence to the defendant, unless it be for the absence of this rail at this time." It appeared that complaint had been made as to this defective rail and promise to repair had been made but neglected, and that deceased continued to use the car without protest. It was held that deceased assumed the risk in so using the car, as he had not been induced to continue its use by defendant's promise to repair.

6. Engineers injured.

Collision between cars and trains — Engineers injured.

In *LYON v. DETROIT, LANSING & LAKE MICHIGAN R. R. Co.*, 31 Mich. 429 (April Term, 1875), judgment for defendant in the Superior Court of Detroit was *affirmed*. The *PER CURIAM* opinion was as follows: "The plaintiff was employed as an engineer in running one of the passenger trains of the defendant in error, and on the evening of November, 23, 1871, and when a switch near the Grand Trunk Junction was misplaced, ran his train off upon a side track and against cars which were standing there, and received an injury for which he brought suit against the company. Under the ruling of the court the jury returned a verdict against him. The evidence conclusively showed that, in managing and running the train at the time, he disregarded the instructions which the company had issued for his guidance, and was therein guilty of gross negligence which directly conduced to the injury complained of. There is also much room for saying that his accident was within the risks he assumed by entering into the employment."

In *MICHIGAN CENTRAL R. R. Co. v. DOLAN*, 32 Mich. 510 (1875), where plaintiff, Dolan, an engineer of defendant's passenger train, was injured by a collision with a freight train, he jumping from the engine in order to save his life, the accident being caused by the negligence of the conductor in failing to give a dispatch which he had received to the engineer until too late to avoid the collision, judgment for plaintiff was *reversed*, on the ground of negligence of fellow-servant, of which plaintiff assumed the risks.

In *MICHIGAN CENTRAL R. R. Co. v. GILBERT*, 46 Mich. 176 (1881), action by administratrix of defendant's engineer killed in a collision caused by negligence of defendant's yardmaster in sending out a train, judgment for plaintiff was *reversed*, for erroneous admission of certain testimony bearing on the question of incompetency of negligent employee and defendant's knowledge thereof.

In *KELLY v. DULUTH, SOUTH SHORE & ATLANTIC R'y Co.*, 92 Mich. 19 (May, 1892), where plaintiff, a locomotive engineer on a freight train of another company, was injured in a collision with a train upon defendant's road

at a grade crossing, judgment on verdict directed for defendant in the Marquette Circuit Court was *affirmed*, on the ground of the negligence and reckless conduct of the engineers of each of the trains in collision, in failing to see that the way was clear before attempting to make the crossing.

In *PRESTON v. CHICAGO & WEST MICHIGAN R'y Co.*, 98 Mich. 128 (October Term, 1893), judgment for plaintiff for \$9,000 was *reversed*, it being held that a verdict should have been directed for defendant on the facts as stated in the opinion by McGRATH, J. It appeared that plaintiff was a locomotive engineer in defendant's employ, and, while switching in the yard at Muskegon, was injured in a collision. Plaintiff, while backing his engine and drawing a train of freight cars on the spur A towards the main track, collided with flat cars which were being backed upon the main track from the spur B. Two of the freight cars were thrown some distance west of the main track, one of them striking and breaking a telegraph pole, which was about ten inches in diameter, and stood west of the main track. One of the flat cars reared, and struck the corner of the tank on the tender of plaintiff's engine, breaking a hole in the tank, and raising and slewing it round against the engine cab, pinioning and injuring plaintiff. The sole negligence charged was the failure to properly fasten the tank to the frame on which it rested. The evidence failed to make out a case of negligent construction.

Derailment of train — Misplaced switch — Engineer injured.

In *TOWN v. MICHIGAN CENTRAL R. R. Co.*, 84 Mich. 214 (October Term, 1890), where plaintiff, a locomotive engineer upon defendant's passenger train, was injured by the derailment and wrecking of his train caused by a misplaced switch, judgment on verdict directed for defendant in the Monroe Circuit Court was *reversed*, it being held that the question whether the absence of lights at the place of the accident would have prevented the derailment was for the jury to determine.

Explosion of locomotive boiler — Engineer injured.

In *WOODS v. CHICAGO & GRAND TRUNK R'y Co.*, 108 Mich. 396 (February, 1896), engineer injured by explosion of boiler of locomotive, judgment for plaintiff in the Calhoun Circuit Court for \$6,500 was *affirmed*. MONTGOMERY, J., delivered the opinion. The negligence charged was failure to properly inspect the boiler, permitting its use when in bad repair by reason of a large number of stay-bolts being broken, and others corroded, and permitting the same to remain so for some days, to wit, thirty days, prior to the injury. Defendant, among other grounds, moved for new trial on ground of excessive damages (verdict \$6,500), but the Supreme Court held that the discretion of the circuit judge in denying the motion would not be overruled. Plaintiff was thirty-one years of age at time of injury and was earning \$103.54 per month; the evidence as to the injuries sustained showed probable permanent disability in earning living.

7. Firemen injured.

In *JARMAN v. CHICAGO & GRAND TRUNK R'y Co.*, 98 Mich. 135 (October Term, 1893), judgment for plaintiff was *reversed* on the fellow-servant rule, the facts being stated in the syllabus to the official report as follows: "Plain-

tiff was a fireman on one of defendant's passenger trains. While in the cab of his engine, and passing a freight train standing on a side track, he was struck and injured by the projecting limb of a tree on a flat car loaded with trees. The cab of the engine was safe, and a rule of the defendant, known to plaintiff, required the conductor of the freight train to inspect the flat car, and see that it was properly loaded before receiving it into his train. And it is held that the case is ruled by *Smith v. Potter*, 46 Mich. 258 (16 Am. Neg. Cas. 115, *ante*), and *Dewey v. R'y Co.*, 97 Mich. 329 (16 Am. Neg. Cas. 101, *ante*), the negligence, if any, being the failure of the conductor to see that the car was properly loaded, or, if not, to reject it." Opinion by GRANT, J.

8. Sectionhands injured.

a. BOARDING TRAIN.

In *NOVOCK v. MICHIGAN CENTRAL R. R. Co.*, 63 Mich. 121 (October, 1886), judgment for plaintiff in the Wayne Circuit Court was *reversed*, on the ground of contributory negligence, etc. CAMPBELL Ch. J., rendered the opinion, and the facts therein stated are given in the second paragraph of the syllabus to the official report as follows: "Plaintiff was employed by defendant on its gravel train, which had been backed in on a side track to the gravel pit for the purpose of loading, and, being obliged to wait for an express train, plaintiff and his companions left the cars, and went on the adjoining bank, which was higher than the level of the cars. The boarding cars had been left on the main track, a few yards distant, to be attached when the gravel cars were loaded. While thus waiting, the gang foreman, as the engine backed in to take out the cars, called out, "All aboard!" Plaintiff did not hear this order, but, seeing the other men starting for the cars, followed them, and as the train was moving out jumped from the bank onto a car, and, the gravel slipping under him, he fell off, and his arm was crushed under the wheels. The men had general orders not to board moving cars. Plaintiff sued defendant for the injury sustained. *Held*, that the case should have been taken from the jury, it being clear that plaintiff acted as he saw others act, and paid no heed to the risk that was patent to everybody. *Held*, further, that the language used by the foreman was the same sort of warning generally given when cars are about leaving, and was no more than notice of that fact, and was no more proof of negligence than if given when a passenger train is about leaving the station, which would justify no one in boarding or leaving cars in motion."

b. COLLISION.

Flat car struck by engine — Sectionhand injured.

In *HARRISON v. DETROIT, LANSING & NORTHERN R. R. Co.*, 79 Mich. 409 (February, 1890), sectionhand injured in collision between engine and flat car upon which he was at work under direction of an assistant roadmaster, judgment for plaintiff for \$9,000 was *reversed*, for erroneous instructions, etc. The syllabus to the official report states the case and points decided by LONG, J., as follows: "An assistant roadmaster who has general charge of a division of a railroad, and of the work of the sectionhands thereon, which control is absolute as far as their employment and discharge are concerned,

is not a fellow-servant with them, but must be held to represent the company which is responsible for his negligence while in the performance of the duties so delegated to him.

"Where, in a railroad negligence case, the proximate cause of the injury complained of was either the negligence of a superior servant of the railroad company in ordering the plaintiff to continue his work upon a detached car while an engine was approaching, or the failure of the engineer or fireman (plaintiff's fellow-servants) to ring the engine bell, and thus give the plaintiff sufficient warning to enable him to save himself from being thrown from the car by the shock of the collision, it is error to refuse to submit special questions to the jury calling for findings whether such warning would have been given, and whether the accident would have happened, if the bell had been so rung.

"In such a case the jury should be instructed that if at the time said order was given the plaintiff was aware of the near approach of the engine, of which fact the superior servant was ignorant, and failed to notify him, or to save himself, he was guilty of contributory negligence."

The opinion by LONG, J., in the HARRISON case, *supra*, discusses, at length, the superior servant and fellow-servant rule. See abstract of the HARRISON case, 16 Am. Neg. Cas. 119, *ante*.

Train colliding with hand car — Sectionhand killed.

In HAMMOND, ADM'X, v. CHICAGO & GRAND TRUNK R'Y Co., 83 Mich. 334 (November, 1890), sectionhand riding on hand car in company with section foreman and a fellow-laborer on tour of inspection, killed in collision of train with hand car, judgment on verdict directed for defendant was *affirmed*, it being held that the danger was known to the deceased and was voluntarily assumed by him. Opinion by CAHILL, J.

Tricycle struck by wild train — Section foreman injured.

In JOLLY v. DETROIT, LANSING & NORTHERN R. R. Co., 93 Mich. 370 (October Term, 1892), section foreman using a railroad tricycle belonging to local agent, run down by a "wild" train while he was making inspection of the road, judgment for defendant was *affirmed*. Plaintiff was negligent in not using a hand car, which was provided by defendant for the purpose; was negligent in not keeping a lookout for "wild" trains; and he assumed the risks of the employment.

c. LOADING AND UNLOADING CARS.

In TIMM v. MICHIGAN CENTRAL R. R. Co., 98 Mich. 226 (October Term, 1893), verdict directed for defendant and judgment thereon was *affirmed*, the syllabus to the official report stating the facts as follows: "Plaintiff belonged to a section gang of four men, including the foreman, and, while assisting in loading ties onto a hand car, was injured by some of the ties falling off and breaking his leg. There was no evidence tending to show negligence in the employment of any of the men. And it is held that the four men were fellow-servants, and that a verdict was properly directed in favor of the defendant." Opinion by GRANT, J.

IN *PALMER v. MICHIGAN CENTRAL R. R. Co.*, 93 Mich. 363 (October Term, 1892), sectionhand injured while loading car, judgment for plaintiff in the Cass Circuit Court was *affirmed*. The facts and points decided in the opinion rendered by DURAND, J., are stated in the syllabus to the official report as follows:

"1. To require a gang of sixteen men to range themselves in line along a train of moving cars, and, acting as one man, to lift from the ground and throw upon the car as it passes them a steel rail weighing from 600 to 700 pounds, and then to run fast enough along the uneven ground, usually observed along the side of a railroad track, to be able to have the next rail in position to throw on the car of the moving train at the proper moment as it passes, at least without notifying a new and inexperienced man of the great hazard attending the performance of such work, is negligence *per se*.

"2. A narrow or technical construction of the rule of *respondeat superior* is not in harmony with the more recent decisions on that point, and the rule laid down in *Harrison v. R. R. Co.*, 79 Mich. 409, may be considered as settled law in this State.

"3. While it is not held that it is necessary to show it by positive proof in every case, yet the question whether or not the servant has power to employ and discharge other servants is important in determining whether or not he is deemed to be a superior servant, for whose acts the master is held liable.

"4. It is not error to exclude testimony showing whether or not the attorney for a plaintiff in a negligence case has taken the case to prosecute on a percentage and whether or not he is bearing the expenses of the litigation. Citing *Denman v. Johnston*, 85 Mich. 387; *Ripley v. Seligman*, 88 Mich. 177.

"5. The declaration in a negligence case only claimed for an injury to plaintiff's leg, caused by its being struck by a steel rail, which bounded back from the car upon which he was assisting in loading it. Upon the trial plaintiff was asked if there was anything on his hip indicating the force of the blow, which question was objected to because the declaration only claimed for an injury to plaintiff's leg, but he was permitted to answer the question on the statement of plaintiff's counsel that the testimony was offered for the purpose of showing the force of the blow, and that he desired the court to instruct the jury that they could not give any damages for an injury to the hip; which action of the court is sustained."

The court (per DURAND, J.) in the *PALMER* case, *supra*, in its reference to the *Harrison* case, said: A narrow or technical construction of the rule of *respondeat superior* is not in harmony with the more recent decisions on that point, especially in this State. In the well-considered case of *Harrison v. R. R. Co.*, 79 Mich. 409 [16 Am. Neg. Cas. 119, and 168, *ante*], this court, in an opinion written by Mr. Justice Long, unanimously say:

"It is difficult to lay down any general rule which shall determine all cases.

* * * The tendency of modern adjudications is more and more to relax the rule that those who are engaged in the same common enterprise or business are fellow-servants, especially if it can be pointed out that the one in fault occupies some higher grade or more power than the party injured.

* * * Some general rules may, however, be laid down which in many instances may serve as a guide in the determination of the question. It is not to be determined solely from the grade or rank of the offending or

injured servant, but it is to be determined by the character of the act being performed by the offending servant. If it is an act that the law imposes the duty upon the part of the master to perform, then the offending employee is not a fellow-servant, but a superior or agent, for whose acts the master is held liable. Again, if the master has delegated to a servant or employee the care and management of the entire business, or a distinct department of it, the situation being such that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master, then such superior servant stands in the place of the master, and the rule of *respondeat superior* applies." * * *

See also former decision in the PALMER case, 87 Mich. 281, where it was held that Wahl, the assistant roadmaster in full power and control of the men and the work, stood in place of the master, and defendant was liable for his negligent acts. PALMER v. MICHIGAN CENTRAL R. R. Co., 87 Mich. 281 (1891).

d. INJURED ON TRACK.

In HILTS, ADM'R, v. CHICAGO & GRAND TRUNK R'Y Co., 55 Mich. 437 (1885), laborer in defendant's employ, engaged under a section boss in repairing track, etc., run over and killed by an engine, due to alleged negligence of engineer, who was shown to have been intoxicated and in the habit of drinking to excess, the railway company was liable.

9. Switchmen injured.

a. COUPLING CARS.

For actions arising out of accidents to switchmen while engaged in coupling cars, see Division 2 of this Note, under the title "CAR COUPLERS."

b. DANGEROUS PREMISES.

Switchman crushed between car and building in railroad yard.

In SWEET, ADM'R, v. MICHIGAN CENTRAL R. R. Co., 87 Mich. 559 (October, 1891), switchman killed while switching cars in defendant's yards, being crushed between a car and a building, judgment for plaintiff for \$5,000 was affirmed, it being held that the maintenance of a side track so near to a building in defendant's yards, as to make it dangerous for switchmen to perform their duties, was a violation of the railroad company's duty to provide safe place for its employes to work.

c. EXPLOSION.

Explosion of nitro-glycerine being loaded on train.

In FOLEY, ADM'R, v. CHICAGO & NORTHWESTERN R'Y Co., 48 Mich. 622 (1882), the syllabus to the official report states the case as follows: "A manufacturer of nitro-glycerine contracted with a railway company for the transportation of a quantity, and the latter requested another railroad company to move the car loaded therewith some distance over its track. The company so requested sent a switchman to perform the service, and he was killed by the explosion of a can while it was being loaded. The loading was

done by employees of the manufacturer, and the switchman had no control or authority over them. He however knew the dangerous character of the work. *Held*, that there was no ground of action against the company which employed the switchman for the fatal injury to him. A railroad company which undertakes to accommodate another company by switching over its track a car loaded with dangerous merchandise, has a right to assume that the consignor has exercised due care in packing it." Judgment for defendant *affirmed*.

10. Minor employees injured.

Minor employees braking and switching cars.

In *GREENWALD, ADM'R, v. MARQUETTE, HOUGHTON & ONTONAGON R. R. Co.*, 49 Mich. 197 (October, 1882), minor employee acting as brakeman fatally injured, judgment for defendant in the Marquette Circuit Court was *affirmed*. The opinion was delivered by GRAVES, Ch. J., the facts and points being sufficiently stated in the syllabus to the official report as follows: "A boy about seventeen years old was employed as a brakeman by the engineer of an ore train. The engineer had power to employ and discharge brakemen, and the boy was capable and experienced in the business. The engineer directed the fireman to back the locomotive upon a side track to the train, and told the brakeman to attend a switch. He himself went to attend another switch further on. While this was being done the bell and whistle of a train on the main track near by were both sounding. The first switch was passed and the engineer was about throwing the second when he heard an outcry and saw the brakeman under the locomotive. The brakeman died in a few minutes from his injuries, and his administrator sued the railroad company for the injury. It was proved that the brakeman knew the train was about moving back, and that there was room enough for him to perform his duties. *Held*, that he needed no further warning of his danger, and that the accident was due to his own negligence; also, that if the failure to sound the bell and whistle of the locomotive was negligence, it was the fault of the fireman, who was a fellow-servant of the brakeman, and for whose negligence towards a fellow-servant the company would not be liable."

In *VIETS, ADM'R, v. TOLEDO, ANN ARBOR & GRAND TRUNK R'Y Co.*, 55 Mich. 120 (1884), the syllabus to the official report states the case as follows: "A youth of ordinary intelligence was killed while coupling freight cars. He was fully aware of the danger of such work, and not entirely inexperienced, and his death was not caused by any negligence or carelessness of those in charge of the train. *Held*, that the railroad company was not answerable for his death."

Minor employees injured while loading and unloading cars.

In *ROEPCKE v. MICHIGAN CENTRAL R. R. Co.*, 100 Mich. 541 (June, 1804), plaintiff, nineteen years of age, a member of defendant's section gang, ordered by roadmaster to assist in unloading logs from a car, injured by a log rolling upon him and breaking his leg, judgment for plaintiff in the Washtenaw Circuit Court was *reversed*, on the ground that the danger was one of the risks of employment.

In *SANER v. LAKE SHORE & MICHIGAN SOUTHERN R'Y Co.*, 108 Mich. 31

(December, 1895), judgment for plaintiff in the Hillsdale Circuit Court was *reversed*. The case as stated in the opinion is set forth in the syllabus to the official report as follows: "Plaintiff's intestate, a young man eighteen years of age, was a member of defendant's extra section gang, and as such went from place to place with the construction train, and assisted in unloading material. A train of twenty flat cars had been unloaded, and was returning at the rate of from fifteen to twenty-five miles an hour. The men were riding upon the pilot of the engine, which was running backward, pulling the train. When about a mile distant from the place where the men were to alight, the conductor ordered them to go to the rear of the train, so as to be ready to drop off when the train should slack up for that purpose. The deceased started upon a run to obey the order, fell between the cars, and was killed. He had been in defendant's employ for about three months, and had been repeatedly cautioned by the foreman of the gang against running backward and forward over the cars while they were in motion. *Held*, that he was guilty of such negligence as to preclude a recovery for his death. (McGRATH, Ch. J., *dissenting*)."

WUOTILLA V. DULUTH LUMBER COMPANY.

Supreme Court, Minnesota, June, 1887.

[Reported in 37 Minn. 153.]

RISKS OF EMPLOYMENT—KNOWLEDGE OF SERVANT.—The fact that a servant knows the defective condition of the instrumentalities with which he works does not necessarily charge him with contributory negligence, or the assumption of the risks growing out of such defects. He must also understand, or ought, in the exercise of ordinary prudence, to understand, the risks to which these defects expose him; following former decisions.

MACHINERY UNCOVERED—KNOWLEDGE OF SERVANT—CONTRIBUTORY NEGLIGENCE.—Although it may be negligence on the part of the master to leave dangerous machinery uncovered, yet the servant is not necessarily guilty of contributory negligence because he works in the vicinity of it, knowing its condition; the measure of the duty of the two in that regard not being the same.

Evidence considered, and held sufficient to sustain the verdict.

(Syllabus by the court.)

APPEAL by defendant from an order of the District Court for St. Louis County denying new trial. The facts are stated in the opinion. *Order affirmed.*

Defendant's fourth, fifth, and seventh requests for instructions to the jury, which were refused by the trial court, and

which are referred to in the opinion, are as follows: "*Fourth.* In cases of this kind, where the defect in the machine or other appliance from which the danger arises, is of such a character, or occurs at such a time, that the employer cannot reasonably be expected to have knowledge thereof, it is the duty of the employee to give notice, and the neglect of such duty exempts the employer from responsibility." "*Fifth.* In this case, if you find that it was the duty of plaintiff to oil the cogs in which he was injured, and the bearings immediately under the same, daily or oftener, and for that purpose he must necessarily have seen and observed the uncovered condition of the cogs in doing such work when the cover was off, you must find for the defendant, for the reason that, if this cover had not been off long enough before plaintiff was injured for him to have discovered it, it had not been off long enough to charge the defendant with neglect in failing to discover it; and, if it had been off long enough to charge defendant with negligence in failing to remedy the defect, plaintiff was guilty of contributory negligence in remaining with and not reporting such defect, so that it might be repaired." "*Seventh.* In case you find that defendant's foreman showed plaintiff the cogs in which he was injured, and explained to him the need there was in keeping that board in place, and that plaintiff appeared to comprehend the instruction, and afterwards worked there, with a board, evidently in plain view, off the gearing, so that it was exposed, then he was guilty of contributory negligence, and you must find for the defendant."

WHITE, SHANNON & REYNOLDS, for appellant.

ALLEN & PARKHURST, for respondent.

Mitchell, J. — This was an action for damages for personal injuries alleged to have been caused by the negligence of defendant. The plaintiff was employed in defendant's saw-mill as an "off-bearer," his duty being to stand at the head of the "live rollers" and start the slabs, etc., down the rollers after they left the saws. In case a slab got crooked, or a piece of bark got into the rollers (which would occur occasionally), he had to leave his stand and go down and straighten it out or take it out. In doing this he had to go past a gearing where two wheels "mashed." On one occasion, as he was going down to straighten a slab on the rollers, the gearing caught his clothing, and drew in his leg, causing the injuries complained

of. The negligence charged against defendant consists in not boxing or covering the gearing (1).

The main contention here is that the verdict was not justified by the evidence, for the reasons, 1, that it does not appear that the defendant was guilty of any negligence; and, 2, that it does appear that plaintiff himself was guilty of contributory negligence.

The first requires but little consideration. There was abundant evidence tending to prove that it was dangerous to leave the gearing open, and that ordinary prudence would have re-

1. *Accidents from uncovered or unguarded machinery.* See also the following cases:

In *BARBO v. BASSETT ET AL.*, 35 Minn. 485 (September, 1886), order denying defendants new trial was affirmed. Plaintiff was employed as a laborer in defendant's saw-mill to assist in sawing slabs and, occasionally, to help another employee in lifting heavy plank which was moved rapidly over rollers by cogs connected with the machinery of the mill. While at his ordinary work he stood with his back towards the table, and to attend to this special work he was obliged to turn, and go about six feet across a passageway from his accustomed place of work. It required a quick movement on his part to reach and handle the plank as required. "The evidence tended to show that when the plaintiff commenced work, and until about the first of June, the several sets of cogs connected with the rollers were covered with plank, but at the last date one set was uncovered, and so left till after the injury complained of, which occurred on June 7, and was exposed from the top of the table, but covered on the sides. It also appears from the plaintiff's testimony that, being called suddenly to help move an extra-heavy plank on that day, and in attempting to reach over and pull it towards him while it was

moving rapidly, his hand slipped, and was caught in the cogs and severely injured." *Held*, that it was for the jury to judge whether it was prudent to leave such machinery exposed, whether plaintiff was informed of the danger and whether he was negligent, and that these questions were properly submitted.

In *CRAVER v. CHRISTIAN ET AL.*, 36 Minn. 413 (February, 1887), the official syllabus states the case as follows: "Where the machinery in a flour-mill was extensive and complicated, and certain parts of it, which the evidence tends to show were dangerous, had been covered, to plaintiff's knowledge, but from some of which such covering had been removed, and, for several days before he was injured, had been running in that condition, in an action to recover damages for injuries caused by such machinery, *held* that, upon the evidence in the case as to the amount, character and situation of the machinery, the nature of plaintiff's employment, and his want of notice or knowledge in respect to the changes referred to, was not so clear that, in the exercise of ordinary prudence, he must necessarily have seen or ought to have known the condition of the machinery, and the risks to which he was exposed, as to have warranted the trial court in determining, as matter of law, that he

quired it to be covered. There was also evidence that the covering had been off at least two weeks, — ample time for defendant to have discovered the fact, and replaced it.

Second. It is undisputed that plaintiff had known, for two weeks before the accident, that the gearing was uncovered, and that he continued to work there without objection or complaint. Defendant contends that this conclusively establishes, as a matter of law, contributory negligence. The grand fallacy running all through the argument of the learned counsel is in assuming that, if it was negligence for defendant to leave the

assumed such risks as necessarily incident to his employment, or was guilty of contributory negligence in the premises." Verdict and judgment for plaintiff in the District Court for Hennepin County, and order refusing new trial, *affirmed*. Opinion by VANDERBURGH, J. See, also, former appeal, CRAVER *v.* CHRISTIAN ET AL., 34 Minn. 397.

In CARROLL *v.* WILLISTON ET AL., 44 Minn. 287 (August, 1890), order of District Court of St. Louis County refusing new trial after verdict for plaintiff for \$4,500 was *reversed*. The opinion was rendered by VANDERBURGH, J. "The plaintiff's employment was that of a common laborer in defendant's saw-mill. One part of his business was to remove or clear away blocks, rubbish, and sawdust from under a circular saw. The complaint is that the saw was not properly 'housed' or protected, and that the shovel furnished him to work with was unfit to use for such purpose on account of a broken or defective handle, and that, in attempting to use it in removing the rubbish, his hand was caught by the saw, and injured." It was held that: "It is not actionable negligence *per se* as between master and servant to omit to protect or cover dangerous machinery, but the question of negligence must depend upon the circumstances of each case, such

as the nature of the employment, degree of exposure to danger, and notice thereof to the employee."

In FREEBERG, ADM'X, *v.* ST. PAUL PLOW WORKS, 48 Minn. 99 (January, 1892), order of District Court of Ramsey County refusing plaintiff new trial was *affirmed*, on the ground of failure to establish cause of action. Opinion by MITCHELL, J. Plaintiff's intestate was a plow-fitter in defendants' factory. "The negligence complained of was in setting a drilling machine (operated by the aid of pulleys and a belt connected with a main driving shaft) in such close proximity to a 'face' coupling on the shaft that when the belt jumped from the pulley (which frequently occurred) and dropped upon the shaft, and came in contact with the coupling, it was very liable to be caught by the uncovered nuts and ends of bolts projecting from the face of the coupling, and then be wound up around the shaft. The alleged negligence consisted in placing the pulley and belt in such close proximity to such a coupling, when such a thing was so likely to happen, it being claimed that the defendant ought to have either placed the pulley and belt further from the coupling, or else covered the nuts and bolts, or used another kind of coupling, called the 'flange' or 'safety' coupling. The accident occurred as follows: The deceased

gearing uncovered, it must necessarily have been negligence on the part of plaintiff to work near it while in that condition, and that, because he knew that it was uncovered, therefore he knew, or ought to have known, that it was dangerous to go near it. But the master and servant do not stand at all upon the same footing in these matters. It is the master's duty to supply safe instrumentalities for the use of his servants. He is bound to exercise reasonable diligence in informing himself as to whether his machinery is safe; whereas the servant, in the absence of notice to the contrary, or something to put him on

had occasion to carry a moldboard from his bench to the drill to have it countersunk by the driller. While he was awaiting this being done the belt came off the driven pulley on the drilling machine, and then from the larger pulley on the driving shaft above, dropping on the shaft on the opposite side of the pulley from the 'coupling.' The deceased's duties had nothing to do with the belts and pulleys, but the defendant kept a man called a 'belter' for that business, whose duty it was when a belt came off to put it on. The deceased, however, took a stick, and attempted to put the belt back on the pulley. The driller at first seems to have attempted to help him, but, being afraid, went and called the belter, who was in the blacksmith shop, only about twenty-five feet distant. The belter immediately came, and, seeing the deceased standing attempting to hold the belt on the pulley with a stick, told him it was no use; to 'stand back.' Thereupon the deceased stepped back, and the belter kneeled down, at the end of the drill, and, taking hold of the belt, attempted to put it on the driven pulley of the drill, the deceased apparently standing immediately behind him. Just at this juncture of affairs, a stick or piece of board, from some unexplained source, 'came flying' and 'knocked the belt off, as it (the

stick) came between the pulley and the belt, and the belt ran off, and was jerked out of the belter's hands, and caught one of the shares (on a pile near by), and turned it over,' and then, in some way caught the deceased, and drew him up with great force (the shaft revolved 170 to 180 times a minute), and caused the injuries of which he died. The cause of the belt winding up in this way was, as subsequent investigations proved, that it caught on the projecting nuts and bolts of the coupling on the shaft." * * *

In *ROTHENBERGER v. NORTHWESTERN CONSOLIDATED MILLING CO.*, 57 Minn. 461 (June, 1894), order denying defendant's motion for new trial after verdict for plaintiff for \$500 in the District Court of Hennepin County was *affirmed*. Plaintiff was employed to dust the machines and sweep a floor in defendant's flouring mill. A number of machines were on this floor, the outside wheels of which were not covered or guarded. While attending to his duties plaintiff's right hand was caught between two cog-wheels resulting in loss of three of his fingers. The attention of defendant's foreman was called to the danger of the uncovered wheels, and he promised to cover them, and plaintiff relied on the promise, which, however, was not kept. Defendant held liable. What is a reasonable

inquiry, has a right to assume that his master has done his duty, and to rely on his superior judgment. Of course, a servant is bound to use his senses, and cannot be heard to plead ignorance of a danger that was obvious to any one on inspection; but, on the other hand, because he engages to work with or in the vicinity of machinery, he is not necessarily bound to know as much as his master ought to know as to what is or what is not safe. Again, it is one thing to be aware that machinery is defective, or in a particular condition, and another thing to know or appreciate the risks resulting therefrom.

time in which to repair after promise given is a question of fact for the jury.

In *SCHARENBERG v. ST. CLOUD FIBER-WARE CO.*, 59 Minn. 116 (November, 1894), order of District Court of Stearns County denying defendant's motion for new trial was *reversed*. From the statement of facts and the opinion rendered by MITCHELL, J., it appeared that plaintiff was employed as a common laborer in defendant's pulp and paper mill at St. Cloud, which mill was operated by water power. It was part of his business to turn on and shut off the water to start or stop the machinery. In turning on the water on the day of the accident his foot slipped, and came in contact with the revolving pinion which was left unguarded and uncovered. The floor was wet from the spray, the condition of which was known to plaintiff. *Held*, that plaintiff voluntarily assumed the risk of injury from his employment. Rehearing denied, December, 1894.

In *ANDERSON v. NELSON LUMBER CO.*, 67 Minn. 79 (December, 1896), order of District Court for Carlton County denying new trial after verdict for plaintiff for \$4,000 (reduced by consent to \$3,000), was *reversed* on ground of contributory negligence or assumption of risk. Opinion rendered by MITCHELL, J. "Plaintiff was

employed as a knot sawyer or shingle grader in the shingle department of defendant's saw-mill. The shingle department was on the ground floor of the mill, and the sawyers stood on a raised platform, the floor of which was about four feet above the floor of the mill. The saws were set in a frame or table, on shafts or arbors raised about three feet, or to the height of a man's waist, above and at the side of and parallel with this platform. There were five saws, in a straight line, and about three feet apart, which, when in motion, ran at a high rate of speed, making from 3,000 to 4,000 revolutions per minute. Directly underneath the saws ran an elevator for the purpose of carrying off the sawdust and other refuse dropping from the saws. This elevator consisted of a leather belt, with cleats on it, and ran in a frame or box built on an incline; the distance from the elevator up to the teeth of the saws being at one end about four feet and at the other end, under what we may term the fifth saw, about twenty-two inches. This elevator ran upward from the first saw towards the fifth saw, and carried the refuse on past the fifth saw out through an opening at the end of the mill. One-half the saws, which were circular, was above, and the other half below, the table or frame on which they were set, their under part pro-

A man of ordinary intelligence and experience may know the actual condition of an instrument with which he is working, and yet not know the nature or extent of the risks to which he is exposed. The mere fact that a servant knows the defects does not necessarily charge him with contributory negligence, or the assumption of risks growing out of those defects. The question is, did he know, or ought he, in the exercise of ordinary common sense and prudence, to have known the risks to which the condition of the instrumentalities exposed him? *Russell v. Minneapolis & St. Louis R'y Co.*, 32 Minn. 230; *Cook v. St. Paul, M. & M. R'y Co.*, 34 Minn. 45 (1).

Now, in the present case, the plaintiff was not a machinist, nor employed as such. He was a mere common laborer in the

jecting about two and one-half inches below the under side of this frame. This two and one-half inches of the saws was open and unguarded. The elevator frequently clogged with refuse, and stopped, so that it became necessary for the sawyers in the performance of their duty, to take measures to start it again. Sometimes they accomplished this by going to the end of the arbors immediately beyond the fifth saw, where the elevator ran open, and pulling on the belt. If this method failed, as it frequently did, they had to stoop down and crawl under the frame in which the saws were set, and reach down into the elevator box, and loosen the refuse with their hands. At the time in question, which was about 4 o'clock in the afternoon of June 1, the elevator clogged; and the plaintiff, in the line of his duty, stooped down, and went in under the frame, and reached with one hand down into the elevator box to remove the refuse. As soon as he removed this refuse, the elevator started, when he pulled his hand out quickly to prevent its being drawn in by the elevator, and in doing so it came in contact with the exposed teeth of the fifth saw, and the result was the injuries complained of. The only neg-

ligence charged against the defendant which could be the proximate cause of plaintiff's injuries consisted in leaving exposed and unguarded that part of the saws which extended below the under side of the table or frame. We think that, under the evidence, it was for the jury to decide whether it was practicable to guard the lower part of the saws, and, if so, whether reasonable care did not require the defendant to do so. But, after a careful examination of the whole evidence, we are satisfied that it conclusively appears that the unguarded condition of the saws and the risks incident thereto were so perfectly plain and obvious to the senses of any man of ordinary intelligence that it must be held that the plaintiff either actually knew and appreciated them or ought to have done so, if he had exercised any sort of reasonable care, and hence that he cannot recover because either of contributory negligence or the kindred doctrine of assumption of risks."

* * *

1. The *RUSSELL* and *COOK* cases are reported with the Minnesota "Railway" cases, in this volume of *AM. NEG. CAS.*, *post*.

mill. He had been employed at this point only about twenty days. He testifies (and the jury had a right to believe him) that he did not know that this gearing ever had been covered, or that it should have been covered, and that he did not know, and had never been told, that it was dangerous, or cautioned to keep away from it. There was no evidence that it was his duty to report that the gearing was uncovered. All that the witnesses on that point pretend to say is that it was the duty of every employee to report if they saw anything wrong with the machinery. But the plaintiff did not, in fact, know that the gearing ought to be covered. Neither could a court say, as a matter of law, that the risk or danger was so obvious upon inspection that plaintiff ought, in the exercise of ordinary intelligence, to have understood it. One witness who worked in the mill, and who had worked in saw-mills for five years, testified that it would be quite possible for a man who was not acquainted with machinery not to anticipate danger in going by it. Defendant's own foreman, who admitted to have known for some time that the covering was off, testified that he did not think anybody would get hurt; that he never thought a man would get caught, and advanced the theory that the gearing was so near the floor that plaintiff could not have got caught unless he had kneeled down, and shoved his knee into it. If that is the way it looked to the experienced foreman, this common laborer might well be excused in not realizing the danger. Under the circumstances, whether plaintiff was guilty of negligence, was clearly a question for the jury; and, they having answered it in the negative, no court can say, as a matter of law, that their verdict is not justified by the evidence.

What has been said disposes of most of the exceptions to the charge of the court, — particularly to the refusal to give defendant's fourth and fifth requests. The fourth request was also properly refused, for the reason that it was inapplicable to the facts of the case. It assumed that plaintiff knew, or ought to have known, that the absence of a covering from this gearing constituted a defect. It also assumed that the removal of the covering was such a recent or sudden occurrence that defendant could not reasonably have been expected to have known the fact. The seventh request was also properly refused. If, instead of repairing the defect, defendant saw fit to allow the gearing to remain uncovered, and attempted to relieve itself from liability by "explaining" to plaintiff its dan-

gerous character, it was not enough that he "appeared" to understand the explanation. If defendant proposed to relieve itself on any such ground, it was bound to see to it that plaintiff in fact understood it. The request was evidently framed in that form because the evidence showed that plaintiff understood very little of the English language.

The order denying a new trial must be affirmed.

EMPLOYEE INJURED BY MACHINERY — CLOTHING CAUGHT BY SET SCREW — CONTRIBUTORY NEGLIGENCE. — In **GROFF v. DULUTH IMPERIAL MILL CO.**, 58 Minn. 333 (*July, 1894*), order of District Court of St. Louis County denying plaintiff's motion for a new trial, was *affirmed*. Plaintiff was employed in defendant's flouring mill and was injured by a set screw. "In the basement of the mill, near to the ceiling, was hung a line of shafting, about two inches in diameter, on which was a pinion eight and one-quarter inches in diameter, fastened to the shafting by a set screw, which screw, we have to assume, was longer than was necessary, and for that reason its head improperly projected above the surface of the hub of the pinion. Looking north towards the shafting and the pinion, the cogs of the latter faced to the right, and meshed into corresponding cogs of a large, beveled wheel; thus transmitting power to a conveyor. The set screw was to the left of the cogs, and necessarily in the back of the pinion hub. Two or three feet to the right of the pinion, about eighteen inches above and about twelve inches back of the shafting, was an 'idler,' on which was an oil cup. Plaintiff was oiler of the machinery, and he well knew the location of its various parts, and the distances we have mentioned. At the time of the accident the basement floor was covered with flour barrels—a common occurrence—and for the purpose of filling the cup at the idler plaintiff placed a step ladder on four of these barrels. He had partly ascended the ladder when it 'teetered,' and he was thrown upon the shafting, so that his clothing was caught by the set screw, causing the injuries complained of. It was shown that one leg of the ladder was a trifle shorter than the other three." * * * *Held*, that plaintiff was either guilty of contributory negligence, or that the chances of injury from the alleged defect were so remote that defendant could not reasonably have anticipated them. Opinion by COLLINS, J.

SNOWBERG v. NELSON-SPENCER PAPER COMPANY.

Supreme Court, Minnesota, June, 1890.

[Reported in 43 Minn. 532.]

DEFECTIVE MACHINE—NOTICE TO MASTER—PROMISE TO REPAIR—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.—Where an employee while attending to a straw-cutter machine had his hand caught in the feed rolls of the machine, the complaint was held not to show assumption of risk nor contributory negligence on the part of the injured servant, where it was alleged that he had complained to the master of the defect which the latter had promised to remedy, the questions being for the jury to determine (1).

1. *Employees injured by machinery and appliances.* See, also, the following cases:

In *EICHELER v. HANGGI ET AL.*, 40 Minn. 263 (March, 1889), order of District Court for Ramsey County refusing defendants new trial after verdict for plaintiff for \$2,000 was *reversed*, the official syllabus stating the case as follows:

"The duty of the master to see to it that the machinery furnished for the use of his servants is reasonably safe does not extend so far as to require him to attend to the proper regulation of those parts which necessarily have to be adjusted in the course of the use, and with regard to the particular work to be done, and the adjustment of which is incident to the ordinary use of the machine. The plaintiff, a skilled mechanic, alleging negligence of the master in not having a movable table or platform, connected with a circular saw, properly secured in place, held chargeable with contributory negligence in not paying any attention to the mode in which the same was secured, he knowing that the table was movable." Opinion by

DICKINSON, J. Plaintiff's hand came in contact with the saw so that three of his fingers were cut off.

In *ANDERSON v. H. C. AKELEY LUMBER Co.*, 47 Minn. 178 (August, 1891), order of District Court for Hennepin County refusing new trial after verdict for plaintiff for \$2,000 was *reversed*, the official syllabus stating the case as follows: "The plaintiff was operating a planing-machine, to which the power was applied by a large belt, the motion of which was very rapid. He was familiar with such machinery. He knew, as the evidence is deemed to show, that the fastening of the belt had become insecure so that it was liable to break apart, and called the foreman's attention to it; but the latter declined to repair it, and told the plaintiff to go on with the use of the machine. *Held*, that the plaintiff must be deemed to have known the risk, and to have assumed it." The belt which parted struck plaintiff's elbow. Rehearing denied, October, 1891.

In *MULLIN v. NORTHERN MILL Co.*, 53 Minn. 29 (April, 1893), appeal by defendant from judgment on verdict for plaintiff for \$3,000 in the District

APPEAL from order in the District Court for Otter Tail County overruling general demurrer to the complaint. *Order affirmed.*

The case made by the complaint was as follows: "On December 1, 1888, the plaintiff was in defendant's service, his duty being to operate a machine (fully described) known as a straw-cutter. On that day the defendant negligently built a shed against the mill, darkening the room where the cutter was situated, and at times the darkness was intensified by the escape of steam from a defective attachment in a rotary bleacher in the same room. On January 12, 1889, and for several weeks before, the surface of the feed rolls of the cutter had become worn, dulled, and clogged so as not to work as effectively as they should, and the pinion by which they were revolved had become worn, and would at times slip and remain stationary on its bearing, and not turn the rolls, or would turn them irregularly with sudden stops and starts; and the cogs on the pinion had become worn so as at times to slip by those of the feed-rolls; and two of the knives on the cutting cylinder had been broken and removed, thereby throwing it out of balance and greatly impairing its efficiency; and part of the top of

Court of Hennepin County, judgment was *affirmed*. Plaintiff was engaged as a blacksmith in defendant's saw-mill, repairing the ironwork, and keeping its tools in condition, and while putting the rosser chain in place on a sprocket wheel, his right leg was so injured that it had to be amputated below the knee. *Held*, that questions of negligence of the parties were proper for the jury.

In *NELSON v. ST. PAUL PLOW WORKS*, 57 Minn. 43 (April, 1894), order denying defendant new trial after verdict for plaintiff for \$750 in the District Court of Ramsey County, was *affirmed*. Plaintiff was working in defendant's machine shop. The trip-hammer at which he was temporarily at work was worn and out of order. He quit work for a few days and on his return was told by the foreman that it had been repaired. He went to work at it again and while taking

an iron from the die the hammer unexpectedly fell without being tripped and caught the first finger of his right hand, which had to be amputated. Negligence alleged was failure of defendant to furnish plaintiff safe machinery. *Held*, not essential to recovery that the plaintiff should be able to show the exact nature of the defect, it being sufficient to show that the injury resulted from the defective condition of the machinery chargeable to the defendant's negligence.

In *SMITH v. BACKUS LUMBER CO.*, 64 Minn. 447 (May, 1896), judgment for plaintiff in the District Court for Hennepin County for \$1,855.81, was *affirmed*. The case is stated in the opinion by CANTY, J., as follows: "Plaintiff was employed by defendant as night sawyer in its saw-mill during the time from May until August 21, 1894. On the night of the last named day, the band saw which

the curbing or feed-box in front of the rolls had been removed by defendant. On January 12, 1889, the chaff, which was intended to and did pass through an opening in the bottom of the feed-box, had completely filled the space between such opening and the mill floor, so that the lower feed-roll could not adjust itself upon its springs to receive the straw for the cutter, and plaintiff proposed to defendant to remove the accumulation, but was sent to work in another part of the mill, where he was employed until about 3 o'clock, and was then directed to begin cutting straw with the cutter. When he entered the room to resume work at the cutter, the room was filled with steam and darkened, and in consequence of the accumulation of chaff and the above-mentioned defects in the machinery, the straw would not pass through the feed-rolls, so that plaintiff was obliged to and did attempt to force the straw through the rolls by pressing with his hands, and, while doing so, the resistance was suddenly removed, and his left hand was caught in the rolls and drawn through until the arm was cut off. Plaintiff had notified the defendant (at what time it is not stated) of all the above-mentioned defects, and the defendant had promised him that at the earliest possible time the mill should be so ar-

he was running struck a piece of plate iron imbedded in the log, causing the teeth of the saw to break and fly off, one of which teeth struck the plaintiff in his right eye, destroying it, and another tooth struck him in the face, causing a flesh wound. The piece of iron was about two and one-half feet long, four inches wide, and one-quarter of an inch thick. It had been driven into a split in the butt end of the log, evidently by some malicious person, and about an inch and one-half or two inches of the end of it remained exposed, and bent over against the end of the log. Plaintiff's claim is that his injury was caused by the negligence of the defendant in failing to furnish him with sufficient light to enable him to inspect the logs properly, and discover pieces of iron or stone which were liable to be stuck on or imbedded in the logs, and that, if proper

light had been so furnished, he would have discovered the piece of iron in question in time to have prevented the injury. The lights in use were incandescent electric lights, and the electricity to supply them was generated on the premises by the same steam plant which operated the saw-mill." * * * *Held*, that verdict was sustained by the evidence. What is reasonable time a servant may continue in employ of master after complaint of defect and promise to remedy same is question for jury. Master liable for retention in his employ of habitually careless or incompetent servant whereby another servant is injured.

In *KOSLOWSKI v. THAYER ET AL.*, 66 Minn. 150 (November, 1896), plaintiff's intestate killed by flying substance from machine, judgment for defendant, notwithstanding verdict for plaintiff in the District Court for

ranged that there would be no further need of the cutter, and had specially requested him to continue operating it until such change could be made, which would be in a very short time; and on the morning of the day of the accident the defendant informed him that it would not be necessary to clear away the accumulations under the machine or to repair it, as it would not be used after that day. Plaintiff remained in defendant's service wholly on account of and relying on defendant's promise and in daily expectation of being relieved from operating the cutter."

HALE & PECK and PARSONS & BROWN, for appellant.

T. Z. ROOT and CLAPP & HOUP, for respondent.

Gillilan, Ch. J.—The allegations of this complaint are not so precise and definite as might be desired as to some of the facts, but the pleading will suffice as against a demurrer. There can be no doubt that the defects in the machinery which rendered it dangerous for plaintiff to work with it, and also the danger he was in by reason of such defects, were known to plaintiff, so that he would be taken to have assumed the risk, were it not for the alleged promise of the defendant to remedy

Benton County, was *affirmed*. Opinion by MITCHELL, J. "At the time he was killed the deceased was working in defendant's saw-mill as 'feeder' of a lath machine. The negligence charged is that the defendants failed to provide a proper 'dust board' in front of the saws for the purpose of preventing missiles from flying back from the saws and striking the person engaged in feeding the machine. The particular in which it is claimed that the dust board was defective is that the lower end was allowed to swing loose, instead of being securely spiked and fastened. The theory of the plaintiff is, in substance, that a piece of lath flying back from the saws struck the dust board, causing it to swing back, and then passed on and struck the deceased." It was held that plaintiff failed to show that defendant's negligence was the proximate cause of the injury. "The accident might possi-

bly have resulted from the cause and in the way claimed, although the evidence tends very strongly to prove that this was a physical impossibility. But it might have happened in any one of a variety of other ways that might be suggested, and which had no relation to the swinging condition of the dust board. The questions as to just how the accident occurred and what was the proximate cause of it, were left wholly in the domain of speculation. As already suggested, the burden was on the plaintiff, and not on the defendants, to prove the proximate cause of the injury. While he was not required to prove this by direct evidence, yet he was bound to produce evidence furnishing a reasonable basis for the conclusion that the defective condition of the dust board was the proximate cause of the injury. No verdict can rest on mere conjecture."

the defects, and its request to plaintiff to continue using the machinery until it should remedy them, bringing the case within the recognized exception to the general rule that a servant who uses defective machinery, knowing of the defects and the consequent dangers, does so at his own risk. Of course, one who is within the exception may be so negligent in the use of the machinery that any injury to himself will be chargeable in a greater or less degree to his own negligence, in which case he cannot recover. The manner of the injury to plaintiff, as stated in the complaint, is suggestive of this. It alleges, however, that it was necessary for him to do as he did, and in the face of that allegation it cannot be said that contributory negligence appears, so that the case ought to be withheld from a jury.

Order affirmed.

EMPLOYEE ASSISTING IN SETTING UP PRINTING PRESS — ELECTRIC SHOCK — DEFECTIVE INSULATION OF WIRE — SCOPE OF EMPLOYMENT — QUESTION FOR JURY. — In **VOYER v. DISPATCH PRINTING CO.**, 62 Minn. 393 (*November, 1895*), appeal by plaintiff from an order of the District Court for Ramsey County denying motion for new trial, order was *reversed* and new trial granted. The case is stated in the opinion rendered by CANTY, J., as follows:

“Defendant is the publisher of a daily newspaper in St. Paul. Plaintiff was in its employ for five or six days, mostly in assisting in setting up a new printing press in its press room, in the basement of its printing establishment. There were at the time two other presses already in use in this press room. At one of these presses there was used an electric lamp, to which were attached two electric wires, insulated, and, as we understand the evidence, bound together. These wires extended from the hand lamp where it ordinarily hung, over the press, down into a shallow pit under the press, and were there wound into a coil, which hung on a peg on the side of the pit, and again extended from this coil to the wall of the room, and were there connected with other electric wires. One Cameron was the pressman who operated this press. One Egan was the foreman of the press room, under whose superintendence plaintiff was employed. At the time in question plaintiff was at work on the new press, when he was called over by Cameron to the press of which Cameron was pressman, and told to hand the electric hand lamp to Cameron, under one part of this press where Cameron was at work. He went into the pit under the press, and took the lamp, which then lay under one side of the press, and reached it to Cameron, but the wire attached to the lamp

was too short to permit the lamp to be taken to the desired place. Then plaintiff seized the wire in his hand for the purpose of uncoiling it off the peg, and, while proceeding to do so, received a shock of electricity from the wire, which prostrated him, burned his hands, face, and arms severely, and also burned his clothes.

"This action is brought to recover damages for this injury. It is claimed by plaintiff that he was injured in the course of his employment, by reason of defendant's negligence in permitting this wire to be uninsulated in parts and defectively insulated in other parts, and in permitting a quantity of water to remain in the pit, which gave the person standing in the water and coming in contact with the wire a more complete connection with the ground, causing him to receive a more severe shock from the wire. At the close of the trial the court ordered a verdict for defendant, and from an order denying his motion for a new trial plaintiff appeals.

"We are of the opinion that there was sufficient evidence to sustain a verdict for plaintiff, and that the court below erred in taking the case from the jury. It sufficiently appears from the evidence that this pit is a place where defendant's employees were accustomed to go and handle this lamp and wire as plaintiff had handled them, and we are of the opinion that the evidence tends to prove that defendant was negligent in permitting the insulation of the wire to be defective and out of repair. This proposition is not strenuously controverted by defendant's counsel, but it is contended that plaintiff at the time of his injury was acting without the scope of his employment, and was a mere volunteer in going into the pit and handling the lamp and wire. We cannot agree with counsel that the evidence conclusively shows this to be the case. It is true that Cameron was a mere fellow-servant, who had no authority to change the scope of plaintiff's employment, or direct him to go into the pit and handle the wire, if that was without the scope of his employment. But whether it was within the scope of his employment or not must be determined from all the evidence and circumstances in the case." * * *

The court reviewed the evidence and held that the questions whether defendant was negligent and whether plaintiff was acting within the scope of his employment at the time of the injury, were for the jury. ENOCH JOHNSON and JAMES E. TRASK appeared for appellant (plaintiff below); MUNN, BOYESEN & THYGESSEN, for respondent.

BERG V. BOUSFIELD ET AL.

Supreme Court, Minnesota, June, 1896.

[Reported in 65 Minn. 355.]

MINOR EMPLOYEE INJURED BY MACHINERY—DEGREE OF CARE—CONTRIBUTORY NEGLIGENCE.—Rule applied that a youth between fifteen and sixteen years of age is required to exercise the amount of discretion which a person of his age and experience should exercise, and no more, and whether plaintiff was guilty of contributory negligence held to be a question for the jury.

DANGEROUS WORK—FAILURE TO WARN MINOR EMPLOYEE.—Whether or not his employer was guilty of negligence in failing to instruct such youth, and warn him of the dangers of working around machinery with which he was not familiar, held a question for the jury.

INDEPENDENT CONTRACTOR—AGENT—LIABILITY OF PRINCIPAL.—Rule applied that, where one who performs work for another represents the will of that other, not only as to the result, but also as to the means by which that result is accomplished, he is not an independent contractor, but the agent of that other, who is responsible for his acts and omissions within the scope of his authority.

INDEMNITY POLICY—DEFENSE BY INSURER—EVIDENCE.—Plaintiff was employed in defendants' establishment by one Scott, was injured by the latter's negligence, and brought this action to recover damages for the injury, claiming that he was defendants' servant, and Scott was their agent. They denied this, and claimed that Scott was an independent contractor, and plaintiff was in his employ. On the trial, the court received evidence showing that defendants held an indemnity policy, indemnifying them, and holding them harmless "to a certain extent" from liability "by reason of any injury to any employees, including this plaintiff or anybody else that might be in any part of the mill working in that factory," and that the company issuing the policy had undertaken to defend, and was defending, this action for defendants. Nothing further appeared as to the contents of the policy, and it did not appear that such insurer undertook, by the policy, to defend the defendants in all cases in which they might be charged with any such liability. *Held*, the evidence was admissible, as tending to show that the defendants did not regard Scott as an independent contractor.

RULINGS CONSIDERED.—Other unimportant rulings considered and disposed of.

DAMAGES—VERDICT NOT EXCESSIVE.—*Held*, the verdict as it now stands [\$4,000] is not so excessive that this court would be justified in granting a new trial.

(Syllabus by the court.)

APPEAL by defendants from an order of the District Court for Hennepin County, denying a motion for a new trial. The facts appear in the opinion. *Order affirmed.*

KEITH, EVANS, THOMPSON & FAIRCHILD, for appellants.

F. D. LARRABEE, for respondent.

Canty, J.— This is an action for personal injury. Plaintiff had a verdict, and from an order denying a new trial defendants appeal. The defendants are engaged in the business of manufacturing wooden tubs, pails, and other woodenware. On April 27, 1894, plaintiff, then an infant between fifteen and sixteen years of age, was employed in their establishment by one Scott, who had charge of one department of the business, and who put plaintiff to work carrying wooden bottoms from the car over to one of the saws. Under one of the saws was placed a tub to catch the splints, scraps, and sawdust which fell from the saw. When the tub was full, Scott ordered plaintiff to take it away from under the saw. In attempting to do so, he put his right hand between the pile of refuse in the tub and the under side of the rapidly revolving saw, when his little finger, the next one, and the middle finger below the middle joint were cut off by the saw. Plaintiff claims that he never worked around machinery before, did not know or appreciate the danger of doing so, and was not instructed or warned of these dangers. He claims that Scott was negligent in failing to inquire as to his knowledge of these dangers, and in failing to instruct him as to the same, and that defendants are liable for Scott's negligence (1).

1. *Minor employees injured by machinery.* See also the following cases:

In *TRUNTLE v. NORTH STAR WOOLEN-MILL Co.*, 57 Minn. 52 (April, 1894), action by plaintiff, a boy fifteen years of age, employed as a "helper" in defendant's carding room, for injuries sustained by having his arm caught between the rollers of the carding machine, order of the District Court of Hennepin County denying defendant's motion for new trial after verdict rendered for plaintiff for \$5,750, was reversed. The Supreme Court held that the plaintiff was guilty of contributory negligence. It was also held that: "Even if a master is negligent in not giving his servant instructions and cautions as to the dangers

of his employment, yet if the servant receives the same information and cautions from other sources, whether from other persons or from his own observation, and is nevertheless thereafter injured, the negligence of the master is not the proximate cause of the injury." The first trial of the case resulted in verdict for plaintiff for \$2,000 which, however, was set aside, and new trial granted.

In *OLMSCHIED v. NELSON-TENNEY LUMBER Co.*, 66 Minn. 61 (October, 1896), order denying motion for new trial in District Court, Hennepin County, was affirmed. Opinion by START, Ch. J. "The plaintiff, a boy seventeen years old, was employed by the defendant in its saw-mill, and, while operating therein a machine

On the trial, plaintiff testified that there was, as appeared to be, about five inches of space between the pile of refuse and the saw. "Q. How far from the splints up to the saw? A. About five inches. * * * Q. Well, how did you happen to get your hand cut, and what were you doing? A. I was going to squeeze the splints and the saw came down further than it appeared to come."

1. We cannot hold, as a question of law, that he was guilty of contributory negligence. It may well be that a boy of his age, who had never worked around such saws, and was not familiar with them, would fail to realize that the teeth of a rapidly revolving saw are invisible, and would fail to learn that there was any danger in putting his hand where he could see nothing to interfere with it. He had worked in the factory only about one hour after he was hired until he was injured. The law did not require him to exercise the care and discretion that

known as a 'bolting or cut-off saw,' used for cutting shingle stock, three of his fingers on the left hand were cut off by the saw. This action was brought to recover damages for such injuries on the ground of the defendant's alleged negligence in the premises. The plaintiff had a verdict for \$3,000, and the defendant appealed from an order denying its motion for a new trial." The evidence as to defendant's negligence and plaintiff's contributory negligence and as to whether the latter assumed the risks of operating the defective saw, was held to sustain verdict in plaintiff's favor.

In *HESS v. ADAMANT MANUFACTURING COMPANY OF AMERICA*, 66 Minn. 79 (October, 1896), appeal by defendant from a judgment of the District Court for Hennepin County for plaintiff for \$7,309.17, and from orders denying motion to set aside the service of the summons, and denying motions for new trial, in action brought under Gen. Stat. 1894, § 5164, for injuries sustained by plaintiff's minor son while in defendant's employ in its factory, judgment

for plaintiff was *affirmed*. *KITCHEL, COHEN & SHAW* and *JOHN H. NICKELL*, appeared for appellant; *HARRISON & NOYES* and *R. E. NOYES*, for respondent. The opinion was rendered by *MITCHELL, J.*, in which the facts of the injury were stated as follows: "At the time of the injury complained of, the defendant was engaged in manufacturing adamant plaster, the practical part of the business being under the management and supervision of one O'Brien, as general foreman, whose duty it was to superintend and overlook the machinery and the progress of the work, to see that the machinery was kept in proper working order, to see that the machinery was run and that the men were kept at work, and to direct them what work to do. He also at times hired and discharged the men. In short, he was the general foreman in charge of the factory and the employees who worked there. He employed the plaintiff's son, and assigned to him the duty of attending to the sand elevator used to convey sand from the basement to the third floor. [The construction and opera-

a person of mature years should. It required him to exercise such care and discretion as a boy of his age and experience should exercise, and no more. Wood Mast. & Serv., § 350. Whether he exercised this amount of care and discretion was, on the evidence, a question for the jury.

2. We are also of the opinion that it was a question for the jury whether or not Scott was guilty of negligence in failing to instruct the boy, and warn him of the dangers before sending him to empty the tub. *Kailen v. Northwestern Bedding Co.*, 46 Minn. 187, 48 N. W. 779, 16 Am. Neg. Cas. 26, *ante*.

3. The next question in the case is whether the jury were justified in finding, from the evidence, that Scott was the agent or servant of defendants, so that they are responsible

tion of this machinery are fully explained by the witness Stebbin, in connection with the drawing Exhibit A, found on page 44 of the paper book.] One of the duties assigned to the boy was, whenever the elevator clogged, to go down into the basement and clear it out, by removing the oversupply of sand from the boot. On the day in question he had gone down into the basement for that purpose, and, while he was engaged in removing the sand with his hand, O'Brien, on the story above, turned on the power, thereby setting the elevator in motion. The result was that the boy's arm was caught and crushed in the machinery, rendering amputation necessary." * * * The points decided are stated in the official syllabus to the report as follows:

"Held, that, upon the evidence, the court was justified in refusing defendant's motion to set aside the service of the summons on the ground that the person on whom it was served was neither an agent nor officer of the company.

"G. S. 1894, sec. 5164, authorizing a father to bring an action for injuries to his child, is constitutional. The action is for the benefit of the child, and the judgment would be a bar to another action by the child.

"Under the evidence, the trial court committed no error prejudicial to the defendant in submitting to the jury the question whether the negligent act of defendant's foreman, which caused the injury complained of, was the act of a vice-principal or of a fellow-servant.

"Certain requests to charge as to the assumption of risk held to have been properly refused, because not justified by the evidence, and also because ambiguous and misleading in their language.

"Laws 1895, c. 173, being merely declaratory of the common law, it was not prejudicial error to read it to the jury as the law of the case, although the statute was not enacted until after the injury complained of occurred."

See, also, *KAILLEN v. NORTHWESTERN BEDDING Co.*, 46 Minn. 187, where inexperienced boy, fourteen years old, was injured, as to duty of masters to warn minor employees of dangers to which their duties may expose them.

A brief note of the *KAILLEN* case, 46 Minn. 187 (which case is cited in the case at bar) appears on page 26 of this volume, *ante*, where it was inadvertently placed with the Michigan cases.

for his negligence. It appears by the uncontradicted evidence that Scott took the work of which he had charge by the piece. Defendants paid him a fixed price for a specified amount of work, and he hired the other employees under him, paid them himself, and retained the profits or suffered the losses which were the difference between the fixed contract price which he received and the amount of wages which he paid. He carried on his operations in one room of defendant's factory. They furnished the machinery, the power, and the material, and there is ample evidence to sustain a finding that they reserved and exercised complete control over the manner of performing the work. The defendants are partners, and each personally superintended, more or less, the work in or about the factory. For a part of this work they employed the laborers

Minor employee engaged as laborer injured by machinery—Scope of employment.—In *ANDERSON* (by guardian) *v.* *MORRISON*, 22 Minn. 274 (November, 1875), appeal by plaintiff from an order of the District Court for Hennepin County refusing a new trial after verdict for defendant, the order was *affirmed*. The facts are stated by GILFILLAN, Ch. J., as follows: "The cause of action set up in the complaint is based upon the following facts: That the defendant was engaged in running a cotton mill; that the plaintiff, a boy of fourteen years, was, with the consent of his father, employed by the defendant as a common laborer to serve and work at and about the elevator in the mill; that after such employment the defendant, without the knowledge or consent of plaintiff's father or of plaintiff, improperly, wrongfully and negligently directed and required plaintiff to quit such employment, and serve the defendant in feeding, working and cleaning a picking machine in said mill; that working at said picking machine exposed the person employed thereat to very great and unusual danger and risk of receiving personal and bodily injury—to

greater risk and danger than service about the elevator—and exposed such person to greater risk than ordinary machines of that kind; that this increased danger was known to defendant, but unknown to plaintiff or his father; and that defendant at all times negligently, carelessly and wrongfully omitted to inform plaintiff or his father of any of the risks and dangers attending work on such picking machine; that the plaintiff while carefully, and to the best of his then discretion and ability, attending said machine, had his left hand and arm caught and injured in it, so that it was necessary to amputate the arm." * * * The ruling in the case is as follows:

"When an employer set an employee, who is a minor, to do a dangerous work, other than that for which the minor was employed, the employer is not liable for injuries caused to the minor while engaged in such dangerous work on the ground merely that he set him at work, unless it was, under all the circumstances of the case, imprudent and negligent on the part of the employer to set him at such work."

themselves, and they let other portions of the work to different parties, on similar terms to those on which they let the part that was let to Scott.

The defendant Bousfield was called for cross-examination, and testified as follows: " Q. And Mr. McVoy is the superintendent? A. Yes, sir. Q. And in all departments it is done subject to his approval, and he has a right to order it to be done a certain way, has he not, or not to be done a certain way? A. In a general way, yes. Q. It is all done subject to him? A. He has general supervision of the whole business. Q. And this man Scott was under him? A. Yes. Q. And had to do the work subject to his approval? A. Yes, sir. Q. And he had authority to stop Scott, and make him do it in a different way, didn't he? A. Yes. Q. And make him do it as he wanted it done? A. Yes, sir. Q. Now, what department was under Scott? A. What we call the bottom and cover department. Q. You said that all the work done by Scott and those under him is all done subject to the approval of the superintendent, McVoy? A. I say all that Mr. Scott does is subject to the approval of Mr. McVoy. Q. All that is done by Scott individually and those working under him? A. Yes. Q. And McVoy has authority at all times to superintend the work, has he not, * * * and all portions of it? A. He has. Q. And has a right to direct when things shall be done? A. He has; yes, sir. Q. When they shall be done, and how they shall be done? A. Yes, sir. Q. And the manner in which it shall be done? A. Yes. * * * Really he hasn't any authority to say one word to that boy, you may say. He should do it through Mr. Scott. Q. You say he has no right to boss those boys at all? A. No. Q. But he has a right to say to Scott: ' You must not have it done this way, you must have it done so and so.' That is right, isn't it? A. That is right — do it through Scott. * * * Q. What does he (McVoy) go in there at all for? A. To know what is going on, and get a general supervision. He has general supervision of the whole of it. Q. What do you mean by saying he has general supervision? A. To see that everything is going right. Q. In what respect? A. To see that they are using our materials properly. Q. In what way? A. And not wasting it. Q. Well, what other respect? What right has he there, except to see that he is not wasting material? A. To see that we get — well, certain results. Q. And in what other respects? A.

Well, to see that things are going right generally. Q. Every respect? A. In every respect; yes. Q. Suppose they are not going right in any respect whatever, then what? A. It would be his duty to call the contractor's attention to it. Q. And what would he do? What authority would he have over the contractor in a case of that kind? A. If he did not comply with it, he could discharge him. Q. Then he had a right to make him do things just as you wanted them done? A. Certainly. Q. Not only one thing, but everything in connection with his work there — he had a right to make him do it just as you wanted it done? A. Certainly. Q. You reserved that right there to make him do it just as you wanted it done? A. Always. Q. In every particular? A. Yes, sir. * * * Q. But, in exercising the right, to exercise that privilege to get a right result, you did have the right to direct him, and control him in every particular, in the doing of that work and in the management and use of the machinery, and, if he didn't obey your orders, you had a right to discharge him? A. Mr. Scott? Q. Yes, sir. A. Yes, sir."

It is true that, on redirect examination, Bousfield repeatedly asserted that neither he nor McVoy had any control over Scott, except to see that he accomplished a certain result; but the effect to be given to the contradictory statements of the witness was a question for the jury. The testimony of the defendant McVoy was of somewhat the same character. There was also evidence tending to prove that Bousfield had stated to other parties that plaintiff was working for him at the time of the injury. While the undisputed evidence shows that Scott was to some extent a contractor, yet the jury were justified in finding, from the evidence, that he was not so far an independent contractor that defendants were not responsible for his acts.

"The true test, as it seems to us, by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." 1 Shearm. & Redf. Neg. (4th ed.), § 164.

The evidence tends to prove that Scott represented the will of the defendants, not only as to the result, but also as to the means to accomplish that result.

4. The following rulings of the court made on the cross-examination of Bousfield, are assigned as error: "Q. You had what is known as an accident insurance policy — your firm, did you not, for which you paid a consideration, and by which this insurance company agreed to indemnify you, and hold you harmless to a certain extent by reason of any injury to any of the employees, including this plaintiff or anybody else that might be in any part of the mill working in that factory, did you not? (Objected to as incompetent, irrelevant and immaterial. Overruled, and exception.) A. We have such a thing. Mr. Evans: Was that policy in writing? A. Yes, sir. Mr. Evans: We make the further objection to this testimony, as to the character of that policy, as incompetent, irrelevant and immaterial. The Court: Well, there is nothing before the court now. The question was asked and answered. Q. And under and by virtue of that policy this case is being defended here by these attorneys, is it not? (Objected to as incompetent, irrelevant and immaterial. Overruled, and exception.) A. I am spending my time here. Mr. Evans: And on the further ground that the terms of that policy appear to be in writing, and that writing is not here. The Court: I think he may answer the question. Mr. Evans: Exception. A. That is the case, I believe. Q. It is by virtue of that contract that they are appearing here, defending this case — the insurance company? A. Yes, sir. Mr. Evans: The same objection and exception."

Evidence of this character is highly prejudicial, and it certainly was error to admit it unless it was competent. But we cannot say that it was not competent. Except as above stated, the nature of the indemnity furnished to defendants did not appear, but it seems to us that the evidence had some tendency to prove that defendants regarded themselves liable for the negligence of Scott, and the insurance company did, also. It does not appear that the insurance company undertook by the policy to defend the defendants in all cases where they were charged with any such liability, and we cannot so presume. It is fair to presume that defendants required the insurance company to defend them. It seems to us that the conduct of defendants in this respect had some tendency to show that they did not regard Scott as an independent contractor, and, as to that issue, we are of the opinion that the evidence was admissible. The objection that the evidence was secondary came

too late to affect the first questions, and it had no application to the subsequent questions, because they did not call for the effect or contents of any written instrument.

5. There was evidence in the case tending to prove that the saw was partly covered, and defendants assign as error the refusal of the court to charge that, if the jury found that the saw was covered, plaintiff could not recover. The saw was not covered at the point where plaintiff's hand came in contact with it, and the question of whether it was covered at some other point is not decisive of the case. Therefore the request was properly refused. Appellants assign as error the refusal of the court to charge a number of other requests. But all the questions worthy of consideration involved in such refusal have already been disposed of.

6. The refusal of the court below to grant a new trial on account of excessive damages is also assigned as error. The jury awarded plaintiff the sum of \$5,125, and, on the motion for a new trial, the court ordered that the same be granted unless plaintiff, in writing, would remit all above \$4,000, which he did. We cannot say that, on the evidence, a verdict for \$4,000 is so excessive that this court should interfere to set it aside.

This disposes of all the questions raised having any merit, and the order appealed from is affirmed.

MINOR EMPLOYEES INJURED WHILE USING ELEVATORS.—In **McDONOUGH v. LANPHER et al.**, 55 Minn. 507 (*December, 1893*), it appeared that the plaintiff was sixteen years old and in defendant's employ; that in going to her work in the building she took the elevator to go up to the fifth story, and on entering it rested her hand on the upper strip and one foot on the lower, and in ascending, the foot, which must have been in part outside the strip, was caught and injured by a joist or timber in one of the floors projecting inside the wall or casing of the elevator well or shaft so as to come very near the edge of the elevator floor. On the trial of the action in the District Court of Ramsey County she obtained verdict for \$1,250. Defendant's motion for new trial was denied. On appeal to Supreme Court the order denying new trial was *reversed*. Opinion by GILFILLAN, Ch. J. The official syllabus states the case as follows: "Defendants carried on their business in a five-story building, using the whole of it. In the building was an elevator, running from the lowest to the highest story, used for freight, but in which the employees in the business were permitted, but not required, to ride in going up to and down

from the stories in which they respectively worked. *Held*, that while so riding they were employees, and not passengers, and the degree of care required of defendants was that required on the part of the master towards his servant, and not that imposed on a common carrier of passengers in respect to those carried by him."

In **LUDWIG v. PILLSBURY et al.**, 35 Minn. 256 (*May, 1886*), order of District Court, for Hennepin County, refusing plaintiff new trial, was *affirmed*, the opinion by MITCHELL, J., stating the case as follows: "We are of opinion that this action was properly dismissed, for the reason that it clearly and indisputably appears from the evidence that the injuries to this boy must have been caused by his own negligence. He was 'an unusually bright boy,' nearly thirteen years old, and therefore *sui juris*, and capable of caring for his own safety. He had been at work in this mill for a month; and during that time had ridden daily on this elevator to his work in the sixth story of the mill. He must have seen, and hence known, that if, when the elevator was ascending, an object was extended any considerable distance over and outside of the top of the railing around the elevator, it would come in contact with the sides of the shaft as the elevator passed through the hatchways or openings in the floors in the mill. He had entered the elevator solely for the purpose of ascending to the sixth story, and was engaged in no present duty which might distract his mind from his surroundings. He was not thrown from an erect position by any accident, such as a sudden lurch or jerk. The beam or joist came in contact with the extreme back part of his head. Now, while he says he doesn't recollect whether he leaned over, but supposes he did, the physical facts demonstrate that he must have leaned over the top of the railing, and extended or stretched his head some eight or ten inches beyond or outside of the elevator. He did this without any necessity or controlling cause for it. Holding him responsible simply for the exercise of such care and vigilance as could reasonably be expected from one of his age and capacity, it seems to us that but one conclusion can be arrived at, to wit, that he was guilty of gross carelessness and negligence. This renders it unnecessary to consider whether there was any evidence of negligence on part of defendants. If there was, it was certainly very scant. Order affirmed."

GRAIN, ELEVATOR — DANGEROUS PREMISES — EMPLOYEE STEPPING INTO OPENING — ASSUMPTION OF RISK. — In **EHMCKE v. PORTER**, 45 Minn. 338 (*February, 1891*), order refusing defendant new trial after verdict for plaintiff for \$2,000 was *reversed*, the facts being stated by GILFILLAN, Ch. J., as

follows: "Defendant owned and operated an elevator in connection with a flouring mill, and the plaintiff was in his employment as foreman of the elevator. On the first floor of the elevator was a narrow passageway between the bins, under the floor of which ran what is called the 'conveyor,' an iron screw revolving with great rapidity when in operation, used to convey the grain to what are called the 'elevator legs.' At places directly over the conveyor boards, fourteen inches wide, were fitted into the floor, leaving an even surface, but left unfastened so that they could be lifted out and the conveyor exposed whenever occasion might require. When these boards were in place the passageway was safe, but if one of them was left out it rendered the passage dangerous to any one passing along it; the danger being that he might step into the opening upon the conveyor. The rule of the elevator was that any one lifting out one of these boards should replace it before leaving, and this rule had always been observed prior to the occasion on which the injury for which the action is brought occurred. The only danger from this condition of things was that some employee at the elevator might disregard the rule, and leave one of these openings exposed; otherwise, the passage was entirely safe. Such had been the condition of things for several years during which plaintiff had been foreman, and he knew the danger of that condition as fully as did the defendant. Shortly prior to the accident one of the employees of the elevator took out one of the boards for the purpose of shoveling grain in upon the conveyor, as plaintiff had directed him to do, and he continued at that work until plaintiff directed him to do something else, which, leaving the board out and the conveyor exposed, he proceeded to do; and at about the same time the plaintiff, not knowing that the board was out, started to go through the passage towards the opening thus left, taking with him, as he had always done, a lighted lantern, which went out before he had gone far; and he then, without any light, continued on until he stepped into the opening upon the conveyor, and was injured so that it was necessary to amputate his leg. He therefore brings this action, alleging that the injury was caused by the negligence of the defendant in having a passageway in a dangerous condition." * * *

After discussing the case the court held (as per official syllabus) that: "A servant whose duties require him to work in a place known by him to be unsafe, so that he would otherwise be taken to have assumed the risk, cannot relieve himself from such assumption of risk by showing a promise to make the place safe by one other than his master, unless such other person had authority to determine what should be done for the safety of those employed in the place, and to do it or have it done."

EMPLOYEE INJURED IN SAW-MILL — DANGEROUS PREMISES — FAILURE OF MASTER TO GIVE SIGNAL. — In **ANDERSON v. NORTHERN MILL CO.**, 42 Minn. 424 (*January, 1890*), order refusing new trial to defendant, after verdict for plaintiff for \$500, was *affirmed*. The official syllabus states the case as follows: "Respondent (plaintiff) was employed in appellant's saw-mill by B., who had a contract with said appellant to remove from the mill, and pile in the yard, all lumber as fast as sawed. The work performed by respondent brought him upon a part of the platform frequently made dangerous by reason of heavy timbers which came down upon it from the saws above with great velocity and at irregular intervals. The appellant had adopted and practised the custom of warning the men upon the platform of the coming of these timbers, by means of a signal, usually given by a man or boy standing at the head of the slide or chute through which the timbers were sent, thus affording the workmen an opportunity to avoid the danger. *Held*, that it was negligent for the appellant to omit the customary and cautionary signal, and that it was not negligent for the respondent, engrossed as he was in his work, to wholly rely upon its being given." The court (per COLLINS, J.), said that the case was, in its essential features, like that of *Erickson v. St. Paul & D. R. Co.*, 41 Minn. 500.

In *ERICKSON v. ST. PAUL & DULUTH R. R. Co.*, 41 Minn. 500 (*October, 1889*), referred to in preceding paragraph, where a workman in employ of contractor engaged in grading railway track, was struck by passing train while loading and unloading dump cars near track, judgment for plaintiff for \$6,000 and order refusing new trial (District Court, St. Louis County), was *affirmed*.

EMPLOYEES ACTING AS BRAKEMEN IN MILLS, ETC. — COUPLING CARS — COLLISION — FELLOW-SERVANTS. — In **McLAREN v. WILLISTON et al.**, 48 Minn. 299 (*February, 1892*), where plaintiff recovered a verdict for \$5,500 in the District Court of St. Louis county, order denying defendants new trial was *reversed*, on the ground of assumption of risk, fellow-servant rule, etc. Opinion by VANDERBURGH, J. The case is stated in the official syllabus to the report as follows:

"The plaintiff was employed as a brakeman upon a train of logging cars, operated upon a short railway track, with ordinary locomotive engines as motive power, in connection with defendants' saw-mill. The cars were built very low, and the drawbars thereof, used for coupling, were so much lower than that of the engine that when the engine was backed up to a car the drawbar of the car passed under that of the engine, and there was nothing to prevent the tender from striking and colliding with the body of the car

unless the engineer was careful to stop it in time. The facts were well known to the plaintiff, and the risk and danger of coupling the engine and cars under the circumstances were obvious. Plaintiff required no further instruction to notify him of such danger. *Held*, that he assumed the risk of this condition of the cars and engine, and the danger of going between them to couple and uncouple them.

“Conceding that the case does not fall within the statutory rule established by Laws 1887, ch. 13, plaintiff also took the risk of the negligent acts or conduct of the engineer in the common employment.

“The case presented by the record is not one in which the negligent act of a fellow-servant co-operates with the actionable negligence of the master in furnishing unsafe instrumentalities.”

In **ANDERSON v. L. T. SOWLE ELEVATOR COMPANY**, 37 Minn. 539 (*December, 1887*), order refusing plaintiff new trial, on dismissal of action, was *affirmed*. It appeared that plaintiff was employed by defendant at its elevator, and while so employed was required by it to go between two empty railroad cars and couple them. While he was doing this a loaded car was, by order of defendant's servants, moved along the track against one of the empty cars, driving it against the other, so that, as plaintiff was inserting the coupling link, his hand was caught between the bumpers and injured. *Held*, that defendant was not liable, the act from which the danger arose being that of a coemployee.

LINDVALL v. WOODS ET AL.

Supreme Court, Minnesota, July, 1889.

[Reported in 41 Minn. 212.]

LABORER INJURED BY FALL OF TRESTLE—DEFECTS—FELLOW-SERVANT.—Defendants were engaged in grading a line of railroad. The work was done by cutting down one part, and with the material making a fill in another part adjacent. The material was conveyed from the cut to the fill in dirt cars. In the dump these cars were run on a track laid on a temporary trestle, constructed with materials (sufficient in quality and quantity) furnished on the ground by defendants; and, as the dump was filled, this trestle was from time to time extended. Part of the men worked in the cut, others drove the teams which drew the cars, others unloaded the cars and shovelled on the dump, and another, one Johnson, framed the bents and built the trestle, but all were subject to be called, on the orders of the foreman, from one part of the work to another. A foreman, one Murdock, was in charge

of the work, and gave all the orders to the men, where to work and what to do. He also hired and discharged men on the work. On the occasion in question, it being desired to raise additional bents and lengthen the trestle, the foreman called upon plaintiff and one Peterson to assist Johnson. While plaintiff, Peterson, and the foreman were on the trestle, attempting to shove out two stringers to reach the new bent, the trestle fell, and plaintiff was injured. The cause of the accident was that the trestle was not properly braced. *Held*, that all those engaged in the different departments of the work (including the construction of the trestle), were fellow-servants; that the trestle was not a structure furnished by the defendants for their employees to work on, but was itself a part of the construction of the road, and a part of the work which they themselves were employed to perform.

WHEN FOREMAN A FELLOW-SERVANT.—In the matter of building the trestle the foreman was a fellow-servant with the workmen under him. It is not the rank of an employee or his authority over other employees, but the nature of the duty or service he performs, which determines whether he is a vice-principal or a fellow-servant.

WHEN FOREMAN A VICE-PRINCIPAL.—Whenever a master delegates to another the performance of a duty to a servant which rests upon himself absolutely, he is liable for the manner in which the duty is performed, and to the extent of the discharge of that duty the agent stands in the place of the master; but as to all other matters he is a mere co-servant with other employees.

(Syllabus by the court.)

ACTION brought in the District Court for Hennepin County, where dismissal was ordered at the close of the evidence for plaintiff. A new trial being refused, the plaintiff appealed. The case is stated in the opinion. *Order affirmed.*

PIERCE, ARCTANDER & NICKELL, for appellant.

SHAW & CRAY, for respondent.

Mitchell, J.—The defendants were engaged in grading a piece of the line of the St. Paul & Duluth Railroad. The mode of operation was to cut down one part, and with the material taken from the cut to fill a lower part adjacent. The material was conveyed from the cut to the fill in dirt cars. In the dump these cars were run out on a track laid upon a temporary trestle, constructed with materials (sufficient in quantity and quality) furnished on the ground by the defendants; and as the dump was filled, the trestle was extended from time to time, by raising additional bents and placing stringers and ties thereon. One crew of men worked in the cut, filling the cars; others drove the teams that drew the cars; others unloaded the cars, and tamped the dirt on the dump; and still another, one Johnson, framed the bents for the trestle, and attended to rais-

ing them and putting in place the stringers and ties for the track; but all the men were subject to be called by the foreman from one department of the work to another. One Murdock was the foreman who had charge of all the men, and who gave them orders where to work and what to do. It also appears that he was in the habit of hiring and discharging men on the work. When Johnson was not engaged on the trestle, he assisted in shoveling on the dump. Whenever he wanted to raise new bents and extend the trestle, he called for help on the foreman, who sent some of the men, usually from the dump, to assist. The plaintiff, a common laborer, was hired by Murdock, and set to work on the dump, and that was his usual employment, although it does not appear that his contract of service was limited to any particular department of the work. He did anything he was told to do, and he had been called upon to assist on the trestle prior to the occasion of the accident. On the day in question, it being desired to raise some bents and extend the trestle, Murdock took plaintiff and one Peterson to assist Johnson. One bent had been raised, and the foreman, Peterson, and plaintiff were on the trestle, attempting to shove out two long stringers so as to reach the new bent, when the trestle upon which they were fell, and caused the injury complained of. The cause of the accident was that the bents of the trestle were not properly braced.

In the law of master and servant there are two familiar rules: First, that the master is not responsible to the servant for the negligence of another servant, in the same common employment, unless the master was negligent in the employment of such fellow-servant; second, that the master is bound to use due care in furnishing safe structures or instrumentalities with which the servant is to work, and he is responsible if, through his own negligence or the negligence of other servants employed to furnish them, they are unsafe, and injury follows. We think the facts of this case bring it within the first of these rules. The work which the defendants were engaged in was grading a railroad, and they employed various servants in different departments of labor on that work, but all liable to be called, upon the orders of the foreman, from one department to another. All those engaged in these different departments bore to each other the relation of fellow-servants. They were all serving the same master, under the same control, and all engaged in the same general work. The thing to be done was

the building of the road, and the co-operation of all the employees in each department of the work was necessary to bring about that result. The trestle was not a structure furnished by the defendants for their employees to work on, but was itself a part of the work which they were employed to perform. It was a thing which they themselves made, and was as much a part of the construction of the road as was digging in the pit, loading cars, driving teams, or tamping dirt on the dump. *Kelley v. Norcross*, 121 Mass. 508, 15 Am. Neg. Cas. 608ⁿ; *Colton v. Richards*, 123 Mass. 484, 15 Am. Neg. Cas. 658; *Killea v. Faxon*, 125 Mass. 485, 15 Am. Neg. Cas. 607; *Pescher v. Chicago, Milw. & St. Paul R'y Co.*, 62 Wis. 338, 21 N. W. 269; *Gallagher v. Piper*, 16 C. B., N. S., 669 (1). Johnson was a fellow-servant with plaintiff.

It is claimed, however, that Murdock, the foreman, was a vice-principal, and therefore, for any negligence on his part, the defendants were liable. The authorities upon the question when and under what circumstances the servant becomes the representative of the master are involved in much confusion and conflict, but any one desirous of examining them will find them exhaustively cited and classified in 7 Am. & Eng. Ency. Law, under the head of "Fellow-servants." But, under the doctrines announced in various decisions of this court, we think it must be held that in the work of constructing this road Murdock was a fellow-servant of plaintiff. In *Brown v. Winona & St. Peter R. Co.*, 27 Minn. 162, 6 N. W. 484, it was held that difference in grade of employment or in authority with respect to each other, does not remove employees from the class of fellow-servants, as regards the liability of the master for injuries to one caused by the negligence of the other. And, in speaking in that case of the basis upon which this rests, it is said: "If the servant is supposed to assume the risks which the master, with due care and diligence, cannot prevent, then he assumes the risks from negligence of those servants who may be placed over him as superior servants or overseers, as well as of those of equal grade with himself; for, in respect to

1. In *GALLAGHER v. PIPER*, 16 C. B. N. S. 669, where plaintiff, a scaffolder in defendants' employ, was injured by the negligence of defendants' general manager, it was held that defendants were not liable. WILLES, J., said: "A foreman is a servant as much as the other servants whose work he superintends."

such overseers or superior servants, the master, when he has used due care in selecting them, cannot prevent their casual negligence any more than he can prevent the casual negligence of those inferior in grade." On the same ground it was held in *Gonsior v. Minn. & St. Louis R'y Co.*, 36 Minn. 385, 31 N. W. 515, that a "truck-packer" and the foreman of a round-house were fellow-servants, although the former was subject to the orders of the latter. In *Olson v. St. Paul, M. & M. R'y Co.*, 38 Minn. 117, 35 N. W. 866, it was held that a section foreman and the sectionmen were fellow-servants; and in *Brown v. Minn. & St. Louis R'y Co.*, 31 Minn. 553, 18 N. W. 834, it was said that one employee becomes a vice-principal as respects another, only when he is intrusted with the performance of some absolute and personal duty of the master himself, such as the providing of proper instrumentalities with which the service of an employee is to be performed, or the general management and control of the master's business or some branch of it. In the case of *Fraker v. St. Paul, M. & M. R'y Co.*, 32 Minn. 54, 19 N. W. 349, and *Tierney v. Minn. & St. Louis R'y Co.*, 33 Minn. 311, 23 N. W. 229, the question whether the negligent employees were vice-principals or fellow-servants was made to depend, not upon their grade or rank, but upon the nature of the service which they performed; in the former case the defendant being held not liable because it was a servant's and not a master's duty which the employee was discharging, and in the latter the defendant being held liable because the employee was discharging a master's, and not a servant's duty (1).

The result of these decisions would seem to be that it is not the rank of the employee or his authority over other employees, but the nature of the duty or the service which he performs, that is decisive; that whenever a master delegates to another the performance of a duty to his servant which rests upon himself as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of a discharge of those duties by the middleman, however high or low his rank, or however great or small his authority over other employees, he stands in

1. The Minnesota cases cited in the cases in this volume of *AM. NEG.* opinion in the case at bar are reported *CAS.*, *post.* with the Minnesota "Railroad"

the place of the master, but as to all other matters he is a mere co-servant. It follows that the same person may occupy a dual capacity of vice-principal as to some matters, and of fellow-servant as to others. Hence, in the present case, if the defendants delegated to Murdock, the foreman, the duty of employing laborers for this work, or of providing materials for the building of the trestle, and he had been guilty of negligence in employing incompetent men, or in furnishing improper material, the defendants would be liable, for these are duties which the master owes personally and absolutely to his servants. But in whatever he did on the work, which was the object of their common employment, viz., the building of this road, he was a mere fellow-servant with the laborers subject to his orders; and for his negligence in such matters the defendants would not be liable, unless they were negligent in employing him, of which there is no claim (1).

It is urged upon the argument that Murdock was negli-

1. In *FRASER v. RED RIVER LUMBER COMPANY*, 45 Minn. 235 (January, 1891), order of District Court for Polk County denying defendant new trial after verdict for plaintiff for \$2,100, was *reversed*. Opinion by MITCHELL, J. The case is stated in the official syllabus as follows: "The defendant, a manufacturer of lumber, had a mill, in which the lumber was sawed, and from which it was taken and piled in an adjoining yard. It employed in this yard a crew of men, part of whom were engaged in piling the lumber, while others were engaged in measuring, sorting and scaling it. The plaintiff, who was one of this crew, was engaged in assorting and scaling, and had nothing to do with the piling. In accordance with the usual custom in piling lumber, boards were projected from the piles at certain intervals as steps on which to ascend and descend. The lumber contained sufficient sound and suitable boards for steps, and the men employed as pilers were competent men to perform that work.

In making one of these piles, the pilers negligently projected, as a step, an unsound and unsafe board, and subsequently the plaintiff, while ascending the pile in the line of his duty, stepped on this board, which broke, causing him to fall, whereby he sustained personal injuries. *Held*, that the plaintiff and those who piled the lumber were fellow-servants, and therefore defendant was not liable."

The court, in the *FRASER* case, *supra*, said (after discussing the general rules of the law of master and servant, and citing cases on the fellow-servant rule): "We think the present case is not distinguishable in principle from that of *Lindvall v. Woods*, 41 Minn. 212" (the case at bar).

A former decision in the *FRASER* case, *supra*, affirmed the order overruling defendant's demurrer to the complaint, on the ground that the complaint sufficiently showed negligence of defendant. See *FRASER v. RED RIVER LUMBER Co.*, 42 Minn. 520 (1890).

gent in employing Johnson, an incompetent person, to build the trestle. It is sufficient answer to this to say that this is not the negligence charged in the complaint.

It is sought to bring the case within the rule of *Cook v. St. Paul, M. & M. R'y Co.*, 34 Minn. 45, 24 N. W. 311, where the defendant was held liable for an injury received by the plaintiff while temporarily engaged, under the orders of its superintendent, in a work wholly outside of that for which he entered its service, and outside of the line of the defendant's usual business. Both of the facts upon which that case was made to turn are wholly wanting in this. The work in which plaintiff was engaged when injured was not outside of that for which he entered the service, and it was directly within the line of defendants' usual business. Whatever negligence there was in this case on part of either Johnson or Murdock (within the allegations of the complaint) was in the common employment of building the road, as to which they were fellow-servants of the plaintiff. Therefore the action was properly dismissed.

Order affirmed.

ABEL, ADM'X. V. BUTLER-RYAN COMPANY.

Supreme Court, Minnesota, July, 1896.

[Reported in 66 Minn. 16.]

LABORER INJURED BY FALL OF TANK—FOREMEN—VICE-PRINCIPAL—FELLOW-SERVANT—QUESTION FOR JURY.—

On the evidence introduced on the trial of this case, which was a personal injury action, it is held that the questions as to whether either or both of two foremen in defendant's employ were vice-principals at the time of the accident, and whether such accident resulted from the negligence of either or both of said foremen, were for the jury.

(Syllabus by the court.)

APPEAL by plaintiff from an order of the District Court for Ramsey County, denying a motion for a new trial. The case is stated in the opinion. *Order reversed.*

HUMPHREY BURTON, for appellant.

P. J. McLAUGHLIN, for respondent.

Collins, J. — Action by plaintiff, as administratrix, to recover for injuries received by her intestate while in defendant's

employ as a common laborer, from which injuries he died. At the close of plaintiff's testimony the court instructed the jury to return a verdict in defendant's favor.

The facts, as shown by the evidence, were as follows: Defendant corporation was erecting a large building, and had brought the basement wall to its full height. On this wall the joists for the first floor had been placed, and a rough floor laid. It then became necessary to lower a large iron tank from this floor to the basement, and, to do this, three skids were placed with the upper ends resting on the floor at the edge of an opening which extended to the south wall of the basement, fifteen or twenty feet distant, and the lower ends on the ground below, no basement floor having been laid. The plan was to slide the tank down these skids, and to prevent its striking and wedging against the wall when it reached the ground, skids were laid with the upper ends on the top of the wall and the lower on the ground, intersecting or intercrossing the skids first mentioned three or four feet from the ground. These skids were placed in position by a gang of men at work on the building but under the immediate supervision of their foreman, Emmett Butler.

About this time his brother, Cooley Butler, the foreman of another gang of men also at work on this building, appeared, and from that time seems to have had actual charge of the lowering. He directed that a chain be passed about the tank, which weighed about 4,000 pounds, and connected with block and tackle, so as to hold it as it descended. As it was started down the skids the latter held the "snub rope" which controlled the block and tackle. The tank had been lowered a short distance on the skids, when it was stopped, and Cooley Butler, handing the rope to one of the men, stepped over to the top of the wall, directly opposite the tank, and noticed the skids which had been placed to prevent its striking the wall. Thinking that it would be easier to put the tank in place if these skids were dropped so as to lie flat on the ground, he suggested to Emmett that this plan be adopted, and when the edge of the tank rested on them, those used for sliding it down could be pried out of the way, and, by means of the block and tackle, the tank easily lowered so that it would rest upon the skids which had been dropped to receive it. At this time the hour for quitting work had been reached, and most

of the men had started home, — only those remaining who were actively at work upon the tank.

This plan was agreed upon, and, turning to the men, Cooley Butler ordered that two or three of their number go down into the basement, pull the skids down, and let them lie. Although the order was given by Cooley Butler, it was, to all intents and purposes, that of both foremen. Thereupon plaintiff's intestate and another workman went around by a basement door, while one Conners slid down the skids, reaching the ground first. That Cooley Butler knew that three men had gone to obey his order is apparent from his testimony. Emmett Butler was not called upon as a witness, but that he knew, or ought to have known, that the three men had started to do the work, is also apparent.

Conners pulled down the skids, as directed, before the other men got there, by going under those on which the tank rested, and pulling by the ends — the most feasible plan to promptly accomplish the work, and quite as safe a method as could be adopted, for he would be quite as safe under the tank as in front of it. The skids were flat on the ground when the other men reached the place, but a piece of joist lay partly across them. It appeared that this joist had been lying across the skids while they were in their first position, but for what reason was not shown. Evidently thinking that this should be removed, Abel, the plaintiff's intestate, stepped partly under the standing skids, and seized hold of the joist. Just before this Cooley Butler gave an order to lower the tank. It descended about one foot, when the skids slipped, the tank partly fell, and Abel received the injuries from which he died (1). It seems

1. See, also, the following cases arising out of injuries caused by falling objects:

In *KELLY v. ERIE TELEGRAPH & TELEPHONE CO.*, 34 Minn. 321 (December, 1885), where plaintiff, while at work upon the top of one of defendant's telegraph poles, had his leg injured by the fall of the pole, verdict for plaintiff in the District Court for Ramsey County for \$1,500 was sustained, and order refusing defendant new trial *affirmed*.

In *SATHER, ADM'X, v. NESS*, 42

Minn. 379 (January, 1890), it appeared that plaintiff's intestate was working in defendant's stone quarry, and while using a derrick it broke and the "mast" fell upon and killed him. The negligence alleged was defective working appliance. The trial court directed verdict for defendant and refused plaintiff new trial. Plaintiff appealed and the Supreme Court *reversed* the order, holding that the evidence made a case for submission to the jury. Motion for rehearing was denied.

that Butler gave the order to lower without paying the slightest attention to the whereabouts of any of the men, except Conners, and, while he testified that he thought the latter was out of the way, it appears that Conners only escaped injury by jumping after he noticed that the skids were slipping.

Under these circumstances, the questions presented — a verdict for defendant having been directed — are two: First, was it for the jury to determine whether either or both of the Butlers were vice-principals of the defendant master, or fellow-servants of the intestate? Second, if they were vice-principals, was Cooley Butler negligent when he gave the order to lower the tank? We are of the opinion that both of these questions should have been submitted to the jury.

It was quite as much the duty of the master to see to it that the skids were properly placed before the workmen — nothing but common laborers — undertook the difficult and dangerous task of sliding the heavy tank down into the basement, as it was to furnish proper and sufficient material with which to do the work itself. This was understood, apparently, for the skids were put in position under the immediate supervision and direction of the foreman Emmett Butler. Another foreman seems to have then taken charge, and at his suggestion a chain was put around the tank, so that it might be controlled by block and tackle to which the chain was attached — an additional means of safety. Subsequently to this, and after the lowering process had commenced, the three men were sent to the basement, there to do a thing which naturally brought them into a place of exceedingly great danger, should the skids give way or the tank fall. This was upon the order of the foreman who had assumed charge of the work, by consent of the other foreman, and while the intestate was in this dangerous place the accident happened. We need not repeat the rule so often laid down by this court, by which to ascertain when an employee becomes the representative of the master as to other employees. But under this rule the first question above noted was for the jury.

And, as to the second, it was for the jury to determine, if

On the second trial in the *SATHER* case, plaintiff had a verdict for \$3,000. Defendant moved for a new trial, and being refused, appealed. The Supreme Court affirmed the order denying new trial. See *SATHER, ADM'X, v. NESS*, 44 Minn. 443 (November, 1890).

they found either or both of the Butlers to have represented the master in this hazardous undertaking, whether or not there was negligence in giving the order to lower the tank without notifying all the men who had gone into the basement to stand out of the way, or at least to exercise some degree of care to ascertain that they were not in danger. The fact that Cooley Butler waited to give the order until he saw the skids lying down upon the ground was not conclusive upon this question of negligence. A new trial must be had.

Canty, J. (dissenting). — I agree with the majority that it was error to order a verdict for the defendant in this case, and that the question of defendant's liability was for the jury. But I cannot agree with them as to the principles on which the case should have been submitted to the jury.

SNEDA, ADM'X V. LIBERA ET AL.

KULAS V. LIBERA ET AL.

Supreme Court, Minnesota, June, 1896.

[Reported in 65 Minn. 337.]

ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE — QUESTIONS FOR JURY. — In actions based on the alleged negligence of a master towards his servants, arising out of the same accident, tried separately below, but on appeal argued and submitted together, it is held, on the evidence, that the question of the master's negligence was for the jury, and also the question of the assumption of risk by the servants, and also whether a certain act said to have been performed by one of the servants in and about the work rendered him guilty of contributory negligence which would prevent a recovery in either or both of the cases.

EXPERT TESTIMONY — OPINION EVIDENCE. — The general rule laid down in respect to the admission of expert opinion evidence is that the opinions of witnesses possessing peculiar skill are admissible whenever the subject matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance.

EXPERT EVIDENCE — SUFFICIENCY OF WALL — EMPLOYEE INJURED BY COLLAPSE OF WALL. — *Held*, under this rule, that, in an action growing out of the collapse of a cistern wall while being constructed, the opinions of qualified experts might be received in evidence as to the sufficiency of the wall in respect to thickness alone, and whether a wall of the thickness of the one in question was strong enough to resist the pressure naturally resting upon it.

EXPERT—DISCRETION OF COURT.—The preliminary question whether a witness offered as an expert has the necessary qualifications is for the court, and is largely within its discretion.

(Syllabus by the court.)

APPEALS from the District Court for Winona County. The facts are fully stated in the opinion.

In the first action plaintiff appealed from an order denying a motion for a new trial. *Reversed.*

BROWN & ABBOTT, for appellant.

P. J. McLAUGHLIN and SAMUEL MORRISON, for respondents.

In the second action defendants appealed from an order denying a motion for a new trial after a verdict in favor of plaintiff for \$3,500. *Affirmed.*

P. J. McLAUGHLIN and SAMUEL MORRISON, for appellants.

BROWN & ABBOTT, for respondent.

Collins. J.—These actions, growing out of the same accident, were tried separately, but on appeal were argued and submitted together, and can be considered and disposed of in the same way. The one in which Mrs. Sneda, as administratrix, is plaintiff, was brought to recover damages for the death of her husband, caused, as she claims, by defendants' negligence when constructing a cistern wherein the deceased was employed by them as a brickmason, while that in which Kulas is plaintiff was brought to recover for injuries received by him at the same time, while he was working for defendant as a common laborer. At the conclusion of the trial of the Sneda case the court directed a verdict for the defendants, and she appeals from an order denying her motion for a new trial. Kulas had a verdict in his favor, and defendants appeal from the refusal of the court to grant them a new trial.

It is necessary that a very full statement of the facts be given. Defendants were contractors and builders, and in 1894 entered into a contract with the owners to do certain specified work in and about the convent buildings in the city of Winona. They were also to do such other or extra work as might be ordered by the superintending architect of the owners, who were to furnish all materials. As extra work, they were ordered to build a 600-barrel cistern in a designated place, about eight feet distant from one of the buildings. The building was of brick and stone, two stories high, and surmounted by a tower an additional story in height. The subsoil here was sand and

gravel, and very easily set in motion by its own weight. The cistern was to be built in accordance with plans prepared by the architect, and these plans required it to be sixteen feet in diameter, eighteen feet deep, and enclosed in a circular wall eight inches wide, made of brick and cement.

The defendants first caused the earth to be removed where the cistern was to be constructed, leaving the sides of the excavation thus made sloping so as to be self-sustaining, and to the depth of eight or nine feet. In the center and on the bottom of this excavation, defendants built a circular wooden ring, about sixteen feet in diameter, eight inches thick at the top, eight inches deep, and brought to an edge at the bottom, perpendicular on the outside, and caused an eight-inch circular brick wall to be laid on the top of this ring, flush with the outside thereof, thus starting the brick and cement wall of the proposed cistern. After building this circular wall up to a height of several feet, defendants caused the earth to be filled in on the outside of it. The building of this wall was continued until it was fourteen inches above the surface of the ground, the plan being to cause the ring to settle and cut its way down as the excavation deepened. When the cistern and wall had been thus sunk to a depth of about twelve feet, the top of the wall having been kept about sixteen inches above the surface of the ground, the excavation became more difficult, and could not be carried on so as to cause the ring and wall to settle as fast as the masons were laying the brick, and it became necessary for the masons to wait for the excavation. For this reason, about two days before the accident, defendants laid off the two brickmasons (the deceased and one Stanek), and proceeded personally, in the absence of the masons, to excavate the cistern and sink the wall in the manner described.

At the time the masons left the work the cistern wall was moving downward as the excavation proceeded, in the proper manner; but after they had gone, and defendants had proceeded with the sinking of the cistern and wall about sixteen inches, the whole wall "hung," and refused to settle any further, supposedly on account of the lateral pressure of the earth around and upon the outside. The defendants then caused the earth around the outer side of the upper portion of the wall to be removed to the depth of about four or five feet, placed timbers across the top of the cistern wall, and piled

a large quantity of brick upon the timbers, for the purpose of weighing down and sinking the wall, and thus forced the upper part down so that it joined the part which had fallen away. About the time the bricks were placed on the timbers across the top of the well, several perpendicular cracks or breaks appeared, running from the top of the cistern down for several feet. Defendants then caused five holes to be punched down, close to and outside of the wall, to its full depth, and passed five ropes down through these holes, outside of the wall, under the bottom of the ring, into the cistern, thence up to the top, and joined the ends, forming five perpendicular loops or bonds about the wall. They then placed in each of these loops a stick or lever, whereby they were twisted tight so as to hold the lower portion of the wall to the upper. The dirt which had been dug away from outside of the wall was then replaced. On the side of the wall towards the building the bricks were loosened, and defendants caused a plank a foot wide and several feet long to be placed over these loose bricks, and another plank to be placed perpendicularly against the opposite side of the wall, and placed two braces, sixteen feet in length, composed of 2x6 pine planks, across the cistern, nearly parallel, with the ends nailed to these perpendicular planks. In placing these braces in position, they were forced and driven in between the upright planks so tightly that they were caused to bend in the middle, at which point such braces were spiked together. After a short time the shape of the cistern wall was so changed that these braces became straight. Defendants, in their efforts to sink the wall, dug out more or less sand from underneath it, which was not replaced. Defendants then caused a carpenter to build another circular wooden ring inside the first one, but similar, so that the top of the new came up to the bottom of the one first put in.

When this was completed, and the wall was in this condition, defendants sent word to the bricklayers (deceased and Stanek) to come and resume work, and upon their return, ordered them to build an eight-inch brick wall upon this inside ring until it was built up to the horizontal crack in the outer wall, and then to remove the dirt from the center of the cistern, and build up on the top thereof as fast as the dirt should be removed and the inside wall should settle, keeping the top of this inside wall about even with the crack in the outside. This the masons

proceeded to do, Kulas assisting as a common laborer. When the inside wall had been settled to the depth to which the cistern was to be built, the masons removed the cross braces or planks, and proceeded to reduce the inside wall to four inches, and to build it upward. It was claimed by plaintiffs that defendant Libera instructed the masons to remove the braces, and the evidence on this point was conflicting, Libera testifying that he gave no such order. Soon after their removal, Kulas being at work in the cistern with the masons, the loose bricks before mentioned commenced to fall to the bottom of the cistern; considerable sand poured in; and the wall collapsed, or gave way, burying all three. Both masons were killed, and Kulas was seriously injured (1).

1. See, also, the following case relating to personal injury from a falling wall:

IN *BENNETT, ADM'R, v. SYNDICATE INSURANCE CO. ET AL.*, 31 Minn. 254 (September, 1888), order of District Court for Hennepin County refusing plaintiff new trial, after verdict directed for defendants, was *reversed*, the facts in the case presenting several questions for the jury to determine. The opinion was rendered by COLLINS, J., who stated the case as follows: "The St. Anthony Elevator (so called) having been destroyed by fire, July 19, 1887, its contents, when so burned (about 800,000 bushels of wheat), were sold to defendants, who, upon July 30, commenced to remove the same, employing a large force of laborers, among them the deceased. The building, an immense structure, eighty-two feet wide and 300 in length, rested upon a rubble-stone wall, of the same dimensions, averaging thirteen feet in height and eighteen to twenty inches thick, also upon posts, twelve by twelve inches, placed inside the wall upon proper footings, in groups of six, an inch apart, across, and four inches lengthwise of the superstructure. These groups were three feet apart one way

and six the other, well braced with each other, but in no manner connected with the wall. Both posts and wall were built as a substructure only, were not designed to resist lateral pressure, but simply to hold up and sustain the great weight of grain which might be stored in the bins above. With the burning of the elevator its contents fell to the ground, about the posts, and outside, as well as inside the wall. The overflow of grain extended many feet around, in some places buried the wall out of sight, while at the point of the accident it reached the top, although some had been taken away when the deceased commenced work. The building had burned eleven days previously; it had rained several times; large quantities of water had been poured upon the wheat and walls; men were at work night and day attempting to subdue the fire; but the condition was such that the gangs of laborers would frequently have to move to escape the heat, which would prove unbearable, and at times the wheat could not be handled. When this occurred, those moving it would work elsewhere, while other men would pour on water, and in other ways seek to render the heat less

The only information either of the masons had as to what had been done while they were absent was such as they could have gathered from the appearance of the wall, so far as appeared on the trial. It also appeared that the duties of the architect were supervisory. He furnished the plans, and, as the representative of the owners of the premises, ordered defendants to do this particular job of work under the extra clause in their contract. He also made frequent visits to the work, as might be expected, and at times advised with defendants and the workmen. But the latter were employed by, and

intense. This, then, was the situation during the four days that deceased was at work. The testimony shows that the defendants made no attempt to learn the actual condition of the wall. Assuming that it was safe, although it had bulged out upon one side, they wholly failed to guard against its falling when the overflow should be removed from the outside, and took no steps to avert such a catastrophe anywhere along its lines. On the morning of August 3d Brown was killed, with several other men, at a point upon the outside where nearly all of the wheat had previously been taken away, by the falling of about twenty feet of the wall. The stones which covered these unfortunate men were so hot that water had to be applied before the bodies could be removed, while the mortar had been so affected by the fire and water that it crumbled to dust when taken in the hand." * * *

"There was but little controversy over the facts in the case, but fair men, exercising ordinary intelligence when considering them, might easily arrive at different conclusions upon the question of defendants' negligence. The defendants were in possession of all the facts as to the magnitude and severity of the fire, the difficulty in controlling or subduing it. They knew that the foundation wall was not built to resist lateral pressure;

that the groups of posts composing part of the foundation were on fire; that large quantities of burning timbers were scattered through the grain, which was also briskly burning; that the action of the fire and water tended to disintegrate and weaken the wall; that, from some cause, it had already bulged out in several places; and it may well be argued that they should have realized the danger to workmen, the risk and hazard of attempting to remove the overflowed wheat, which sustained it upon the outside, without first taking the precaution of a thorough examination of the wall, and, unless fully assured of its safety, providing adequate means to keep it upright and intact. It was, then, for the jury to say whether, from the facts which were in defendants' possession, or which they might have learned by the exercise of proper diligence, that is, diligence proportionate to the occasion, the defendants took such precautions as prudent and careful men should take. Did they exercise due care to prevent exposure of their servants to an unnecessary and unreasonable risk? Did they exercise reasonable diligence to see that the place where the deceased was set to work was safe for that purpose? And in refusing to allow these matters to be passed upon by the jurors the court erred."

were wholly under the control of, the defendants — responsible to them alone, and not in any manner to the owners. Although in the Kulas case the court submitted to the jury the question whether or not the workmen were servants of the defendants, or of the owners of the premises, there was, on the evidence, no such question in the case. Undoubtedly, the relation of master and servant existed between defendants and the workmen.

In the Kulas case the court submitted to the jury the question of defendants' negligence. This was correct, for the general duty of a master is to exercise care to prevent the exposure of his servant to unnecessary and unreasonable risks. He is required, among other things, to use reasonable diligence in seeing that the place where the service is to be performed is safe for the purpose; and this duty extends, not only to such unnecessary and unreasonable risks as are in fact known to him, but also to such as he ought to have known in the exercise of diligence proportionate to the occasion, and this duty is continuous. Nor can the master avoid his duty, or the liability which arises therefrom, by saying that he acted, when adopting his plans, upon the advice of an architect whom he believed to be competent. On the facts as they appeared upon the trial of each of these cases, there was an abundance of evidence on which to submit the question of the master's negligence to the jury, both as to the plan adopted, and the manner of doing the work. This clearly appears from our statement of the facts, many of which were not in dispute. The evidence tended to show that, taking into consideration the character of the soil, the size of the cistern, and the fact that it was being constructed within a few feet of a heavy brick building, the weight of which would exert more or less pressure on one side of the wall, the latter was scarcely half thick enough for the purpose. And it also tended to show that the methods pursued by defendants after the cracks and the loose brick appeared — the latter on the side nearest the building — were hazardous, and invited the disaster. A jury would certainly have been justified in finding that the defendants did not take sufficient precautions when they discovered that the wall gave indications of a tendency to fall apart.

What has been said in regard to the question of negligence on the part of defendants applies to both cases; for, on the

facts, no sufficient distinction can be pointed out, arising either from the testimony, or from the fact that Sneda was a skilled brickmason, while Kulas was a common laborer. On this question the Sneda case should have been submitted to the jury; for it is only when there is an entire absence of testimony tending to establish a master's negligence that a court can order a nonsuit.

It is also urged by defendants' counsel that all of the workmen assumed the risk, and therefore no recovery can be had in either case. A servant assumes the ordinary risks of his employment,—such as are reasonably necessary and incidental to it, including negligence of fellow-servants; and, as a general rule, he also assumes such extraordinary risks as he may knowingly and voluntarily see fit to encounter. But he does not stand on the same footing as his master, as respects the matter of care in inspecting and investigating the risks to which he may be exposed. If he did, the servant would always assume the risks. He has a right to assume that the master will do his duty in respect to risks, although this proposition is subject to the qualification that the servant must not rashly or deliberately expose himself to unnecessary and unreasonable risks. And it is one thing to be aware of defects in plans or methods, and another thing to know or appreciate the risks resulting, or which may follow, from such defect. The mere fact that a servant has knowledge of defects in plans or methods of construction may not charge him with contributory negligence, or assumption of risk. The question is, did he know, or ought he to have known in the exercise of ordinary common sense and prudence, that, in addition to the defects, the risks existed? And upon the evidence this question of assumption of risk was for the jury in both cases.

In the Sneda case it is urged that his administratrix cannot recover, because he removed the braces, and was therefore guilty of contributory negligence. In the first place, the jury might have found from the evidence that they were removed by express direction of one of the defendants; and, second, the court could not say, as a matter of law, that this removal caused the wall to collapse. The cause of the accident was an open question, and for the jury to determine. It is also claimed that as Sneda and Kulas were fellow-servants, and the accident was caused by the removal of the braces by the for-

mer, the latter cannot recover. We have already answered this contention. It follows from what has been said that the trial court erred when it directed a verdict for defendants in the Sneda case, and that a new trial must be had.

We now reach a consideration of certain rulings made by the court when receiving testimony in the Kulas case. The questions to which defendants' counsel made objections were all of the same general character, and called for opinions from the witnesses as to the sufficiency of the wall in respect to thickness alone,—it being admitted that the materials used were of excellent quality, and well put together,—and whether, considering the undisputed facts, a wall eight inches thick was strong enough to resist the pressure naturally resting upon it. The objections made by counsel to this class of testimony were that it was incompetent and inadmissible, and, in some instances, that the qualifications of the witnesses to express expert opinions had not been shown.

The preliminary question whether a witness offered as an expert has the necessary qualification is for the court, and is largely within its discretion. And in some States it is held that under no circumstances will the exercise of this discretion be reviewed. 1 Greenleaf, *Ev.* (15th ed.), § 440, and note c. All of the witnesses were shown to be, to some extent, qualified to express opinions on the subject concerning which they were questioned, and were clearly brought within the rule first above stated, which we regard as the proper one.

The general rule laid down in respect to the admission of expert opinion evidence is that the opinions of witnesses possessing peculiar skill are admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance. On questions of science, skill, and trade, or others of the like kind, persons of skill may not only testify to facts, but are also permitted to give their opinions in evidence. 1 Greenleaf, *Ev.*, § 440, note 4. See, also, *Sowers v. Dukes*, 8 Minn. 6 [23]. As cases bearing upon the admissibility of expert testimony with respect to the strength and sufficiency of the cistern wall, we cite *Claxton's Admr. v. Lexington & B. S. R. Co.*, 13 Bush (Ky.), 636; *King v. N. Y. C. & H. R. R. Co.*, 72 N. Y. 607; *Evarts v. Town of Middlebury*, 53 Vt. 626; *Bemis v. Central Vt. R. Co.*, 58 Vt. 636,

3 Atl. 531; Pope *v.* Filley, 9 Fed. 65. The witnesses had superior skill and knowledge as to the resisting powers of a brick wall imbedded in sand in close proximity to great weight, and of what thickness it should be to sustain the pressure. Inexperienced men, such as ordinary jurors, were not likely to prove capable of forming a correct judgment upon such a subject without assistance from the skilful and experienced. There was no error in the rulings challenged by the last seven specifications of error.

The order refusing a new trial in the Sneda case is *reversed*, and a like order in the Kulas case stands *affirmed*.

BRICKLAYER INJURED BY COLLAPSE OF BRICKWORK — CONTRACTOR — FELLOW-SERVANTS — DEFECT — NEGLIGENCE. — In **GRIFFITHS v. WOLFRAM et al.**, 22 Minn. 185 (*September, 1875*), it appeared (as per opinion by GILFILLAN, Ch. J.), that “defendants, as partners, were erecting a machine shop on their own ground in Mankato. One Wysong, a bricklayer, was doing the brick work for the engine room, furnishing labor and materials at so much per thousand bricks, under a special contract with the defendants. Among other things, he was constructing in the corner of the engine room a small apartment, seven or eight feet square, to be used as a place of deposit for shavings. This apartment was to be covered with a brick arch. A wooden frame work (or as it is styled in the complaint, a center piece) over which to build the arch was, by defendant, Paus, prepared and put upon the walls from which the arch was to spring. * * * The plaintiff, being in Wysong’s employ, was, with Wysong and one Faddis, engaged as a bricklayer in building the arch. While they were thus engaged, and when the arch was nearly completed, the center piece gave way and the plaintiff fell to the ground, a distance of twenty to twenty-five feet, whereby he was grievously injured.” * * * Plaintiff recovered a verdict and a new trial was refused defendant. The Supreme Court *reversed* the order and granted a new trial. The syllabus to the report of the case states the rulings as follows:

“Where several persons are engaged in the same work, in which the negligent or unskilful performance of his part by one may cause danger to the others, and in which each must necessarily depend for his safety upon the good faith, skill and prudence of each of the others in doing his part of the work, then it is the duty of each to the others engaged on the work to exercise the care and skill ordinarily employed by prudent men in similar circumstances, and he is liable for any injury occurring to any one of the others by reason of a neglect to use such care and skill.

“But to make one liable for such an injury it must be the result, not merely of a defect in the work, but of a defect occurring from his neglect.”

CAVE-IN OF DITCH—EMPLOYEE INJURED—DEFECTS—NOTICE—FOREMAN—VICE-PRINCIPAL—MASTER LIABLE.—In **CARLSON v. NORTHWESTERN TELEPHONE EXCHANGE CO.**, 63 Minn. 428 (*January, 1896*), verdict for plaintiff in the District Court for Hennepin county for \$1,500, was *sustained*, and order denying motion for new trial *affirmed*. HALE, MORGAN & MONTGOMERY appeared for appellant; F. D. LARRABEE and STILES & STILES for appellee. The case is fully stated in the opinion by START, Ch. J., in which the facts are stated as follows: “The plaintiff, on August 3, 1893, with some eighty other laborers, employed by the defendant, a corporation, was engaged in the work of excavating a ditch along Nicollet avenue, in the city of Minneapolis, in which telephone wires were to be laid (1). The work of making this ditch was in the charge of a foreman of the name of Purvey, who had control of the work and of all of the men engaged thereon, with power to employ and discharge them, and to direct them what to do and where to work. He was the supreme authority there present, and all of the men were subject to his orders in every particular, and no one present had any authority over him. The plaintiff had been employed on the work for about three weeks before the accident, and was not assigned to any particular portion of the work. The soil through which the ditch was excavated consisted of sand, with a top layer, about a foot in depth, of tough, hard material, which had been filled in over the natural surface. The excavation had been made and the ditch completed along several

1. See, also, the following cases arising out of cave-in accidents:

In **OLSON v. McMULLEN**, 34 Minn. 94 (*July, 1885*), order refusing new trial, after dismissal of action, was *affirmed*. Opinion by GILFILLAN, Ch. J. The negligence alleged was that defendant's foreman, without informing him of the danger, ordered plaintiff, who was in defendant's employment, and who alleges he was not aware of the danger, into a place of great and extraordinary danger to do his work. The work in which plaintiff was employed was wheeling earth in a wheelbarrow to uncover a stone quarry. He had to wheel the earth

along a path two or three feet wide. On one side of it was a precipitous excavation about fifteen feet deep; on the other side a bank or wall of earth about fifteen feet high, nearly perpendicular, and in some places even overhanging the path. It was in the spring, when the frost coming out of the earth made the earth in the bank or wall more than usually liable to break away and fall upon and over the path into the excavation. As plaintiff, with a wheelbarrow full of earth, was passing along the path, a part of the earth in the wall broke away and fell, striking plaintiff and his wheelbarrow, and throwing them

blocks without any curbing or artificial support of its sides, until, on the day the plaintiff was injured, it reached the street railway track, when it became necessary to increase its depth some three or four feet. At this point of the work, and on the morning of the day named, Purvey, the foreman, observed that a crack in the soil existed, extending from the ditch near the railway track sixteen feet, describing a semicircle and ending near the ditch, the most distant part of the crack being four feet therefrom. Thereupon it became necessary, in order to prevent the side or wall of the ditch caving down, to put in curbing consisting of planks provided by the defendant, which were ample for that purpose. The work of putting the curbing in place was done by workmen other than the plaintiff, under the direction of the foreman. The curbing was in fact insufficient to hold the side of the ditch in place, and the complaint alleges that the walls and sides of the ditch were so negligently and defectively supported and braced that they were unsafe and dangerous, and a menace to the life and limb of the defendant's employees; and that the defendant knew, at the time the plaintiff was ordered, as hereinafter stated, to work in the ditch at this point, that such walls were unsafe, and were liable to cave in and injure persons there working. The plaintiff, while the curbing was being constructed, was at work in another part of the ditch, and took no part therein, and had no knowledge of the crack in the soil at the point where the curbing was placed. When it was completed he was ordered by the foreman to go into the ditch where the curbing was placed and clean out the loose sand at the bottom, and, ignorant of the true character of the curbing, and not knowing that the place was an unsafe one, he obeyed the order, and commenced

into the excavation, and he was hurt. The rule that a servant cannot recover from master for injury sustained in being set to do dangerous work, if the danger is such that it must be as apparent to servant as master, applied.

In *PEDERSON v. CITY OF RUSHFORD*, 41 Minn. 289 (July, 1889), order dismissing plaintiff's action for damages for injuries sustained while digging an earth bank, some of the material falling upon him, was *affirmed*, it being held that he assumed the risks of the employment.

In *BERGQUIST v. CITY OF MINNEAPOLIS*, 42 Minn. 471 (February, 1890), appeal by plaintiff from order

refusing new trial, order was *affirmed*, the official syllabus stating the case as follows: "Plaintiff was employed by the city as a laborer, excavating a trench in the earth for the laying of water pipes. Upon other laborers in the same employment, and working in connection with plaintiff, devolved the duty of putting in wooden curbing as the work of excavation progressed, and, as the laborers saw the need of it, to prevent the earth falling into the trench. *Held*, that such laborers were fellow-servants with the plaintiff, for whose negligence in putting in the curbing the city was not responsible."

the work as directed, when a piece of earth, constituting the side of the ditch inside of the track mentioned, settled down by a sliding movement under the curbing into the bottom of the ditch, catching the plaintiff and breaking his foot and ankle. The foreman did not caution or advise the plaintiff as to the unsafe condition of the ditch at the place he was ordered into, but the plaintiff saw the curbing and knew that it was placed there to prevent the ditch from caving in." * * *

The points decided in the CARLSON case, *supra*, are set out in the syllabus to the official report, as follows:

"*Held*, following *Lindvall v. Woods*, 41 Minn. 212 (16 AM. NEG. CAS. 200, *ante*), that the decisive test whether, in any given case, an employee is to be regarded as a vice-principal or a fellow-servant, is not his title or rank, but the nature of the services which he performs. If he is authorized to perform duties which are the absolute duties of the master he is, to the extent of a discharge of those duties, a vice-principal.

"*Held*, further, that whenever the nature and magnitude of the master's work, whether it be that of construction or otherwise, are such that it is necessary that orders be given regulating the conduct of his employees, and directing them where to work, it is not only the right, but the absolute duty, of the master to give such orders; and in obeying such orders the employees have a right to assume that the master, in giving the orders, has exercised due care for their safety.

"The defendant, in excavating a ditch, placed the work and the men employed thereon, of whom the plaintiff was one, in charge of a foreman who had general oversight of the work. The men were subject to his orders, he had authority to employ and discharge them and to direct them what to do, and where to work, and was the supreme authority there present. The foreman negligently ordered the plaintiff from the place where he had been working into the ditch at a point where he had not previously worked, which was a place of unusual danger by reason of a crack in the earth on the side of the ditch and defects in the curbing, which danger and defects were not obvious or known to the plaintiff, who obeyed the order, and was injured by the caving in of the ditch. *Held*, that in giving the order the foreman was a vice-principal and the defendant liable for his negligence."

SMITH V. TROMANHAUSER ET AL.

Supreme Court, Minnesota, December, 1895.

[Reported in 63 Minn. 98.]

FALL OF SCAFFOLD — OBVIOUS DANGER — RULE OF LAW. — The rule, that a master is not liable for an injury sustained by his servant in the course of his employment, when the danger is of such a character as to be as obvious to the servant as to the master, *applied* in an action for personal injuries sustained by a carpenter by the fall of a scaffold used in the work of constructing a grain elevator, which work was being done by defendants.

APPEAL by defendants from an order of the District Court for Hennepin County, denying a motion for a new trial. The case is fully stated in the opinion. *Order reversed.*

A. B. JACKSON, for appellants.

CHARLES G. LAYBOURNE, for respondent.

Collins, J. — This was a personal injury case, in which plaintiff had a verdict. The appeal is from an order denying defendants' motion for a new trial.

Plaintiff was an experienced carpenter, having worked for ten years upon all kinds of buildings, from the smallest to the largest structures, and also upon bridges. At the time of the accident, he was at work for defendants, with other carpenters, upon a large grain elevator, which was being built of the usual materials, and in the usual manner, by laying two-inch planks flat, one above another, and spiking them together. This work was all done from the inside of the building; the exterior and the interior, or bin, walls being carried up together, as near as was practicable, the bin floors going in place as the points where they were to be located were reached in the course of construction. When the outer and inner walls were built up about four feet above any of these permanent floors, it became necessary to erect, for the use of the workmen, temporary scaffolds on the inside of each bin, and these scaffolds were raised up as the work on the walls progressed. They were used for the men to stand on, so that they might conveniently lay and spike the planks of the walls, and as a place for the deposit of tools and materials to be used in the work. One man worked regularly in each bin, and, as occasion required, other men assisted him.

On the morning of the accident, plaintiff and one Meyer were in adjoining bins, at work on the walls (1). Defendants were then requested by the company for which the elevator was being built to make a change in the plans, by placing the floors of the Meyer bin, and others adjoining, some three or four feet lower than had been designed. As the walls were then about three feet above the place where the floors were to go according to the proposed change, and could not be torn down readily, the only practicable way to make the change

1. The "Meyer" referred to in the case at bar is the "Myhre" referred to as the plaintiff in the following case:

MYHRE *v.* TROMANHAUSER ET AL., 64 Minn. 541 (June, 1896), was an appeal from an order of District Court of Hennepin County denying defendant's motion for new trial (provided plaintiff consented to reduction of verdict for \$2,000 to \$1,000). The Supreme Court *affirmed* the order. A. B. JACKSON, appeared for appellants; W. S. DWINNELL, for respondent. The opinion rendered by CANTY, J., is as follows:

"Most of the facts necessary to an understanding of this case are recited in the opinion in the case of Smith *v.* Tromanhauser, 63 Minn. 98 [the case at bar]. The plaintiff in this action is the 'Meyer' therein mentioned. He built the staging in the bin in which the injuries to the parties occurred; worked in this bin in building up the partition walls of the elevator; and when the heavy cross beam fell, and broke down the staging, he, with the others, was precipitated to the bottom of the bin. This action was brought to recover damages for the injuries so received by him. He had a verdict, and from an order denying a new trial defendants appeal.

"It is contended by appellants that there is no substantial difference between this case and the Smith case,

either in the evidence or the principles involved, and that the verdict for plaintiff cannot be sustained. We cannot agree with appellants. Smith himself was the very man who, under the orders of Tromanhauser, took the crowbar, and pried the end of the beam off the wall, thereby causing it to fall and break down the scaffold. And in his case we held that, even if Tromanhauser was guilty of negligence in giving the order to pry the beam, Smith was equally guilty of negligence in obeying it; that Smith was an old and experienced carpenter, who thoroughly understood the kind of work in which he was engaged, and knew all the dangers of executing the particular task in hand as well as did Tromanhauser. We held (as it was there expressed) that, under these circumstances, Smith assumed the risk of his own positive act in prying the beam off the wall.

"But the testimony in the case at bar tends to prove that this plaintiff had nothing to do with the attempted insertion of the beam in the mortises cut in the partition walls, except in one instance, when Smith or Norton called him to block up the lower end of the beam, which they had been trying to insert in the mortise. After he had blocked up the end of the beam by placing some pieces of scantling under it, he went on with his work of cribbing or building up the partition walls, until Norton told him to

was to mortise, at the proper places on opposite walls, and then to put in heavy cross-beams as floor supports. This could be done by bringing a beam into a bin, inserting one end into mortise, pushing it through to such a distance as to permit the beam to drop to a level, then inserting the other end in the corresponding mortise in the opposite wall, and pulling the beam into its proper place. Mortises were cut in the walls of the Meyer bin, opening into what was called

get out of the way, as the bin was small, and he had been striking against Norton and Smith, and in that way interfering with them in their efforts to insert the beam in the mortise. He stepped back, away from them, to the other end of the bin. They both had their backs to him, and continued in their efforts to cut the mortise larger, pry a protruding spike out of it, and insert the beam into it, until finally the beam was precipitated by Smith prying it into the mortise with the crowbar, as before stated. It is true that this plaintiff cannot recover in this action on account of the negligence of his fellow-servant Smith, but he may recover if he has been injured by reason of the negligence of the master, Tromanhauser. The evidence tends to prove that Tromanhauser (one of the defendant partners) gave Smith the crowbar, and ordered him to take it and pry against the upper end of the beam resting on the wall, so as to push the lower end through the mortise in the opposite wall. Smith obeyed, and the injury resulted.

"Whether or not Tromanhauser was guilty of negligence in giving the order was a question for the jury, and they have found that he was. Whether or not, after the order was given, this plaintiff could or should have done anything to avert the danger, was, at most, a question for the jury. That he was an old and experienced carpenter is not, under the

circumstances, a controlling fact, and does not, as appellants contend, show that he assumed the risk of this negligent order. It certainly cannot be held as a question of law that he assumed a risk which came up so suddenly, and was so wholly unexpected and unforeseen, as this negligent order of Tromanhauser. Neither can it be held as a question of law that plaintiff knew the exact condition of the mortise, nor that he was in a position to know that the order was a negligent one or how it was being executed, as the evidence tends to prove that both Smith and Norton stood between him and the beam, thereby concealing much that was going on.

"It is assigned as error that, against objection and exception, the witness Norton was permitted to testify that, when Tromanhauser called for the crowbar, his manner 'was quite stern, repulsive, and sharp,' and that when he handed the bar back to Smith, and gave the order, his manner was 'about the same, decisive, as though he meant it.' We cannot say that this was error. The testimony may have had a tendency to prove that Tromanhauser compelled Smith to act so promptly as not to give sufficient time to execute the order with sufficient care, or to consider the danger of executing it at all.

"These are the only questions raised worthy of consideration, and the order appealed from is affirmed."

"Wasson's bin," on one side. This was the condition when several of the men brought one of the beams into the Meyer bin, and called upon plaintiff to help them put it in place. On trying to insert one end in the mortise opening into the Wasson bin, the other end being necessarily elevated to clear the top of the opposite wall, it was found that it could not be pushed in. The beam was then pulled back and laid on the scaffold, on which the men stood, while plaintiff and some of his fellow-workmen cut out and enlarged the mortise.

After two or three attempts the end was inserted, but could not be pushed through, principally because of a spike which protruded from the planks above by mortise. The plaintiff then attempted to pry the spike out of the way with a pinch-bar, and, while so engaged, one of the defendants came upon the scene. Noticing that there was some obstacle in the mortise, he stepped over into the Wasson bin, and, when plaintiff had cleared out the mortise as well as he could, except the spike, defendant asked for the bar, saying that he would take that out. Plaintiff handed the bar to defendant, and, quoting his own testimony: "I stood there, and waited until he done his work." When asked "what work," plaintiff replied: "What he saw was needed to be done in the mortise." Referring to the bar, plaintiff was asked by counsel: "After defendant had it, what did he do with it?" The answer was: "Well, I suppose he took the spike out, because that is what he wanted with it. He said: 'Give me that bar.'"

While defendant was at work with the pinchbar, one end of the beam rested upon the top of the opposite wall, while the other, as before stated, had been inserted into the mortise. Plaintiff and his associates stood on the temporary scaffolding, while defendant remained in the Wasson bin. One man then attempted to push the beam into the mortise, by using a long-handled chisel at the end on the wall. Defendant, observing that the attempt was unsuccessful, handed the bar back to plaintiff, directing him how to use it at the wall to push the beam. The latter took the bar, and applied it to the end resting on the wall without result. A second application moved the beam a little, and the third caused it to slip quickly into the mortise to such a distance that the other end dropped upon the scaffold, breaking it down, whereby the men were thrown about thirty feet, to the permanent floor below; plaintiff receiving

the injuries complained of. We have detailed the facts quite minutely, that the exact situation and circumstances might be understood.

Counsel for appellants contends that, irrespective of all questions of negligence on the part of either plaintiff or defendants, all the dangers from which the accident resulted were so apparent and obvious to the plaintiff that he must be held to have assumed the risk; and we quite agree with him (1). The plaintiff was an experienced workman, necessarily accustomed to handling timbers of all sizes and weights. He knew that one end of this beam, which was very heavy, rested upon the top of the wall, the other, considerably lower, resting upon the edge of the mortise, into which it was designed to slip, and to such a distance as to allow the other end to be brought down clear of the wall, so that, upon being pulled back, both ends could be securely tenoned into opposite mortises. He knew that the spike was the only remaining obstacle, for he had removed all others, and that, with the spike out of the way, the lower end of the beam would, it was expected, slip into the mortise, and he also knew that, if the aperture was sufficiently large, it might slip far enough to pull the other end off from

1. See, also, the following scaffolding accident cases:

In *JENNINGS v. IRON BAY COMPANY*, 47 Minn. 111 (August, 1891), it was held that: "It is not incumbent upon a master, who has caused a scaffold to be erected, on which planks, suitable in quantity and quality, are laid to walk upon in the customary manner, without being fastened, to see to it that these planks are adjusted and in proper place at all times. The adjustment of such planks is incident to the service required of a servant who uses the same." Plaintiff was a carpenter in defendant's employ and was injured by falling from a scaffold upon which he was at work. He had a verdict for \$2,500 in the District Court for St. Louis County, which, on appeal by defendant, was *reversed* by the Supreme Court.

In *MARSH v. HERMAN ET AL.*, 47

Minn. 537 (December, 1891), it was held that: "Where the general work in which several servants are engaged includes the construction or preparation of the appliances with which they are to work, as where they are engaged in erecting a building, and they construct the scaffold on which they are to stand in doing the work, they are to be deemed fellow-servants, as well in respect to the negligence of one of them in constructing such appliances as in respect to negligence in doing any other of their work." Plaintiff, while at work upon a scaffold, injured by the giving way of one of the cross-pieces, causing him to fall to the ground. Verdict directed for defendants in the District Court for St. Louis County sustained and order denying new trial *affirmed*. Rehearing denied, January, 1892.

the wall; the inevitable result being, unless precautions were taken, that the beam would drop with great force and weight upon a scaffold not erected to resist such a falling body. The plaintiff knew, further, that no one was holding the beam so that it could not fall upon the scaffold, and that it was not supported or held in place by ropes or blocks, or any other appliances. The danger to be apprehended if the beam should easily slip into the mortise was perfectly plain.

The negligence complained of by plaintiff seems to be that the defendant who handed him the pinchbar, with directions how to use it at the elevated end of the beam, should have told him that the spike was removed, or should have caused the beam to be held or fastened up so that it could not fall upon the scaffolding; and upon his cross-examination plaintiff would not admit that he knew that the spike had been pried away, so that it no longer obstructed the entering of the beam. From his answers to counsel's questions, as to what he knew about the spike, plaintiff appears to have been of the impression that knowledge as to its removal could not be attributed to him, unless from where he stood on the scaffold in the Meyer bin he could see that it had been removed; and, as he could not actually see into the aperture, because of the beam, his knowledge of what had transpired could not be established.

As we have seen, the risk growing out of a failure to support the beam so that it could not slip from the wall was apparent, and plaintiff might as well claim that he did not know that one of the defendants was over in the Meyer bin, with the bar in his hands, because he could not see him, as to insist that he knew nothing of the removal of the spike, because he could not actually see that it had been removed. He knew that one of the defendants, standing in the Wasson bin, had called for the pinchbar, and had received it from his hands, for the express purpose of removing the spike. He admitted, when testifying, that he stood and waited for defendant to do the work for which he took the bar, and also, that he supposed defendant had taken out the spike before the bar was handed back, with directions to apply it to the beam where it rested on the wall. It was conclusively established by plaintiff's testimony that he well knew that the spike was no longer in the way. Knowing the fact, there was no reason why he should be informed of it, verbally or otherwise.

Plaintiff's counsel seems to think that it was incumbent upon the defendant, who used the bar, if he would escape a charge of negligence, to notify the plaintiff that the beam would "go easy now," before giving orders to pry upon the end. But plaintiff, knowing that the spike had been removed, was better posted as to the ease with which the beam would enter the mortise than was the defendant. The close attention of the former had been given to all of the obstacles, while that of the defendant present had been directed to the spike only. The mortise had been trimmed out and enlarged by plaintiff and other workmen two or three times before defendant arrived at the place. None of the dangers to be apprehended were concealed, but all were open to the observation of the men, and were actually known to plaintiff. He admitted full knowledge of the situation, while testifying, except as to the spike; and, in respect to this, it is evident that he knew all that had been done. The plaintiff saw, and must have appreciated, the dangers incident to the work itself, and the way it was being performed, quite as well, if not better, as the defendant who was present. So plain was the proof of his knowledge, and so obvious was it that he assumed the risks, that there was no question for the jury as to his knowledge or assumption of risks.

It was not charged in the complaint that the scaffolding on which the beam fell was improperly or negligently constructed. The negligence relied on by plaintiff was not based on any allegations of this character; but, under the proposition that defendants were bound to furnish a safe place for plaintiff to work in or upon, counsel argues that it was incumbent upon the former to erect a scaffold which would sustain a falling beam of the size and weight of the one in question. If it was expected that beams would fall upon the scaffolding, there might be something in the argument, but this scaffold was not built for the purpose of resisting and holding up falling beams. It was constructed, as plaintiff knew, as a temporary flooring, upon which the men could stand while working, and on which they could place their tools and their materials, and its strength and stability for these purposes was not questioned.

We need not discuss other questions raised by counsel. On the uncontradicted testimony, defendants should have had a verdict.

Order *reversed*, and new trial ordered.

EMPLOYEE STRUCK BY FALLING BEAM AND TACKLE ON VESSEL — WARNING OF DANGER — CONTRIBUTORY NEGLIGENCE. — In **McCARTHY v. LEHIGH VALLEY TRANSPORTATION CO.**, 48 Minn. 533 (*March, 1882*), plaintiff injured while loading defendant's steamer, having been struck by a cross-beam and the tackle attached thereto which fell down an open hatchway, order refusing plaintiff new trial, after direction of verdict for defendant, was *affirmed*, on the ground of plaintiff's contributory negligence, he having been injured while standing in the hold of the vessel under the open hatchway after being warned by an officer of the vessel against standing in such position.

STAGING USED ON VESSEL BREAKING AND EMPLOYEE INJURED — DEFECTIVE PLANK — PRESUMPTION — FELLOW-SERVANT — DEFENDANT LIABLE. — In **SIMS v. AMERICAN STEEL BARGE CO.**, 56 Minn. 68 (*January, 1894*), judgment for \$3,667.85, on verdict rendered for plaintiff for \$3,500 in the District Court for Ramsey county, was *affirmed*. KITCHEL, COHEN & SHAW, appeared for appellant; C. D. & THOS. D. O'BRIEN, for respondent. The court (per COLLINS, J.), said: "Plaintiff was a ship plater in defendant's employ at its yards in West Superior, Wisconsin. He was injured while 'laying off' steel plates upon the deck of a steam barge which defendant corporation was constructing in said yards. The deck beams of steel had been put in but the spaces between them were open. In order to do his work the plaintiff had to go upon a staging made of two or more planks, sixteen or eighteen feet long, laid upon wooden horses about two and a half feet high. These horses rested on planks laid down upon the deck beams. A plank used for staging broke and plaintiff was precipitated to the hold of the vessel, some eighteen feet, receiving the injuries complained of (left foot seriously injured), and which he attributes to defendant's negligence. Certain it is that the plank in question was defective and unfit for use in such a place." * * *

The claim is made "that there was no evidence offered or received which tended to show that the defective plank, or the staging in which it was found, were placed in position by the men employed by defendant as builders of necessary staging, or by any other authorized person. The plaintiff did not prove by whom the staging in question was built. He did prove that the materials were furnished by defendant, and that the construction of all staging used about the barge was delegated by defendant to one Guinane and a crew of from two to four men, his assistants. Guinane and his crew were not employed in the general work carried on by defendant, their exclusive business being to build such

staging and scaffolding as might be needed, from time to time, by other workmen engaged in defendant's general work and business. On the day of the accident plaintiff had gone from near where he was afterwards injured, the staging not being then in position, to the other side of the vessel, and had been there at work for something more than an hour. He then went, with his helper, into the yard for a mold, which was to be used at the point where they found the staging built on their return. The helper testified that it was put up while plaintiff and himself were in the yard after the mold. So the facts were that at the time plaintiff was required to perform work at that particular place and, necessarily, to stand upon and use a staging, while performing it, he found the one in question in position and used it. It is certainly fair to presume that this staging was built by one or more of the men employed and delegated by the defendant to do that special work when needed, and whose exclusive duty it was to do it, and unless this is a fair presumption we must infer that these men wholly failed to do their duty, and also infer that a staging upon the barge may have been erected by an intermeddler. If this was the fact it was incumbent upon the defendant, at least, to offer to show it. The presumption we have referred to was not affected by proof that Guinane himself did not build the staging, nor could he tell who did." * * *

The official syllabus to the report of the SIMS case, *supra*, states the case as follows:

"Where, upon the trial of a case, it is shown that a defendant had in his employ a crew of men whose exclusive work and duty it was to put up such staging and scaffolding as, from time to time, was needed for the use of workmen engaged in defendant's general work and business, the presumption arises that a staging found in position at the place where a workman is required to perform his work, and upon which he is obliged to stand to perform it, was built by one or more of the staging crew.

"The men composing such a crew, and the men engaged in defendant's general work and business, are not fellow-servants."

MINER KILLED BY DESCENDING CAGE — OBVIOUS DANGERS. — In **QUICK, Adm'r v. MINNESOTA IRON CO.**, 47 Minn. 361 (*November, 1891*), order of District Court for St. Louis county refusing new trial after verdict for plaintiff for \$2,000 was *reversed*. **DRAPER, DAVIS & HOLLISTER**, for appellant; **McGINDLEY & COTTON**, for respondent. The case is stated in the opinion by **GILFILLAN, Ch. J.**, as follows:

"Action for injuries to plaintiff's intestate, from which he died, caused, as alleged, by the negligence of the defendant. The deceased was in the employment of the defendant as a miner. The

defendant, in its business of mining ore, had sunk a vertical shaft about 300 feet deep. Along this, at intervals, were what are called 'levels,' being horizontal excavations or tunnels extended from the shaft to reach the ore. Of these there were four, the fourth being, as we understand, at the bottom of the shaft. The first and second from the top had been abandoned, the third was still being worked, and the miners were working at and preparing the fourth. In the shaft was what is called a 'cage,' being, as we understand, a lift or elevator, running up and down between the bottom of the shaft and the surface, and used for carrying tools and machinery and hoisting dirt, and frequently for carrying the men to and from their work in the shaft or levels. It was customary with defendant, as with all mining companies working by means of such shafts, when opening a new level to excavate around the sides of the shaft a roadway or passage for the men to pass from one side of the shaft to the other without crossing it. A bell at the surface, with a line extending down to the different levels, was used, according to a prescribed code of signals, of one, two, or three taps, to call for the ascent and descent of the cage. At the time of the killing of the deceased the defendant had not made the roadway around the shaft at level four, and had not extended the bell line from level three to level four, so that the only means for those working at level four to indicate when they desired the cage to be let down or drawn up was to call to the men at level three, and they signaled by the bell to those running the cage. The deceased had been at work for defendant in other shafts and this shaft five or six months, and about two weeks excavating this shaft between level three and level four. It was necessary for the men working at the level to go from time to time to the other side of the shaft, and, there being no roadway, they had to go across the shaft in order to do so. While crossing on one of these occasions deceased was killed by the cage, which ran without noise, coming down upon him. He had previously called to the men at level three to signal for the cage to be let down, and it had been let down three times, and at the last of the three times he had called to them to have it drawn up and not let down again. The cage came down at the time where he was killed, probably, as the evidence indicates, because the men at level three did not hear or did not understand his order not to let it down again.

"The negligence charged against defendant is in its omission to have the roadway around the shaft, and its omissions to have the bell line extended down to level four.

"The sole question in the case is, did the deceased, by continuing in the employment, assume the risks incident to that condition? The risk was of injury from the cage, which worked noiselessly, coming down upon him unawares when he might be crossing the

shaft. And as the rule is unquestioned that a servant is to be held, ordinarily, to assume such risks, such dangers, as are incident to the business, in the place and with the means in and with which he is required to do the work, provided he knows such risks and that he is held to know such as are manifest to one of ordinary common sense and observation, or which by the prudent exercise of the senses and common sense may be perceived and appreciated, the question is narrowed down to this: Were the risks which the deceased incurred, the danger to which he was exposed, and by which he was finally killed, manifest to one of common sense and observation, and could they be ascertained by the prudent exercise of the senses?" * * *

In reversing the order the court applied the rule "that a servant ordinarily assumes such risks of his employment, because of an unsafe place or of unsafe appliances, as are manifest to the senses or may be ascertained by a prudent use of them."

MINER INJURED BY STONE FALLING FROM ROOF — DEFENDANT LIABLE. — In **BERGQUIST v. CHANDLER IRON CO.**, 49 Minn. 511 (*May, 1892*), miner injured by stone falling from roof of tunnel in defendant's iron mine, verdict for plaintiff for \$4,437.67, in the District Court for St. Louis county, was sustained, and order denying new trial *affirmed*. The statement of facts and the opinion by COLLINS, J., show the following: "The plaintiff, Charles Bergquist, a Swede, was employed by defendant August 5, 1889, and set to work under ground in its iron mine at Ely, Minnesota. In this mine was a drift or tunnel running east and west, excavated before plaintiff was employed. He and his brother were set to work to excavate another drift or tunnel running from this one to the south at right angles and on the same level with the other. At the point of junction was a well into which plaintiff and his brother poured the earth or ore they excavated, and it fell down to a lower drift, in which were a tramway and ore cars to take it out of the mine. This well is called by miners a 'raise,' as it is constructed by digging from the bottom drift upward. A plank lay across the top of this well or raise to afford a passage over it for the miners. The plaintiff, on August 8, 1889, lay down on this plank to loosen the earth that had adhered to the sides of this well. While doing this a quantity of soapstone fell from the roof over the well and broke his left leg above the knee. He brought this suit to recover damages for this injury, claiming the stone fell from the roof of the drift or tunnel running east and west. He contended that defendant was negligent in not making the roof of that drift reasonably safe for workmen to pass under. The defendant claimed that the stone fell from the roof of the new drift dug by

plaintiff and his brother, and because of their negligence. The principal question of fact in the case was, which of these contentions was true." The court sustained the case made by plaintiff. DRAPER, DAVIS & HOLLISTER, appeared for appellant; JOHN JENSWOLD, for respondent.

BURSTING OF TEN-INCH PIPING TO BOILER — EMPLOYEE SCALDED — INDEPENDENT CONTRACTOR — FOREMAN — FELLOW-SERVANT — SCOPE OF EMPLOYMENT — QUESTION FOR JURY. — In **THEISEN, Adm'r v. PORTER et al.**, 56 Minn. 555 (*February, 1894*), order of District Court of Hennepin county denying plaintiff's motion for new trial was *reversed*, the court (per COLLINS, J.), stating the case as follows: "This was an action to recover damages for the death of plaintiff's intestate, John Lohr, alleged to have been the result of defendants' negligence. The trial court dismissed the action when plaintiff rested, and afterwards refused a new trial. The facts appearing were that defendants had been employed by the Minneapolis Brewing Company, for whom Lohr was then working, to put in a system of steam piping and connections at one of its plants. This piping was to run from the boilers in a boiler room, through a tunnel, to the basement of the main building, some sixty feet, thence across one end and along one side of the basement, the connections being with the engines and other apparatus on the floor above. The exact details of the work had not been determined when defendants commenced work, and it was agreed that the company should pay for the necessary materials at cost, and for the labor of defendants' men while putting it in place at a certain rate per hour. The company indicated in a general way what was needed in the line of pipes and connections, but defendants made all plans, had charge of the workmen, and the manner in which the work was done. There was some delay, but under the superintendence of one Teetsel, a foreman, defendants' workmen put in a twelve-inch main from the battery of boilers through the tunnel and across the front end of the basement. Here it turned at right angles and was reduced to a ten-inch pipe. This pipe was continued along the side of the basement some distance, and then terminated in what is known as a 'blind flange' or 'cap.' Connecting with these main pipes were a number of smaller pipes, of various sizes, running to the engines and other apparatus on the floors above. In the ten-inch pipe, at a point near to where it connected with the twelve-inch, a cut-off valve was placed; so that in the winter season, when the refrigerators were not in use, steam could be cut off from that part of the ten-inch pipe beyond, which was nearly all of it. While being delayed, as before mentioned,

owing to the nonarrival of material, and before the system was fully ready for use, it became important that the company should operate its refrigerators, the connection being from the ten-inch pipe at a point beyond the cut-off valve; and defendants were directed to put in, for temporary use, a six-inch pipe leading from two of the boilers, through the tunnel and across the basement to the ten-inch pipe, there to connect at a point beyond the cut-off valve; the plan being to run the steam through the six-inch pipe into the ten-inch pipe at a point between the cut-off valve and the connection with the refrigerator engine. With the valve closed the steam would necessarily reach the engine, and no part of it would go back, towards the boilers, into the twelve-inch main. For putting in the six-inch pipe, and making such connections as were needed to accomplish the anticipated result, defendants were to be paid an agreed sum, and all materials were to be returned to them when the permanent system was completed to the satisfaction of the brewing company. The six-inch pipe was put in, and a connection with the ten-inch was made, all under the direction of defendant's foreman. The pump used to supply the boilers with water at the time of the accident was operated solely by steam taken from the six-inch pipe. To operate the pump, or to use the boilers for any purpose, it was necessary to turn the steam into that pipe. No cut-off valve had been put into it, nor was there a drip pipe or 'bleeder,' so all condensation had to run into the ten-inch pipe and escape through a drip near the flange or cap at its end. After the twelve-inch main was fitted up the packing leaked, more or less, so that for repairs, and at different times, the company was obliged to shut off steam therefrom, and, when needed for use in operating the refrigerators, to conduct steam through the six-inch pipe. It was shown that whenever steam was shut off or turned on to the twelve-inch main, up to the day of the accident, it had been done at the request of and under the supervision of Teetsel, the foreman. On June 26, 1892, the permanent system was ready for continuous use, and Teetsel, with other men in defendants' employ, went to the brewery building to finish making connections, and to disconnect the six-inch pipe that it might be removed. The fires under the boilers had been put out the night before in anticipation of the work. The men worked all day, but did not have time to disconnect as expected. Towards evening the fires were started up, and, when steam was generated, the fireman went through the tunnel, to inform the company's engineer, who was in the basement, that, to start the pump, he needed steam in the six-inch pipe. Thinking that Teetsel was then at work upon the main the engineer closed the cut-off valve in the ten-inch pipe, so that the steam would not work back towards the boilers, and directed the fireman to let steam into

the six-inch, which was done. As it came through the pipe the steam 'hammered.' Teetsel, hearing this, remarked to the engineer that the steam was not turned on right, whereupon the latter said, 'You are in charge here and had better turn it on yourself.' Teetsel, after telling the engineer to open the cut-off valve slowly, went to the boiler house, had the fireman shut off steam from the six-inch pipe and then, while he was slowly turning it into the twelve-inch main, told the fireman to very slowly let it on again into the six-inch. When steam was fully onto the main Teetsel returned to the basement, and soon afterwards, while the fireman was still engaged with the six-inch pipe, the ten-inch burst a few inches from the flange or cap. Lohr had just been sent to that point by the brewery company's engineer to look after the drip pipe, or bleeder, and received injuries which caused his death." * * *

The point decided is stated in the official syllabus to the report of the THEISEN case, as follows:

"In determining whether a particular act was done in the course of a servant's employment the question is, was it committed by the authority of the master, expressly conferred, or fairly implied from the nature of the employment and the duties incident to it? And, in determining the question of authority, we are to regard the object, purpose, and the end of the employment.

"*Held*, on an examination of the record in this case, that the court below erred in dismissing the same." Rehearing denied, April, 1894.

ESCAPE OF STEAM FROM SAFETY VALVE OF BOILER — EMPLOYEE SCALDED — DANGEROUS PLACE — CONTRIBUTORY NEGLIGENCE. — In **McCALLUM v. McCALLUM**, 58 Minn. 288 (July, 1894), order of District Court of Hennepin county denying plaintiff's motion for new trial, after dismissal of action, was *affirmed*. Plaintiff was a licensed engineer, and his business was also pile driving and bridge building. At the time of the injury he was in the employ of his uncle, the defendant, as foreman of a crew of ten men engaged in pile driving. The motive power was steam; the boiler was an upright one, standing about twelve feet high above the platform upon which it rested. Two of the crew of ten men under plaintiff were a fireman and engineer who ran the engine. Plaintiff attended to the plant for the work and inspected the boiler. The steam gauge appeared to be out of order and plaintiff informed defendant who said he would have it fixed. On the day of the accident plaintiff was looking at the smokestack to see if he could fix an exhaust pipe when the steam suddenly escaped from the safety valve into his face and blew him off, and he fell down upon the platform below, striking some pro-

jection as he fell, breaking his ankle and sustaining other injuries. The court (per CANTY, J.), said that it did not appear from the evidence that the place where the accident occurred was a place where an employee was ever likely to go when the steam was up, and that it would naturally be expected that any alteration in the pipes or appliances on top of the boiler would be made when the boiler was cold.

EXPLOSION OF BOILER ON STEAMBOAT — EMPLOYEE INJURED — FELLOW-SERVANTS — EVIDENCE — OWNER — PARTNERS — LIABILITY — INSTRUCTIONS. — In **CONNOLLY v. DAVIDSON**, 15 Minn. 519 (*July, 1870*), judgment on verdict for plaintiff in the District Court for Dakota county was *affirmed*. ALLIS, GILFILLAN & WILLIAMS, appeared for appellant; SMITH & GILMAN, for respondent. The case is very fully discussed in the opinion by RIPLEY, Ch. J. The official syllabus states the case as follows:

“On November 4, 1864, the steamboats ‘Albany’ and ‘John Rumsey’ were navigating the Mississippi in the passenger and freight business. Plaintiff was a deck hand on the ‘Albany.’ While the boats were near each other the ‘John Rumsey’s’ boiler exploded, whereby plaintiff was injured. *Held*, that the rule that the master is not liable to one of his servants for injuries sustained by him through the negligence, etc., of a fellow-servant engaged in the same general business does not apply, though appellant were a partner in the business of so running both boats. *Held, also*, that the fact of such explosion is full *prima facie* evidence, as against those interested in the boat’s navigation as joint owners of her earnings and profits, that it was caused by their fault or negligence or that of their servants. *Also*, that section 13 of the Act of Congress, approved July 7, 1838 (5 U. S. Stat. at L., p. 306), is not limited in its application to suits brought by passengers, but that, under its provisions, such fact was full *prima facie* evidence of negligence in this case (1).

1. The court (per RIPLEY, Ch. J.) said: “The explosion is like that out of which the actions of **McMAHON v. DAVIDSON**, 12 Minn. 357, and **FAY v. DAVIDSON**, 13 Minn. 528, arose. In the former, plaintiff was a deckhand on the ‘Rumsey,’ in the latter, a passenger on the ‘Albany.’ We are unable to see how the fact that plaintiff was a deckhand on the ‘Albany’ makes any difference in principle. Those decisions, therefore, sustain the instructions given, and the refusal to give the instruction asked by defendant as to the effect of the explosion as evidence of negligence, and the application of the Act of Congress, as the same are set out in the bill of exceptions. The second and third instructions asked by the defendant and refused, are identical respectively with the second and fifth asked for him in *Fay v. Davidson* (*supra*), and held in that case to have

"The plaintiff offered evidence tending to prove that said boat was jointly owned and managed by appellant and one H. T. Rumsey. The appellant introduced evidence tending to prove that she was exclusively owned and managed by said H. T. Rumsey, and also, that said Rumsey, owning said boat and another, and appellant, several, one, the 'Chippewa Falls,' and appellant and his brother owning the 'Albany,' and each running his own boats in the aforesaid business, they had agreed, that at the end of the season of navigation, they should divide in certain agreed proportions the earnings of said boats between them; the earnings of the 'John Rumsey' and 'Chippewa Falls' to be equally divided; that each should then render to the other an account of the earnings of his boats, the balance, according to the proportions agreed on, to be then paid over; each to have the exclusive control and management of his own boats and business. The jury were instructed that 'if Rumsey owned the "John Rumsey," and Davidson the "Chippewa Falls" and other boats, and it was agreed between them that each should employ the men and manage his own boats, and at the end of the season the profits of the boats were to be divided between them, that made them partners in running the boats, and each responsible for the carelessness and negligence of the officers and men of each boat.' *Held*, to be correct in point of law. That the presumption being that this language was used by the court and understood by the jury in the ordinary and correct sense of an agreement for the division of profits, as such, which would vest a present interest or ownership in them as they accrued and before they were divided, the agreement described would, as to third persons, create the relation of partners. *Also*, that even if the evidence of defendant had no tendency to prove the state of facts assumed by the instructions, the charge was not objectionable on the ground that the jury would be misled by it into that belief; for plaintiff's evidence being sufficient to sustain the verdict, it could not be said that the result showed that the jury were misled by the generality of the charge. If defendant feared any such misapprehension he should have requested a more specific instruction, and as the bill

been properly refused; the latter as abstract and inapplicable to the case, because the interest of Davidson, whatever it was, was not an interest attaching at the end of the season; the former, because he might have an interest which would have made him responsible for the negligence of the employees on the 'John Rumsey,' although it did not give him a right to control or take part in the hire and

discharge of such servants. These reasons are equally applicable to the present case. It follows that the second and third instructions asked were properly refused; and also, that such refusal does not, as the defendant contends, assume, in substance, that the agreement testified to by Davidson made him a partner with Rumsey."

of exceptions does not purport to give the charge in full, it is to be presumed that other instructions sufficiently explicit to prevent such misapprehension were in fact given.

"The jury were also instructed that 'if Davidson was equally interested with Rumsey in the earnings and profits of the "John Rumsey" that made them partners in running the boat.' *Held*, not to be open to the objection that it is to the effect that any interest without regard to its character in such earnings and profits would make defendant such partner. If it necessarily implied (which it does not) that Rumsey was sole owner of the boat, his interest in her earnings must be that of an owner thereof, and if Davidson's were not, he would not in that respect be on an equality with Rumsey. Equally interested imports equality in all respects."

SERVANT INJURED WHILE DRIVING — DEFECTIVE WAGON — NOTICE — PROMISE TO REPAIR — ASSUMPTION OF RISK — MASTER LIABLE. — In **SCHLITZ v. PABST BREWING CO. et al.**, 57 Minn. 303 (*May, 1894*), servant injured while driving master's defective wagon, judgment on verdict for plaintiff for \$1,850, in the District Court of St. Louis county, was *affirmed*. The ruling in the case is stated in the official syllabus: "Where the dangerous condition of an instrumentality furnished a servant to do his work is known to both the master and servant, and the latter, upon his objecting to continue its use, is induced to do so for a short time by the request of the master, for his own convenience and purposes, and his promise that at the end of such time the use shall be discontinued, the servant does not during such time assume the risk incident to such dangerous condition, unless it be so imminently and immediately dangerous that a man of ordinary prudence would have refused longer to use it."

PERSON ASSISTING ANOTHER IN MOVING A BUILDING — RELATIONSHIP OF PARTIES — MASTER AND SERVANT — INSUFFICIENCY OF COMPLAINT. — In **JORGENSEN v. SMITH**, 32 Minn. 79 (*May, 1884*), appeal by defendant from an order of District Court for Dodge county overruling his general demurrer to the complaint, order was *reversed*, it being held that the complaint failed to show sufficient cause of action. The case is stated in the opinion by MITCHELL, J., as follows: "The complaint contains much, which, at most, is mere evidence and not issuable facts. But the substance of it is that plaintiff, at the request of defendant, went with the team of one Patterson (in whose employment he then was) to assist defendant in moving a building. 'That in the course of moving said building said defendant directed plaintiff and others aiding in the moving, to

drive the horses attached to the building through an open space between certain rows of trees; that the space through which the plaintiff and the others engaged in moving said building were ordered by defendant to move the same was too small to pass through with safety to the teams and the parties engaged in said undertaking; that defendant, through negligence and carelessness, failed to make the space between the trees through which said building was to pass large enough for the purpose, but told the workmen engaged in the undertaking that said space was thirty feet wide, while, as a matter of fact, it did not exceed twenty-one feet in width, and the building was eighteen feet wide; that the plaintiff did not know but that said space was large enough for the purpose. Plaintiff, by defendant's direction, fastened his master's team to the building and drove it with due care until the teams and building were in the space between the rows of trees, and, on account of the space being too narrow, the building became lodged in the trees and jammed the plaintiff against one of the trees, thereby breaking one of his legs.' The complaint also alleges that plaintiff was induced to go and assist in this work by defendant's representations that Patterson, his master, had promised that he should, which was false. This is wholly immaterial and unimportant. The gist of the action is defendant's negligence, and not the falsity of these representations. These false representations were in no sense the proximate cause of the injury.

"It is also clear that, for the time being, plaintiff was in the service of the defendant, and that the relation of master and servant existed between them. Hence the duty and liability of defendant to plaintiff was that of a master to a servant. Plaintiff combats this, but, in fact, it is the view most favorable to him, for certainly the duty of defendant, as master, to plaintiff, as his servant, would be as great as under any other supposable relation of the parties.

"Does then the complaint allege any breach of duty on part of the defendant, as master, to plaintiff, as his servant? We fail to find it. At first glance the pleading may seem to allege a great deal, but when analyzed it really alleges very little. Presumptively, from the facts stated, both parties had equal chance to see the situation. Everything was open to common observation, and each could see for himself. The only tangible thing on which to hang a charge of negligence is the allegation that defendant told the men that the space between the rows of trees was thirty feet, when, in fact, it was only twenty-one feet. But it is not alleged that plaintiff relied on this statement, or did not know that the space was only twenty-one feet. True he says that he did not know but that the space was wide enough for the purpose, but this does not imply that he thought it was thirty feet. For anything that appears, plaintiff relied on

his own estimate of the space and not that of defendant. The complaint is too scant. If plaintiff, on the trial, was to prove all that he has alleged and no more he could not recover. Order *reversed*." CHARLES C. WILLSON, appeared for appellant; ROBERT TAYLOR and GEO. B. EDGERTON, for respondent.

LIABILITY OF MASTER FOR TORT OF SERVANT RESULTING IN INJURY TO THIRD PERSON.

Child run over — Negligent driving of teamster — Master liable.

In *MULVEHILL v. BATES*, 31 Minn. 364 (January, 1884), judgment for plaintiff in the Municipal Court of St. Paul, was *affirmed*, the case being stated in the syllabus to the official report as follows: "The owner of an 'express-wagon' employed a servant to drive it, and intrusted it to him, generally, to be used at his discretion, in doing such business as he, the servant, could secure in the way of employment for the wagon. While thus employed, the servant, having delivered a trunk, on his return got a 'load of poles for himself,' and, while taking them home negligently drove over and injured the plaintiff's child. Held, that the master was liable." Opinion by MITCHELL, J.

Person falling down elevator shaft — Direction of shipping clerk — Scope of employment — Master not liable.

In *MOUSO v. A. N. KELLOGG NEWSPAPER CO.*, 58 Minn. 406 (July, 1894), where plaintiff, an employee of an express company, while delivering a package on defendant's premises, fell down an elevator shaft, the negligence charged being that defendant's shipping clerk called out to plaintiff "All right," and that the latter thinking that it referred to the elevator walked through the open door; verdict directed for defendant in the District Court of Hennepin County was *sustained* and order denying motion for new trial was *affirmed*, it being held that the act of the shipping clerk was not within the scope of his duties.

Liability for act of servant in leaving coal hole uncovered — Independent contractor — Respondeat superior.

In *WATERS v. PIONEER FUEL CO.*, 52 Minn. 474 (March, 1893), judgment for plaintiff for \$223.73 in the Municipal Court of the City of Minneapolis, was *affirmed*. VANDERBURGH, J., stated the case as follows: "The defendant's employee, engaged in hauling coal, delivered, by its order, a ton of coal to one of its customers in the city of Minneapolis. He delivered the coal through a hole in the sidewalk in front of the premises of the purchaser, into a vault or bin under the sidewalk, connected with the premises. After the coal was unloaded, he took out the chute through which it was delivered, and put the cover over the hole, but, as is alleged, failed to replace it properly; and the plaintiff, who soon after passed along, stepped upon it, and was precipitated into the hole, and injured. He brings this action against the defendant, and insists that it is a case where *respondeat superior* applies. The defendant, however, resists this claim on the ground that the person delivering the coal was not its servant, but an independent con-

tractor." *Held*, that the employee while so engaged was a servant of the company, and not an independent contractor, merely; and that it was negligence to omit to replace the coal hole cover, and for injury resulting to plaintiff therefrom, defendant was liable.

Person struck by snow and ice from roof of building—Independent contractor—Respondeat superior.

In *RAIT v. NEW ENGLAND FURNITURE & CARPET CO., ET AL.*, 66 Minn. 76 (October, 1896), appeal by defendant company from an order of District Court of Hennepin County, denying motions for new trial and for judgment notwithstanding verdict, after a verdict for plaintiff for \$5,495, order was affirmed. Opinion rendered by MITCHELL, J., who said: "The action was brought to recover damages for personal injuries caused by the alleged negligence of the defendant in throwing from the roof of its building into the street below ice and snow, which struck the plaintiff as he was passing by, and caused the injuries complained of. It is not denied that the question whether the act itself was negligent was, under the evidence, for the jury. But the main question litigated was whether the person who was having the snow and ice removed was or was not an independent contractor. The trial court submitted that question to the jury as one of fact. The contention of the defendant is that the court should have held, as a matter of law, that the party was an independent contractor. This presents the only question which we find it necessary to consider. The building in question was occupied by the defendant as a furniture store. Defendant had been annoyed by the roof leaking, caused by the accumulation of ice and snow, and the president of the company employed one Dinsmore, whose general occupation was that of contractor and builder, to repair the roof, so as to stop the leak." * * *

Continuing, the court said: "The terms 'independent contractor' and 'servant,' as applied to the subject in hand, are somewhat unsatisfactory, but are used for want of better ones. The word 'servant,' as used in this connection, is applicable to any relation in which, with reference to the matter out of which the alleged wrong had sprung, the person sought to be charged had the right under the contract of employment to control, in the given particular complained of, the action of the person doing the alleged wrong. In every case the decisive question in determining whether the doctrine of *respondeat superior* applies is, had the defendant the right to control in the given particular the conduct of the person doing the wrong. If he had, he is liable. On this question the contract under which the work was done must speak conclusively, in every case reference being had, of course, to surrounding circumstances. If defendant had such control, the mere fact that the agent who did the injury carried on a separate and independent employment will not absolve his principal from liability. If this control existed, it makes no difference whether the person doing the injury was the 'servant' of the defendant, in the popular sense of that word, or a person merely employed to do a specified job or piece of work.

"There is eminent authority for holding, as a matter of law, that Dinsmore was not an independent contractor. See *Brackett v. Lubke*, 4 Allen, 138; *Sadler v. Henlock*, 4 El. & Bl. 570. But it is not necessary to go so far in this case. Under all the circumstances it was, at least, a question for

the jury to say whether, in employing Dinsmore to fix this roof, the defendant surrendered all control over his actions as to the matter of removing the ice and snow from the roof of the building. This is all that it is necessary to decide for the purposes of this appeal."

DRYMALA V. THOMPSON ET AL.

Supreme Court, Minnesota, May, 1879.

[Reported in 26 Minn. 40.]

DUTY OF MASTER TO FURNISH PROPER MACHINERY—DELEGATION OF DUTY TO AGENT DOES NOT RELIEVE MASTER FROM LIABILITY FOR NEGLIGENCE OF SUCH DUTY BY AGENT.

—It is the duty of a master to use due care in supplying and maintaining suitable instrumentalities for the performance of the work required of his servants. This duty is imposed upon him as master. It is an absolute and personal duty—that is to say, it is one from responsibility for the proper discharge of which the master cannot escape by entrusting its performance to a servant or agent. If the master does so entrust it, the servant or agent is charged with the master's duty, and in the case of a corporation, such servant or agent occupies the place of the corporation, and the latter is deemed present, and consequently liable for the manner in which such servant or agent acts. The negligence of the agent or servant in such cases is the negligence of the master.

DUTY OF RAILROAD COMPANY TO KEEP TRACK IN GOOD CONDITION—EMPLOYEE INJURED IN DERAILMENT OF TRAIN—NEGLIGENCE OF FOREMAN.—In the instance of a railroad, the track is one of the instrumentalities for the working of the road, and therefore something which it is the master's absolute and personal duty to employ due care in maintaining and keeping in a condition suitable to the purposes for which it is to be used—that is to say, in such a condition that it can be safely used for such purposes.

Application of these views to the case at bar, in which the plaintiff, an employee of defendants on a wood train, was injured through the negligence of a section foreman in taking up a rail for track repair, without putting out proper signals to warn approaching trains (1).

(Syllabus by the court.)

1. In *HUGHES v. WINONA & ST. PETER R. R. Co.*, 27 Minn. 137 (September, 1880), judgment for defendant was *affirmed*, the syllabus to the report (per opinion by BERRY, J.) stating the case and points as follows: "Certain instructions of the trial court considered, and their effect, as applicable to the facts of

this case, *held* to be that if an employer's unsafe and careless custom of doing business is open to observation, so that it can be readily observed by the senses, and the employee has ample and reasonable means of using his senses for the purpose of observing the custom, it is his own fault and negligence if he

APPEAL by defendants from a judgment of the District Court for Ramsey County. The case is stated in the opinion. *Judgment affirmed.*

GEO. L. & CHAS. E. OTIS, for appellants.

PIERCE, STEPHENSON & MAINZER, for respondent.

Berry, J. —The defendants, who were operating the railroad of the First Division of the St. Paul & Pacific Railroad Company, had the plaintiff in their employ, as a laborer on a wood train. The train was in constant use, but had no regular running time. On February 24, 1877, as it was running towards Willmar, the cars which formed part of it, and which were loaded with wood, were ditched, in consequence of a rail having been taken up for repair of the track, and the plaintiff, who was attending the brakes, leaped to the ground for the purpose of saving himself, and broke his leg. He brings this action for damages. No negligence is imputed to the plaintiff, or to any other person belonging to the train. It appears that the railroad is divided into short sections, each of which is under the charge of a section foreman, whose duty it is to keep his section in repair, and for that purpose to take up rails if necessary. It further appears that the rail, the absence of which occasioned the ditching of the cars, was taken up for the purpose of repairing the track by the foreman of the section in which the accident occurred, and that he negligently failed

does not observe it, and he stands upon the same footing as if he has actual knowledge of the custom referred to, so that the risk to him from such custom is his own, and not that of the employer. This is about the same thing as saying that an employee must make reasonable use of his senses, to avoid danger and injury in the course of his employment, or, in other words, that he must not be negligent, and is a correct rule of law.

“In this action the plaintiff was in the employ of the defendant as a night brakeman in defendant’s yard at Winona, one of his duties being to couple cars. In the discharge of such duty he slipped and fell upon a pile of wet ashes, which, according to

defendant’s custom, had been taken out of the firebox of a locomotive, and dropped upon the track. Plaintiff claimed that defendant was negligent, both in depositing the ashes upon the track, and in not removing the same. No complaint is made that the track itself was not in good order and condition. The court instructed the jury that this mode of disposing of ashes was so common and long continued that it was practically the act of the company—the defendant—and that the defendant could not be heard to claim that it was only the negligence of plaintiff’s co-servants. *Held*, that, in view of these instructions, the case of *Drymala v. Thompson*, 26 Minn. 40 [the case at bar], has no application to the case.”

to put out any proper signals as a warning to approaching trains. It is found by the jury, and in effect conceded by the defendants, that the foreman was thus negligent, and that such negligence was the cause of the ditching of the train, and of the consequent injury to plaintiff. The defense is, that the section foreman was the plaintiff's fellow-servant, and that, as he was a competent and suitable foreman, the defendants, his employers, are not liable to the plaintiff for the consequences of his negligence.

In our opinion, this defense is not well taken, the rule recognized in *Foster v. Minn. Cent. R'y Co.*, 14 Minn. 360 (1), exempting a master from liability to one servant for the negligence of a fellow-servant, having no application to the facts of this case. It is the duty of a master to use due care in supplying and maintaining suitable instrumentalities for the performance of the work required of his servants. This duty is imposed upon him as master. It is a duty which the law implies from the relation of master and servant, and which it regards as entering into the contract by which the relation is formed. It is therefore an absolute and personal duty—that is to say, it is one from responsibility for the proper discharge of which the master cannot escape by entrusting its performance to a servant or agent. If he does so entrust it (as a corporation

1. The facts and points decided in *FOSTER v. MINNESOTA CENTRAL RY CO.*, 14 Minn. 360 (July, 1869), are set out in the syllabus to the official report as follows:

"A master, guilty of no personal negligence or misconduct, is not responsible to his servant for injuries resulting to the latter from the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business.

"This rule is applicable, and the master exonerated from responsibility, notwithstanding the servant causing the injury, and the servant injured, are engaged in separate and distinct departments of the same general service or business.

"What would be the rule in case the relation between the servants was

that of superior and subordinate—*Quære*.

"In this case the plaintiff was a section man engaged in repairing defendant's track. The injury was alleged to have been caused by the negligence and carelessness of defendant's servant, in so piling wood upon the tender, and in so running the train, that a stick of wood was thrown from the tender, striking the plaintiff. *Held*, that the plaintiff, and the defendant's said servants, were fellow-servants, engaged in the same general service or business, and that the defendant not appearing to be in fault, is not liable for the injury received." Opinion rendered by BERRY, J., in which the leading authorities on the law of master and servant and the fellow-servant rule are cited.

must do), the servant or agent, as is said in one case from Massachusetts, cited below, is "charged with a master's duty" to another servant, or as said by Chief Justice CHURCH in a case cited below from New York, in which the master was a corporation, "he (the servant or agent) occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which" the servant or agent acts. It follows that the negligence of the agent or servant in performing this duty of his master is the negligence of the master himself, and that the master is therefore responsible for the consequences of such negligence.

These views are fully sustained by the following, among very many cases: *Bessex v. Chicago & N. W. R'y Co.*, 45 Wis. 477; *Snow v. Housatonic R. Co.*, 8 Allen, 441, 15 Am. Neg. Cas. 417; *Ford v. Fitchburg R. Co.*, 110 Mass. 240, 15 Am. Neg. Cas. 427; *Flike v. Boston & Albany R. Co.*, 53 N. Y. 549; *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 495. See, also, Cooley on Torts, 561-564, and citations.

In the instance of a railroad, the track is one of the instrumentalities for the working of the road, and therefore something which it is the absolute and personal duty of the master to employ due care in maintaining and keeping in a condition suitable to the purposes for which it is to be used—that is to say, in such condition that it can be safely used for such purposes. See cases *supra*. When such master entrusts the performance of this duty to a servant or agent, such servant or agent occupies the place of the master as respects such performance, and the negligence of such servant or agent in performing the duty is the negligence of the master himself.

From the application of these rules to the facts of the case at bar, it follows that the negligence of the section foreman, which occasioned the plaintiff's injury, was the negligence of the defendants, and that they were, therefore, properly held liable for the same by the verdict of the jury.

This conclusion disposes of the case, and renders it unnecessary for us to examine or pass upon the other points presented in the briefs of counsel.

Judgment affirmed.

COOK v. ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

Supreme Court, Minnesota, July, 1885.

[Reported in 34 Minn. 45.]

SAFE PLACE TO WORK—EXPOSING SERVANT TO DANGER.—

The general duty of a master to exercise care to prevent the exposure of his servant to unnecessary and unreasonable risks, requires him, among other things, to use reasonable diligence in seeing that the place where the service is to be performed is safe for that purpose. The master's duty and liability to his servant extend not only to such unnecessary and unreasonable risks as are in fact known to him, but to such as he ought to have known in the exercise of diligence proportionate to the occasion.

ASSUMPTION OF RISK.—While the servant assumes the ordinary risks of his employment, and, as a general rule, such extraordinary risks as he may knowingly and voluntarily see fit to encounter, he does not stand upon the same footing as the master as respects the matter of care in inspecting and investigating the risks to which he may be exposed. He has a right to presume that the master will do his duty in that respect, so that, when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders without being chargeable with contributory negligence or with the assumption of the risks of so doing. This proposition is, however, subject to the qualification that he must not rashly and deliberately expose himself to unnecessary and unreasonable risks which he knows and appreciates.

SERVANT'S KNOWLEDGE OF DEFECTS AND RISKS.—*Russell v. Minn. & St. L. R'y Co.*, 32 Minn. 230, *followed*, as to the distinction between a servant's knowledge of defects and his knowledge of risks.

SCOPE OF EMPLOYMENT—NEGLIGENCE OF FELLOW-SERVANT—VICE-PRINCIPAL.—It appearing that the work in which plaintiff was engaged when he received the injury complained of was wholly outside of that for which he entered defendant's service, and outside of the line of defendant's usual business, and the entire general charge, superintendence, and direction of it, as in the nature of a distinct department of business, appearing to have been committed to B and K, at least as far as plaintiff and his co-employees were concerned, B and K are to be taken as standing in the shoes of their principal, the defendant, as respects the place where plaintiff should work, and in sending him to such place of danger, so that their negligence in so doing is the negligence of their principal.

(Syllabus by the court.)

APPEAL by defendant from order of the District Court for Ramsey County refusing new trial, after verdict rendered for plaintiff. *Order affirmed.*

"Plaintiff, a boy of nineteen years, was employed by defendant about its tracks in St. Paul, in spiking rails and shoveling. On the night of June 10, 1884, the Union Passenger Depot in that city was partially destroyed by fire. In the morning of June 11th, by order of one Brennan, the defendant's roadmaster, and of one King, the foreman of the gang in which plaintiff was working, the plaintiff was set to work at removing the ashes and debris in the depot. After plaintiff had worked on the first floor of the building for several hours, King directed him to go upstairs, where three other men were working under direction of a foreman, who was not an employee of defendant, and who gave plaintiff a shovel and directed him to shovel ashes. About five minutes afterwards, and while plaintiff was thus engaged, the floor on which he was working gave way, and plaintiff sustained the injuries for which the action is brought."

R. B. GALUSHA and J. KLING, for appellant.

WARREN H. MEAD and T. T. ALEXANDER, for respondent.

Berry, J. — The general duty of a master to exercise care to prevent the exposure of his servant to unnecessary and unreasonable risks requires him, among other things, to use reasonable diligence in seeing that the place where the service is to be performed is safe for that purpose. *Noyes v. Smith*, 28 Vt. 59; *Hutchinson v. Railway Co.*, 5 Exch. 343 (1); *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282, 15 Am. Neg. Cas. 690n; *Snow v. Housatonic R. Co.*, 8 Allen, 441, 15 Am. Neg. Cas. 417; *Sullivan v. India Mfg. Co.*, 113 Mass. 393, 15 Am. Neg. Cas. 527; *Ryan v. Fowler*, 24 N. Y. 410; *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. St. 389; *Swoboda v. Ward*, 40 Mich. 420, 16 Am. Neg. Cas. 1, *ante*.

The master's duty and liability to his servant extend not only to such unnecessary and unreasonable risks as are in fact

1. In *HUTCHINSON v. YORK, NEWCASTLE & BERWICK R'y Co.*, 5 W. H. & G. (Exch.) 343, where a servant of a railway company, who was proceeding in the discharge of his duty in a train belonging to the company, and guided by their servants, was killed by a collision between it and another of their trains guided by others of

their servants, it was held that no action was maintainable by his personal representative against the company, and that it made no difference in this respect whether the accident was occasioned by the negligence of the servants guiding the train in which the deceased was, or of those guiding the other train, or of both.

known to him, but to such as he ought to know in the exercise of proper diligence, *i. e.*, diligence proportionate to the occasion. *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669; *Noyes v. Smith*, and *Gibson v. Pacific R. Co.*, *supra*. The servant, of course, assumes the ordinary risks of his employment, such as are reasonably necessary and incidental to it, including negligence of fellow-servants; and, as a general rule, also assumes such extraordinary risks as he may knowingly and voluntarily see fit to encounter. But while he may cut himself off from any recourse against his master if he recklessly rush into danger, he does not stand upon the same footing as his master as respects the matter of care in inspecting and investigating the risks to which he may be exposed. He has a right to presume that the master will do his duty in this respect, and therefore, when directed by proper authority to perform certain services, or to perform them in a certain place, he will ordinarily be justified in obeying orders, without being chargeable with contributory negligence or with the assumption of the risks of so doing. *Russell v. Minn. & St. L. R'y Co.*, 32 Minn. 230 (1); *Hutchinson v. Railway Co.*, and *Gibson v. Pacific R. Co.*, *supra*. But this proposition

1. In *RUSSELL v. MINNEAPOLIS & ST. LOUIS R'y Co.*, 32 Minn. 230 (June, 1884), the ruling is stated in the syllabus to the report (as per opinion by MITCHELL, J.) as follows:

"A servant does not necessarily assume the risks incident to the use of unsafe machinery furnished him by his master because he knows its character and condition.

"It is also necessary that he understood, or, by the exercise of common observation, ought to have understood, the risks to which he is exposed by its use."

The injury complained of in the *Russell* case was sustained by plaintiff while in the discharge of his duties as brakeman on a "mixed" train on defendant's road, while coupling a "combination" or baggage car to the tender of a freight engine. "The baggage car was equipped with a 'Miller' coupler, while the

engine had only an ordinary coupling, such as is used on freight cars. The Miller coupler, which has a certain amount of lateral motion, slipped past the draw-head on the tender, and thus permitted the two cars to come so close together as to crush the plaintiff, who was standing between them in the act of making the coupling. The evidence shows that when those two kinds of coupling are thus used together, owing to this lateral motion of the Miller coupler, the ends of the two are liable, under certain circumstances, to slip past each other, and thus leave insufficient room between cars for a brakeman to stand, unless the tender is supplied with a 'goose-neck,' wooden buffers, or some other such arrangement to keep the cars apart. In this case the tender was not supplied with anything of the kind, and hence the injury complained of. That defendant was

is ordinarily subject to the qualification that he must not rashly or deliberately expose himself to unnecessary and unreasonable risks which he knows and appreciates. And here it is important to note a distinction well elucidated in *Russell v. Minn. & St. L. R'y Co.*, *supra*, viz., that it is one thing to be aware of defects in the instrumentalities or plan furnished by the master for the performance of his services, and another thing to know or appreciate the risks resulting or which may follow from such defects. The mere fact that the servant knows the defects may not charge him with contributory negligence or the assumption of the risks growing out of them. The question is, did he know, or ought he to have known, in the exercise of ordinary common sense and prudence, that the risks, and not merely the defects, existed?

The charge of the court in the case at bar is in substantial accord with the views above expressed.

Upon the undisputed facts of the case, the trial court also properly instructed the jury that Brennan and King, under whose orders plaintiff acted, represented the defendant, so that their negligence in sending the plaintiff to the place of danger was the negligence of defendant. The work that plaintiff was engaged in when he was injured was wholly outside of that

guilty of negligence in supplying its servants with such unsafe instrumentalities is very clear, and indeed is not seriously controverted. But defendant's contention is that plaintiff knew, or had the means of knowing, the unsafe character of these couplings, and, having continued their use without objection, he assumed all the risks incident thereto. We shall not here enter into any general discussion of the question when and under what circumstances a servant takes upon himself risks incident to the use of unsafe machinery, by continuing to use it without objection after knowledge of its defective character. We simply say that it is not enough that the servant knew or ought to have known the actual character and condition of the defective instrumentalities furnished for his use. He must also have understood, or by the exer-

cise of ordinary observation ought to have understood, the risks to which he is exposed by their use. To this rule this court has always strictly adhered. *Clark v. St. Paul, P. & S. C. R. Co.*, 28 Minn. 128." * * * Plaintiff had verdict for \$10,500 in the District Court for Hennepin County. Defendant appealed from order denying new trial. Order *affirmed*.

In *HUNGERFORD v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co.*, 41 Minn. 444 (October, 1889), brakeman injured while coupling cars on freight train, the forefinger of his right hand being crushed, verdict for \$1,100 was sustained and order refusing defendant new trial *affirmed*, it being held that the evidence justified the verdict under the rules laid down in *Russell v. Minn. & St. Louis R'y Co.*, 32 Minn. 230 [preceding case reported], and other cases.

for which he entered defendant's service, and also outside of the line of defendant's usual business, and the entire general charge, superintendence and direction of it, as in the nature of a distinct department of business, appears to have been committed to Brennan and King, at least so far as the plaintiff and his co-employees were concerned. They are, therefore, to be taken as standing in the shoes of their principal, as respects the place where plaintiff should work, and in sending him to such place of danger, so that their negligence is the negligence of their principal, the defendant. *Thompson v. Chicago, M. & St. P. R'y Co.*, 14 Fed. Rep. 564.

While we have not overlooked the other matters discussed by counsel, this is all that we deem it necessary to say in this opinion.

Order affirmed.

BERGER (AN INFANT, BY HIS GUARDIAN) V. ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY CO.

Supreme Court, Minnesota, July, 1888.

[Reported in 39 Minn. 78.]

MINOR EMPLOYEE INJURED — DANGEROUS MACHINERY. — Evidence in an action by a servant against a master for an injury sustained in working with machinery, on the ground of the master's negligence in putting the servant to work where he did not know the danger, and in not instructing him in regard to it, considered, and *held* not to sustain a verdict for the plaintiff.

(Syllabus to official report.)

APPEAL by defendant from an order of the District Court for Ramsey County, Kelley, J., presiding, refusing a new trial after a verdict of \$5,000 for plaintiff. The case is stated in the opinion. *Order reversed,*

M. D. GROVER, and FLANDRAU, SQUIRES & CUTCHEON, for appellant.

O'BRIEN & O'BRIEN, for respondent.

Gillan, Ch. J. — This is an action for a personal injury, occurring, as it is alleged, through the negligence of defendant, while plaintiff, in its employment, was working with a machine called a "roller." He was at work in its boiler-making shop, and was set by the foreman to straighten out

pieces of old smoke-stacks, which was done by running them through the machine, in doing which his fingers were caught in the rollers of the machine and crushed. The negligence alleged is: First, in placing plaintiff at work which was too advanced for him; second, in not properly instructing him in such work; and, third, in placing an incompetent person to assist him. The third specification of negligence refers to a fellow-apprentice of plaintiff's named Harrington, who was assigned to plaintiff as a helper in the work of straightening the pieces of smoke-stack. As to Harrington there is no evidence that he was not, so far as any danger to plaintiff was concerned, perfectly competent to do the work he was set to; nor is there a word of evidence suggesting that any act or omission of his caused or in any degree contributed to the injury to plaintiff; so that may be dismissed without further comment.

The first specification of negligence means that plaintiff was set to do work the danger of which his experience and knowledge of the business did not enable him to appreciate, and the second specification, that defendant did not properly instruct him as to such dangers. Plaintiff was an apprentice to learn the trade of boiler-making, and, at the time of the injury, had been so employed by defendant for two years and two months. He was then nineteen years old, and, for aught that appears, was a youth of ordinary capacity. The boiler-making shop was one large room in which plaintiff had worked during the two years and two months. In that room was the machine called the "roller." It appears to have been a powerful machine, of the simplest construction, the operating part consisting of heavy iron rollers, kept in place by the frame in which their ends were set, and which rollers, when set in motion by the motive power, revolved towards each other. When in motion, a plate of boiler-iron, one end of it being inserted between them, would by their movement be drawn through and crushed flat or smooth, taking out all inequalities in the plate. There was no danger in working the machine unless the hand should get caught and drawn in between the rollers, in which case, of course, it would be crushed. This danger was open to the senses, as apparent as the danger to one who should lie down on a railroad track in front of an approaching locomotive. No one of the commonest capacity could see the machine work and see what it would do, with a plate of boiler-

iron, without fully appreciating the danger, and knowing that, if he would avoid injury, he must take care not to get his hands between the rollers. The plaintiff had, as he testifies, seen the machine worked by others almost every day probably, during all the time of his apprenticeship. He had worked it himself every day for a month. Knowledge of the danger was forced on him by his senses. No amount of notice or instruction could have better informed him. The defendant had a right to assume that he knew it. It is apparent that no degree of skill or experience was required to keep the hands away from the rollers. It does not appear that in working the machine there was any need to have the hands so near the rollers that they were likely to get between them. The pieces of smoke-stack which plaintiff was running through the machine were full of rivets, or rivet holes, and the edges were in places turned up, making what are designated spurs or sharp projections. If the pieces were handled with the bare hands, these spurs would cut and scratch them, so it was usual to wear gloves as a protection to the hands. Of course, the spurs would catch the gloves as they would the naked hand. This made it necessary to take care that the glove was not caught by a spur so near the rollers that the hand would be drawn in. No skill nor experience beyond what plaintiff had was needed to know this and to exercise such care. It was not negligence to set him at work, all of the dangers of which he knew as well as any skilled mechanic could know; nor to omit to inform of what his senses had every day informed him. So long as a master is held liable to his servant only for negligence, no case like this can justify a recovery.

Order reversed.

HEFFEREN v. NORTHERN PACIFIC RAILROAD COMPANY.

HEFFEREN (AN INFANT, BY HIS GUARDIAN) v. NORTHERN PACIFIC RAILROAD COMPANY.

[TWO ACTIONS.]

Supreme Court, Minnesota, March, 1891.

[Reported in 45 Minn. 471.]

VOLUNTARY USE BY SERVANT OF DEFECTIVE APPLIANCE—FLYING OBJECT—MASTER NOT LIABLE FOR INJURY—RULE APPLIED TO MINOR EMPLOYEE.—A master who provides and keeps proper tools for the use of his servants, whose duty it is to select such as they require for their work, is not in general responsible if a servant voluntarily uses a tool which has become obviously defective and unfit for use, and is injured by reason of such defect.

This principle *applied* in respect to a "side-set"—a tool for cutting iron,—the power being applied to it by means of a heavy hammer, with which the side-set is struck by one person while another holds the side-set. The tool had become so battered from use that fragments were obviously liable to be broken off by a blow of the hammer. This did occur, the detached fragment putting out the eye of the servant holding the side-set. *Held*, that the master was not responsible, although the servant was only seventeen years of age.

MINOR EMPLOYEE—ASSUMPTION OF RISK,—A servant, although a minor, assumes the risk of the negligence of fellow-servants as a hazard incident to his service.

APPEAL—EVIDENCE—REVIEW—PRACTICE.—The court having ruled upon the sufficiency of the evidence on a motion that a verdict be directed for the defendant, the sufficiency of the evidence to sustain the verdict may be reviewed on an appeal from the judgment, although no motion for a new trial had been made.

(Syllabus by the court.)

ACTIONS brought in the District Court for Crow Wing County and tried before MILLS, J., acting for the judge of the Fifteenth District. In the first case plaintiff had a verdict of \$3,000, and in the second case of \$7,000. Defendant appeals from the judgment in each case. *Judgments reversed. Rehearing denied.*

JOHN C. BULLITT, JR., for appellant.

W. H. ADAMS and J. B. DOUGLAS, for respondent.

Dickinson, J. — These two actions are for the recovery by a father, (Patrick Hefferen) and by his minor son (Thomas Hefferen) of damages for an injury suffered by the son while engaged as a servant of the defendant in its shops at Brainerd. The father seeks to recover for loss of service of his son and for expenses to which he was subjected by reason of the injury; the son, for the personal injury to himself. The facts in the two cases are substantially the same, and both may be considered together.

When the accident occurred (December, 1886) Thomas was seventeen years old. He had been for about two years and a half at work for the defendant, at first in the building of the shops, and after that in the shops. His work in the shops had been of a somewhat miscellaneous character, including the cleaning of machinery, working in blacksmith and boiler shops, operating a steam hammer, pointing bolts, heating rivets, and, as he says, doing whatever he was directed to do. His father was a machinist in the same shop. On the occasion under consideration the foreman had ordered Thomas to go to the engine house to work with one Torkleson cutting off the heads of rivets on the tank of a locomotive. He found Torkleson already there, with the tools which they used. These consisted of a hammer and what is called a "side-set." This is a tool designed to be used for such purposes. It is made of steel, has a cutting edge, and the opposite side, which may be designated the "head," is formed for and intended to receive the blow of a hammer. A handle is fitted to it, by which it is held by one person, with the cutting edge against the rivet or substance to be cut, while another strikes the head of the side-set with a hammer. On this occasion Thomas at first used the hammer, while Torkleson held the side-set. Then they changed, and, while Thomas was holding the side-set and Torkleson using the hammer upon it, a thin scale of steel broke from the head of the side-set as the hammer fell upon it, and was driven into the plaintiff's eye.

The cases show no cause of action, unless it be negligence on the part of the defendant in respect to the condition of the side-set. It does not appear that Torkleson was not a competent, skilful workman; and even if, on this occasion, he was negligent, that would not justify a recovery. One of the ordinary risks incident to such service is that of the negligence of

fellow-servants, and this risk a servant takes upon himself as incident to his service, even though he be a minor. *King v. Boston & W. R. Co.*, 9 Cush. 112, 15 Am. Neg. Cas. 413*n*; *Curran v. Merchants' Mfg. Co.*, 130 Mass. 374, 15 Am. Neg. Cas. 507; *Brown v. Maxwell*, 6 Hill, 592; *Gartland v. Toledo, etc., R'y Co.*, 67 Ill. 498, 14 Am. Neg. Cas. 378*n*; *Chicago & G. E. R'y Co. v. Harney*, 28 Ind. 28, 14 Am. Neg. Cas. 542*n*; *Ohio & Miss. R. Co. v. Hammersley*, 28 Ind. 371, 14 Am. Neg. Cas. 542*n*; *Fisk v. Central Pac. R. Co.*, 72 Cal. 38, 13 Am. Neg. Cas. 407. Nor is there ground for complaining that the plaintiff was required to do work of a more dangerous character than that which was within the scope of the service for which he was employed, or such as was unsuited to his years and experience.

The evidence tended to show that the head of this side-set had become much worn and battered, the pounded surface having become rounded over and a ragged edge formed; and that pieces of the metal were more likely to be broken from it than would be the case if it were not in that condition, although this is liable also to occur even with a tool not thus worn. This condition of the tool was the ordinary result of use. The uncontradicted evidence showed that the defendant kept a tool-repairer in the shops, whose business it was to repair the tools; that the defendant kept a full supply of tools of this kind in a closet and scattered about the shop; that when a workman was to use a tool he would get it for himself, selecting such as he required; and that when a workman found that a tool needed to be repaired, he would take it to the tool repairer for that purpose. There was nothing to show that in selecting tools for use the workmen had not opportunity to act deliberately, and to select such as might be fit for use in the work to be done.

Under the circumstances here presented, we are of the opinion that the recovery cannot be sustained, unless the minority of Thomas Hefferen affects the result. For the present we will disregard that feature of the case, and consider it as it would have been if he had been of full age. The defect was as much the ordinary and natural result of the use of the tool as the dulling of the cutting edge of it would be. The defect, and whatever risk there may have been, were perfectly apparent; and if a workman should of his own choice, and unnecessarily,

use a tool thus plainly defective, when others were provided for his use, he is not absolved from the consequences of his own choice. It cannot be said to be the duty of a master, under ordinary circumstances, who provides and keeps proper tools for the use of his servants, to see to it that all such as from use become obviously unfit for service are removed beyond the reach of his servants. The servant is no less bound to be careful concerning his own safety than is the master; and, where proper instruments are provided for the use of the servants, and their ordinary duties require and enable them to select such as are suitable, they must act with reasonable discretion. Under such circumstances, it is a want of reasonable discretion for them to act blindly upon the assumption that none of the implements will ever become dull, or worn, or otherwise obviously defective. All human experience is to the contrary. The responsibility of the master for injuries resulting from unsafe instruments or machinery may be said to rest upon the ground that these are the means by which the servant is expected and required to do his work. The master furnishes them for that purpose, and expects and intends that the servant shall use them. The servant knows that this is expected of him. He may, therefore, in general, assume without particular inspection that the instruments which he is thus required to use are reasonably safe. But when from use they have become obviously defective and unfit, and the master has provided others, so that the servant knows that he is not required to use the former, the reason of the law holding the master to responsibility is inapplicable. If the master provides the proper tools for the use of his servants, responsibility for neglect to remove from the premises such as have become obviously unfit for use, if such responsibility exists, must rest, not on the ground that it is the duty of the master to furnish reasonably safe means for the prosecution of the work which his servants are required to do, but upon the ground that he is chargeable with negligence in suffering dangerous things to be where his servants may be injured by them. This principle is applicable under many circumstances, as in respect to concealed dangers, like a pitfall. It cannot be applied under the circumstances here stated without ignoring the duty of the servant to exercise ordinary care in respect to matters concerning which he has no right to assume that there is no danger. If he knows that

safe tools are provided for his use, he cannot be expected to use those which have become so defective, that the defects could not be overlooked. Circumstances may be such as to require the master to remove all defective instruments, even though the defect be perfectly apparent; as, for instance, where the duties of the servants in a dangerous employment are such that it is to be expected that they may use such instruments as may be at hand, there being no opportunity to observe even plainly apparent defects. But this case presents no such exceptional or peculiar conditions. According to the evidence it must be taken as a fact that the servants used this particular tool because they did not choose to get another. They knew its condition. They could not have used it for any length of time without knowing it. If it had the defects which alone constitute the ground of the recovery, they must have known that it was more or less probable that the blow of a hammer weighing eight or ten pounds upon the battered steel would break fragments from it. They must have known that such fragments were as likely to strike the eye as any other place no larger than the eye, and that such an occurrence might be expected to involve serious consequences. Of this they took the risk upon themselves. They probably considered that the chances of a fragment being broken off and striking so small an object as the eye were so remote that it was unnecessary to get another tool. But as the case is presented we think that it must be concluded that they knew the defect and the possible consequences; that, other tools being provided for their use, they were not justified in disregarding these things, and in assuming that because this worn implement remained among the tools in the shop it was safe to use it, under conditions which would leave the eyes exposed to injury, if fragments should be broken off. The case does not justify the conclusion either that this was required or expected of the servants, or that they had reason for supposing that it was.

It may be said that this servant who was injured did not select this tool for use, but that he found it in the possession of Torkleson when he went to work with him. That would not affect the result. The plaintiff cannot charge the master with responsibility for any negligence of which Torkleson may have been guilty. But the fact that the plaintiff found that Torkleson had taken an unfit tool for the work would not excuse him

if he knew the defect. He was not obliged to use such a tool merely because Torkleson had taken it for use.

We have considered the case as though Thomas Hefferen had not been a minor. But the majority of the court are of the opinion that he was of such age and experience that his minority does not affect the result. It is to be presumed that he had ordinary intelligence and habits of observation. He was required to exercise the discretion belonging to his years and experience, and it is considered that this would have been quite sufficient to have protected him from this unfortunate accident. The defendant had no more reason to expect that he, any more than an adult, would use a plainly defective tool when others were provided for use. As to this, speaking only for myself, I am not satisfied that the case was not one for the jury.

Upon the grounds above stated it is considered that the cases did not justify the verdicts.

It is urged that the sufficiency of the evidence should not be considered, because there were no motions for new trials; but the court below passed upon the question when it refused motions to direct verdicts for the defendant.

Judgments reversed, and new trials granted.

RAILROAD LABORER ATTEMPTING TO BOARD MOVING TRAIN BY DIRECTION OF FOREMAN — SIGNAL — FAILURE TO RING BELL — RAILROAD — STATUTE. — In **MORAN v. EASTERN RAILWAY COMPANY OF MINNESOTA**, 48 Minn. 46 (*January, 1892*), order refusing defendant new trial, after verdict for plaintiff for \$13,000, was *affirmed*. The facts of the case were as follows: Plaintiff, with others, was at work with a gravel train filling ground for a yard. When the cars were loaded the foreman told plaintiff to get on the train, and to hurry as the train would not wait. He attempted to climb on one of the cars, and, the train starting, he fell sustaining loss of arm and permanent injuries to his back. The negligence complained of was failure of defendant to ring the bell before starting the train. The Supreme Court ruled as follows (as per official syllabus to the report of the case):

“Evidence considered, and held there is none tending to prove that defendant was doing certain work for another company, and not for itself.

“A railroad company operating a line composed of the lines or tracks of several different companies comes within the provisions of Laws 1887, ch. 13.

“Work done in constructing a yard with tracks in it, to be used

tion, and that, by reason thereof, the derrick fell, and injured the plaintiff, then the verdict should be for the plaintiff.' '8. In permitting the witness Johnson to testify on behalf of the plaintiff as to whether there was furnished material sufficient in quality and quantity to make the platform of the derrick reasonably and suitably safe, so it would not fall down. 9. In permitting the witness Case to testify on behalf of the plaintiff that the foundation and platform erected as described by the witness Johnson were not, in his opinion, properly planned and constructed for the use to which they were put, and were not reasonably safe upon which to erect and operate a derrick for lifting stone.'

"Defendant's requests for instructions referred to in the opinion were as follows: '1. The jury are instructed that there is no evidence in this case that the defendant failed to provide sufficient material for the construction of the platform. 2. The jury are instructed that there is no evidence in this case that the proximate cause of the accident was a failure on the part of the defendant to provide a sufficient quantity of material for the erection of said platform. 3. If the jury believe that, in the prosecution of the work carried on at the time of the accident, the gang to which the plaintiff belonged were provided with a derrick and other appliances connected therewith, which were to be set up and erected by the men composing the gang, upon a platform to be erected by them, and the defendant had provided suitable timbers and material for the erection of said platform, and the said platform fell by reason of careless or improper construction of said platform, then your verdict must be for the defendant.' "

H. H. FIELD and WELLS & HOPP, for appellant.

GRAY & THOMPSON and DAVIS, KELLOGG & SEVERANCE, for respondent.

Collins, J.—The plaintiff was injured by the falling of a derrick while in defendant's employ, and brought this action to recover damages. The verdict was in his favor, and the appeal is from an order denying defendant's motion for a new trial. The assignments of error go to rulings of the court in the admission of evidence, its refusal to direct a verdict for defendant, and its refusal to give certain instructions to the jury.

As said by appellant's counsel in their brief, the controlling

question in the case is whether the accident resulted from the negligence of plaintiff's fellow-servants. If it did, it must be admitted that plaintiff cannot recover. The facts were that plaintiff had been in defendant's employ for several months with a crew of stone masons, who went from place to place along the railway lines, repairing and rebuilding bridge abutments. He was a common laborer, and, with other laborers, aided the masons in their stone work. The crew of men carried with them one or more derricks, and material used in setting them up, which were set up as required, and taken down for transportation elsewhere when no longer needed at that particular place. This crew of masons and laborers were under the immediate supervision and control of a foreman, named Enger. He hired and discharged them as became necessary, told them where to work and what to do. Plans for the work were furnished to Enger by defendant's assistant engineer of bridges, one Wood. It appears from the evidence that Wood directed, in a general way, the operations of this crew of men and of several other crews engaged in the same line of work for defendant, which was a foreign corporation, at other places, but he did not exercise special supervision unless on the ground. He was not present at the place where the accident occurred at any time after the crew went there, and gave no special directions concerning the work. It there became necessary to put up a derrick with which to handle stone, and Enger pointed out the place where the platform or scaffold should be built on which the derrick was to stand. There was also evidence tending to show that he gave directions as to just how the platform was to be built. This place was on the south side of the track, which was on top of quite an embankment, on the side of which the platform was to be built up, and brought to a level with the track, out of materials brought there for this purpose,—timbers of different lengths, about six or eight inches square. A trench was first dug near the bottom of the plank, parallel with the track, in which was laid one of these timbers. Short timbers were then rested on the bed piece, at right angles with it, and running into the bank, and then more pieces were placed parallel with the track. This manner of construction was carried on until the required height was reached, and on top, as a floor, were placed timbers about six by twelve inches in size. This struc-

ture was not bolted or fastened together in any way, and on top of it was placed the derrick, the foot of the mast resting on the flooring, and the top firmly fixed in position by the usual guy ropes. This platform was built and the derrick placed in so defective a manner that a tyro in mechanics should have known that, if a stone of sufficient weight suspended at the ends of the boom and stay arm was brought to a certain height directly across the track from the derrick, the pressure on the foot of the mast, outwardly from the embankment, would topple the platform over. The plaintiff had nothing to do with the building of the platform, was at work in another place, and testified that he did not know how it was built. When all was ready for operations, he was put at work turning the derrick crank, with other men, all standing on the platform floor. The stones to be elevated and removed were on the north side of the track, and, on attempting to lift a heavy one, the pressure of the boom against the foot of the mast and away from the embankment caused the platform to collapse and the derrick to fall, plaintiff receiving the injuries complained of.

It cannot well be denied that the foundation for the derrick was constructed in a very negligent manner, and from an examination of the evidence we are convinced that Enger, the foreman, must be declared to have been a vice-principal when it was built. We have stated his general duties as foreman of the stone crew and what was actually done by him in relation to the building of this particular platform. In addition to what has been said, it appeared from the evidence of Wood, the assistant engineer, whose office and residence were out of this State, that Enger had supreme control of the men and the work at all times when Wood himself was absent; that plans were furnished to him from the engineer's office for the work; but that, because of the varying conditions, no plans were ever furnished for putting up the derricks. They were to be erected where and in the manner directed by Enger. This was always left to his judgment, and the proofs were that in every instance he had control of the methods, and it was the duty of the men under him to put up the derricks and otherwise to work as he ordered. To put it concisely, it appeared from the evidence that defendant company had absolutely withdrawn all discretion from the men composing the

crew as to where and how derricks should be erected, and had invested Enger with full power to devise the plans for the structure and complete control over the whole matter. The place, the plan, and the manner of putting up these appliances had been especially and unconditionally delegated to the foreman, and herein is one of the distinctions which may be made between this and the somewhat noted case of *Lindvall v. Woods*, 41 Minn. 212, 16 Am. Neg. Cas. 200, *ante*, 42 N. W. 1020, on which counsel for defendant mainly rely. Enger, the foreman, when directing where and how the platform was to be built, represented defendant company, became a vice-principal; and it conclusively appeared that the company was responsible for his negligence. It follows from what has been said that the trial court was not in error when giving such portions of its charge as are made the basis for counsel's second, third, and fourth assignments.

Both parties introduced more or less testimony on the question of the sufficiency of materials furnished by defendant for constructing the derrick platform, plaintiff claiming that adequate materials were not furnished, and defendant insisting that there was an abundance. Because of the views heretofore expressed as to the representative position held by the foreman, this question is not of importance, but the court was right when refusing to give to the jury defendant's requests numbered 1, 2 and 3.

The eighth and ninth assignments of error are not meritorious. Both of the witnesses were men of some experience in the putting up of derricks, and in some degree capable of expressing expert opinions. The value of these opinions was for the jury in each instance.

Order affirmed.

Canty, J. (dissenting). — I cannot concur in the foregoing opinion. It cannot be held in this case, as a question of law, that the foreman, Enger, was a vice-principal, except on the doctrine that the mere fact that the foreman had authority to hire, discharge and oversee other servants constitutes him a vice-principal. This is the doctrine of the courts of Ohio and some other States, and was for a time the doctrine of the Federal courts. This court has never before adopted that doctrine. This case cannot be distinguished in principle from *Lindvall v. Woods*, 41 Minn. 212, 16 Am. Neg. Cas. 200, *ante*,

42 N. W. 1020. And, while the majority profess still to follow the extreme doctrine of that case, they have in fact gone to the other extreme, and adopted the Ohio doctrine. If the doctrine of *Lindvall v. Woods* is to be overruled, it should be overruled squarely, and not in this manner. On the question of whether such a foreman is a vice-principal, the different courts take one extreme or the other. But I am of the opinion that between these two extremes there is a middle ground, which is far more just, and the principles of which are sound and practicable. These principles I will hereinafter discuss.

The foundation for the platform of the derrick in this case was a temporary appliance, constructed by the men in the progress of the work, as was the defective trestle in *Lindvall v. Woods*, *supra*, the insufficient curbing and braces for the same in *Bergquist v. City of Minneapolis*, 42 Minn. 471, 16 Am. Neg. Cas. 221, *ante*, 44 N. W. 530, the defective step on the side of the lumber pile in *Fraser v. Red River Lumber Co.*, 45 Minn. 235, 16 Am. Neg. Cas. 205, *ante*, 47 N. W. 785, and the defective scaffold in *Marsh v. Herman*, 47 Minn. 537, 16 Am. Neg. Cas. 227, *ante*, 50 N. W. 611. In each of these cases this court held that the rule which imposes on the master the duty to provide safe machinery and appliances for the use of his servants has no application to temporary appliances of this character; that, when such appliances are prepared during the progress of the work by some of the servants of the common master, they do not come within that rule, and I concede this to be the correct principle. But in the case of *Sims v. American S. B. Co.*, 56 Minn. 68, 16 Am. Neg. Cas. 230, *ante*, 57 N. W. 322, this court, while professing to adhere to that doctrine, held that the mere fact that the temporary appliance—the scaffold—was constructed by servants employed for that purpose, and that the servant injured took no part in the construction of the same, entitled him to recover if the scaffold was defectively constructed, by reason of the negligence of those servants who constructed it, and he was injured thereby. This is simply holding that servants employed by the same common master, in different departments of the same work, are not fellow-servants, and that the master is liable for the negligence of a servant in one department resulting in injury to a servant in another department. This court has often repudiated that doctrine. See *Neal v. North-*

ern Pac. R. Co., 57 Minn. 365, 59 N. W. 312, and cases cited (1). The derrick platform was a temporary place, constructed by the fellow-servants of plaintiff as a part of the work in which they were engaged. It was not a permanent place provided by the master beforehand, and what is known as the rule that the master must use due care to provide a safe place for his servants to work in does not apply. But, in my opinion, it does not follow from this that the defendant should not be held liable.

The plaintiff is a common laborer. He was not employed to exercise the mechanical skill or expert knowledge which may have been necessary to determine whether or not the foundation for this derrick was safe. This foundation was built beside the railroad track on the slope of an embankment. The stone which was being raised at the time was across the track, on the opposite side of the embankment, and was unusually heavy. The outer end of the boom or arm of the derrick was more than one-half the length of the upright mast, away from the mast. Applying the principle of the lever, the top of the mast, being held fast by the guy ropes, would act as a fulcrum, and the weight of the stone on the end of the boom would have a tendency to push the bottom of the mast off in the opposite direction, down the embankment, with a side pressure of about one-half the weight of the stone, and

1. In *NEAL v. NORTHERN PACIFIC R. Co.*, 57 Minn. 365 (May, 1894), appeal by defendant from an order of the District Court of Ramsey County denying its motion for a new trial after verdict for plaintiff, for \$18,525, order was *reversed*, the case being stated in the official syllabus as follows: "Defendant had a crew of men, under the direction of a foreman, employed in blasting and quarrying stone along the line of its road, to be used in repairing its roadbed. The blasting of rock frequently broke down the defendant's telegraph poles and wires along its road in the vicinity of the quarry. The plaintiff, a lineman in the employment of defendant, who received his orders from defendant's superintendent of tele-

graph, was engaged in repairing the telegraph line whenever broken down by the blasting. Any assistance required by him was obtained from the quarry crew, on whom he had a right to call for aid. A telegraph pole having been thrown down by a blast, plaintiff and one of the quarrymen descended to the lower side of the railroad embankment to repair it, and, while they were thus engaged, one of the quarrymen negligently rolled a rock down the embankment, and injured the plaintiff. *Held*, that the plaintiff and quarry crew were fellow-servants within the rule which exempts the master from liability for injuries sustained by one servant through the negligence of another."

this probably caused the foundation to give way. But, whether it was this or some other cause, it cannot be held, as a question of law, that a common laborer should have sufficient skill to investigate this foundation for himself, and decide whether or not it was safe, or that he should know or appreciate the dangers to which he was being exposed. If he had or should have had such skill, it was his duty to exercise it, and the master should not be held liable. But if he was not employed to have, did not have, and could not be expected to have, the skill reasonably necessary for his own protection, the duty of protecting him should devolve upon the master. The plaintiff is not paid for exercising such skill, and it is a beautiful theory of law which requires him out of his wages, of perhaps one dollar per day, to hire an expert whose services are worth five or ten dollars per day, to inspect these temporary appliances for him, and inform him as to their safety.

As I have stated, it is held by a number of courts that the mere fact that the superior servant has power to hire, discharge, and direct the inferior servant is alone sufficient to constitute the superior servant a vice-principal as to the inferior servant; but it seems to me that it should require something more to give the superior servant that character. It is often the case that the inferior servant is more familiar than such foreman with the dangers to which he is exposed, and is better able to protect himself from those dangers than the foreman is to protect him; and yet without his fault, and by reason of exposure to those dangers, he may be injured through the negligence of the foreman. When the inferior servant knows and appreciates the dangers to be avoided, and is as well, or nearly as well, able to care for himself, as the foreman is to care for him, he is substantially on an equal footing with the foreman, and in a better position than the master to look out for his own safety. In such a case the foreman is not a vice-principal, but he and the inferior servant are fellow-servants. On the other hand, when the servant does not know or does not appreciate the danger to be avoided, and from his grade or position cannot be expected to know or appreciate such danger, while a competent foreman should be required so to do, it is not good public policy to hold that the master is not liable for the negligence of the foreman, resulting in injury to the servant. It is very often the case

that the prosecution of the work requires a very high degree of skill and experience in the foreman, and but little skill or experience in the inferior servant, who is neither hired nor paid to exercise the skill necessary for his own protection. If the position of the foreman is one which requires of him superior knowledge or skill, which cannot be required or expected of the inferior servant, but which is necessary for the protection of such inferior servant, then, in regard to the exercise of such superior knowledge or skill, the foreman is a vice-principal.

There must be something more in the inequality of the foreman and inferior servant than that which results alone from the one having the authority to hire, discharge, and oversee the other. It is the actual disparity or inequality between them which should control, and the disparity which gives the foreman the character of vice-principal must be substantial, not merely slight. As far as I am able to discover, after much investigation, there are but two kinds of this disparity: 1. Disparity of knowledge; and 2, disparity of skill. Disparity of knowledge is where the foreman has or should have knowledge which the inferior servant neither has nor can be expected to have, the want of which knowledge on the part of such servant causes or contributes to his injury. Disparity of skill is where the foreman has or should have skill which the inferior servant neither has nor can be expected to have, the want of which skill on the part of such servant causes or contributes to his injury. The existence of such disparity of either or both kinds is a question of fact for the jury, and the burden is on the party asserting such disparity to prove it.

The first case holding the foreman to be a vice-principal, by reason of his having authority to hire, discharge, and oversee the servant, was a case where there was such disparity of knowledge between the foreman and the inferior servant. It is the case of *Little Miami R'y Co. v. Stevens*, 20 Ohio, 415, where two trains were, by the regular schedule or time card, in the habit of passing each other at a certain station. New time cards were issued, changing the place of passing, to take effect on the day of the injury. One of these time cards was given to the conductor, but none to the engineer, who stopped at the new place of passing, and inquired of the con-

ductor if a change had taken place. The conductor answered that no change was to take effect that day, and ordered the engineer to proceed. He did so, and a collision occurred, by which he was injured. The engineer was under the control of the conductor, who directed when the cars were to stop and start. It was held that the negligence of the conductor was the negligence of the master, and the defendant was liable. *Chicago, M. & St. P. R'y Co. v. Ross*, 112 U. S. 377, is a similar case (1). There the train was in the habit of passing another train at a certain switch. The conductor got orders to pass at a different place on the day in question, but neglected to communicate the orders to the engineer, who attempted to run on to the usual place, and a collision resulted. It was held that the conductor was a vice-principal, representing the master, who was liable.

In each of these cases the disparity between the engineer and the conductor consisted in the conductor having knowledge which the engineer did not have, but which was absolutely necessary for the safety of the engineer, and the want of which on the part of the engineer was the cause of his injury.

In the case of *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, there was no such disparity (2). The train consisted only of an engine, and was in charge of the engineer, who acted also as conductor, and the fireman was acting under his orders. The engine was running "wild" and had to keep out of the way of the regular train. The

1. But see *NEW ENGLAND R. R. Co. v. CONROY*, 175 U. S. 323, 7 Am. Neg. Rep. 182 (1899), where it was held that the negligence of the conductor of a freight train is not that of a vice-principal, but is that of a fellow-servant of a brakeman who was injured by such conductor's negligence, and the railroad company was not liable therefor. In the *Conroy* case, the Federal rule as to fellow-servants announced in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, *Balt. & Ohio R. Co. v. Baugh*, 149 U. S. 368, *Northern Pac. R. Co. v. Hambly*, 154 U. S. 349, and *Northern Pac. R. Co.*

v. Peterson, 162 U. S. 346, is discussed at length, and the vagueness and uncertainty theretofore existing as to the rule by reason of the decisions cited disposed of, and the rule clearly stated. In the *Conroy* case, Mr. Justice Harlan dissented from the ruling of his brethren, and adhered to the judgment in which he concurred at the time of its being rendered, in *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, holding that a conductor is a vice-principal.

2. See note to the *Ross* case, *supra*.

fireman was injured in a collision with that train. He knew, as well as the engineer, the time of the regular train, and that the engineer was running without orders. He knew that he could not look to the engineer or any superior officer for protection. There was no disparity of knowledge between him and any of his superiors. He knew as much about the situation as the engineer, and they each knew as much about it as any one else knew, or could be expected to know, under the circumstances. He and the engineer had knowingly entered upon a joint venture into danger, and they stood on an equal footing. It has been supposed that this case overrules the Ross case, but it certainly does not. In these three cases it conclusively appeared from the undisputed facts whether or not such actual disparity existed. It is urged that this theory would overturn the rules of the common law. It might overturn some of the blunders of modern courts, but the common law never developed any rules on this question.

For a long time after the decline of feudalism, servants were merely vassals and members of the household of the master, and even in trade the apprentice and journeyman sustained much of the same relation. These rules developed only with the development of more modern enterprises, in which the relation and responsibility of the master to the servant were very different. The first decision on the question of the liability of the master to the servant for injury caused by the negligence of another servant to be found in the English law books was in 1837,—the case of *Priestley v. Fowler*, 3 Mees. & W. 1,—where one servant injured another of equal grade, over whom he had no authority, the opinion in which case is in harmony with the position that I take here (1). The opinion states: "But, in truth, the mere relation of the master and the servant can never imply an obligation on the part of

1. In *PRIESTLEY v. FOWLER*, 3 Mees. & W. 1, the defendant was sued by his servant, injured by the breaking down of a van, in which he and a fellow-servant were carrying goods for his master, by reason of its weakness and excessive loading. Defendant was held not to be liable. The court said that the principal was under no implied obligation to his ser-

vant for the sufficiency of the van, as he had no more knowledge of its condition than the servant himself.

See full discussion of the facts and rulings in the noted case of *Priestley v. Fowler*, 3 M. & W. 1, in 15 Am. Neg. Cas. 276, 278, 310, 343, 349, 410, 411, 515, and the frequent references to the case in this volume of AM. NEG. CAS.

the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant, in the course of his employment, to the best of his judgment, information and belief. * * * In most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master. * * * The plaintiff must have known as well as his master, and probably better, whether the van was sufficient, whether it was overloaded, and whether it was likely to carry him safely." The next decision on the question of the liability of the master for the injury of one servant by the negligence of the other was in 1841, in the case of *Murray v. South Carolina R. Co.*, 1 McM. (S. C.) 385, where the engineer of a locomotive injured the fireman by running too fast and running over a cow. The Supreme Court of South Carolina came to the same conclusion as the English court. The next case is *Farwell v. Boston & W. R. Co.*, 4 Metc. (Mass.) 49, 15 Am. Neg. Cas. 407, where the engineer was injured by reason of the switch being left open through the carelessness of the switchman. Counsel attempted to distinguish this case from the last two on the ground that in those two cases the servants were in fact fellows, and worked side by side; while in this case the engineer and switchman did not, and though working for the same master, in the same general business, were in fact strangers to each other. The Supreme Court of Massachusetts, in answer to this, stated that this doctrine of different departments could not be carried out in principle, and would result in confusion if adopted; that all classes of servants in the same general business should be regarded as fellow-servants, whose negligence each servant assumes. This case has ever since been taken as authority for the doctrine that the master is not liable for the negligence of the foreman or superior servant, resulting in injury to an inferior servant, although the question was not before the court in the case, and was not discussed. In *Brown v. Maxwell*, 6 Hill (N. Y.), 592 (decided in 1844), the plaintiff was employed by the defendant in the business of cutting stone. The foreman directed a particular stone to be taken from a large pile, and plaintiff and other workmen attempted to remove it in such a manner as to cause the fall of another stone, by which plaintiff was injured. The

court, on the authority of the Massachusetts case, held that the master was not liable for the negligence of the foreman; but it nowhere appears in what respect the foreman was negligent, or that he failed in any duty that devolved upon him peculiarly as foreman. If he participated in the particular negligence, it seems to be in performing the mere detail services of an inferior servant. From these two decisions has the doctrine grown up that the master is never liable for the negligence of the superintendent or foreman, resulting in injury to the servant, if the master uses reasonable care to furnish safe machinery and appliances, and to hire competent foremen and servants. If he has done this, he has washed his hands of all responsibility. This rule is too general and too crude to do justice, and so is the rule laid down by the *dicta* in the Stevens case and the Ross case, *supra*, and followed by a number of courts which hold that such a foreman is a vice-principal, regardless of the disparity or inequality between him and the inferior servant. The first rule is as unjust to the servant as the last rule is to the master.

In the case at bar, if there was between the foreman and plaintiff substantial disparity in respect to the danger by reason of exposure to which plaintiff was injured, it was disparity of skill. Whether or not such disparity existed was a question for the jury. The evidence tends to prove that such disparity did exist, and, if it did, the foreman was a vice-principal, and the defendant is responsible for his negligence. *Lindvall v. Woods*, 41 Minn. 212, 16 Am. Neg. Cas. 200, *ante*, is another case where the evidence tends strongly to prove disparity of skill. In that case the defendants were contractors, engaged in excavating a cut and filling a dump on the line of a new railroad. For this purpose the dirt from the cut was carried to the fill on dump cars, on a temporary railroad track, laid on the grade as built. The track was extended out beyond the end of the dump on trestlework built as the work progressed. The trestlework consisted of bents. The stringers were taken up from under the track on the finished portion of the dump, and extended out lengthwise of the right of way over these bents, resting on the caps of the same. Then the ties and rails were laid, extending the track out over the trestle. These bents had no longitudinal support or bracing except as they were held in position by the stringers and track upon them. The

loaded cars were then run out on the track, and dumped. Plaintiff was employed as a common laborer, most of the time in filling the cars in the cut, but on the day in question was ordered to assist in shoving out two long stringers to a new bent just raised, when the trestlework gave way and fell, by reason of the want of such bracing, causing the injury complained of. It was held by this court that the case was properly dismissed; that the foreman under whom the plaintiff worked, and who was negligent in not seeing that the bents were properly braced, was a fellow-servant with the plaintiff. If the plaintiff did not possess the knowledge or skill necessary to determine whether the trestle was safe, or to know and appreciate the danger to which he was being exposed by the negligence of the foreman, and could not be expected from his calling to possess such knowledge and skill, then the defendants should have been held responsible for the negligence of the foreman in not using proper care. In the case of *Bergquist v. City of Minneapolis*, 42 Minn. 471, 16 Am. Neg. Cas. 221, *ante*, 44 N. W. 530, the plaintiff was a common laborer, and had been at work three weeks in making excavations in the streets for the purpose of laying water pipes. In the prosecution of the work, it was necessary to support the walls of the ditch, which was done by placing planks perpendicularly against the sides of the ditch, and bracing them with timbers extending across the ditch from side to side. The planks were driven down as the excavation became deeper. While the plaintiff was so engaged, the curbing fell in, by reason of not being properly built and braced. All of the work was done by common laborers, and it does not appear that to determine its safety required any superior skill, either in the person performing it or in the person overseeing it. As far as appears, the plaintiff should have known and appreciated the danger to be avoided. Besides, the conditions were constantly changing; the curbing and braces might be safe one minute, and unsafe the next, so that inspection by the foreman might avail but little. If there was any disparity between the foreman and the plaintiff in that case, it was probably slight, not substantial. The burden was on the plaintiff to prove that there was substantial disparity between them, and it seems to me that he has failed to prove it, and the case was properly dismissed. In the case of *Fraser v. Red River Lumber Co.*, 45

Minn. 235, 16 Am. Neg. Cas. 205, *ante*, 47 N. W. 785, the defendant was engaged in sawing and piling lumber, and employed a crew of men, a part of whom were engaged in piling green lumber, while plaintiff and others were engaged in sorting and scaling the dry lumber, and had nothing to do with the piling. In accordance with the usual custom in piling lumber, the ends of boards were projected from the piles at certain intervals, forming steps on which to ascend and descend. In one instance the pilers negligently projected for a step a knotty and unsafe board, and subsequently, while ascending the pile, plaintiff stepped on this board, and it broke, causing him to fall, whereby he was injured. It was held that he could not recover. I think the decision is correct. It required no superior skill to ascertain the defect. He was as competent to inspect these steps and ascertain the defect as a competent foreman would be. But as the principle of actual disparity was not taken into consideration, either in the trial or review of these cases, it is likely that many of the facts bearing on such disparity have not been brought out, and whether or not I am correctly applying this principle to these cases is not here important, if the principle is just and capable of being correctly applied. In the case of *Marsh v. Herman*, 47 Minn. 537, 16 Am. Neg. Cas. 227, *ante*, 50 N. W. 611, the plaintiff and others were employed by the defendant in erecting a building; and it was necessary, as a part of their work, to erect a scaffold, which was done under the direction of the foreman. The supports of the scaffold being too far apart, and not sufficiently nailed, gave way, and the plaintiff was injured. It was held that he could not recover. It does not appear that there was any disparity of skill between the foreman and the plaintiff, and therefore the case is correctly decided. The case does not disclose what trade or calling plaintiff exercised, or anything to show what degree of skill should have been required of him. If he was a house carpenter or brick or stonemason, he should, perhaps, as a part of his trade, possess the necessary skill to inspect the scaffold for himself, and to know and appreciate the dangers to be avoided; but if he was a common laborer, such as a hodcarrier, he might not, and the case would then, perhaps, be one for the jury. In the case of *Gonsior v. Minneapolis & St. L. R'y Co.*, 36 Minn. 385, 31 N. W. 515, the plaintiff, a machinist's helper, had been

employed about four years as "truck packer" at defendant's roundhouse (1). He was ordered by the foreman of the roundhouse to adjust a spring on a locomotive. He objected, saying he had no "jack," those kept at the place for the purpose being then in use by others. The foreman then told him he need not use a jack; to use a spring puller, and pull down the spring. He had no assistance. In attempting to do as ordered, the spring puller slipped, and two of his fingers were crushed. There was evidence to show that it required two men to do this work with safety, and that plaintiff had often been engaged in such work, but never before without assistance. It was held that the action was properly dismissed; that the foreman was a mere fellow-servant of the plaintiff. My Brother Mitchell dissented, and it seems to me that he was right in doing so. The plaintiff was a common laborer, not a machinist, but he had four years' experience. It must be presumed that the defendant employed him to exercise, and was paying him for exercising, the skill required by his four years of experience. But whether or not he acquired or had, or should have had, the skill necessary to enable him to take care of himself, notwithstanding the foreman's negligent orders, was a question for the jury. If he did not have such skill, and could not be expected to have it, and the foreman should have had it, and should have exercised it for the plaintiff's protection, then the foreman was a vice-principal. In the case of *Olson v. St. Paul, M. & M. R'y Co.*, 38 Minn. 117, 35 N. W. 866, the plaintiff's intestate was a sectionman, and while engaged with other sectionmen and the foreman on a hand car, was run into by a snowplow, and killed (2). It was held that the plaintiff could not recover. The decision is correct. While the work was dangerous, and the deceased was not able to protect him-

1. In *GONSIOR v. MINNEAPOLIS & ST. LOUIS R'y Co.*, 36 Minn. 385 (February, 1887), it was held that the foreman of a round-house of a railroad is a fellow-servant of an employee working under him, within the rule laid down in *Brown v. Winona & St. Peter R. Co.*, 27 Minn. 162. MITCHELL, J., *dissented*. [The facts in the GONSIOR case are sufficiently stated in the opinion in the case at bar.]

2. In *OLSON, ADM'R, v. ST. PAUL, MINNEAPOLIS & MANITOBA R'y Co.*, 38 Minn. 117 (January, 1888), sectionman killed by a snowplough, order refusing defendant new trial after verdict for plaintiff for \$4,000 was *reversed* and new trial granted. The syllabus by the court states the case as follows:

"The foreman of a gang of section or track men, engaged in the discharge of his ordinary duties in the

self, neither was the foreman able to protect him. The foreman had no superior knowledge or means of knowledge, but he and the deceased stood in this respect on an equal footing. Neither had the deceased a right to look for protection to any officer superior to the foreman. It was not practicable for any of his superiors to protect him, and this is an important element in the question. In the Baugh case it was practicable for the plaintiff to be protected by his superior officers, but he knowingly put himself beyond the pale of that protection; he assumed the risk, in fact, not merely as a fiction of law; so that the principles applicable to that case and the Olson case are the same. In *Brown v. Winona & St. P. R. Co.*, 27 Minn. 162, 6 N. W. 484, this court held that the defendant was not

course of his employment, is a fellow-servant with them.

"Where it is the established practice and one of the rules of a railway company to run special or irregular trains at any time, without notice in advance to station agents or sectionmen, who are required to govern themselves accordingly, and it appears from the evidence that an engine with snowplough is a train of that class: *Held*, that sending out such a train over the road, in a storm, without such notice, was not negligence, but that the risks to trackmen attending its use are among those assumed by such employees, if they are informed of the rule, or if, from their observation and knowledge of the practice of the company in respect to running such trains, they knew, or ought to have known, in the exercise of ordinary intelligence and reasonable prudence, that such a train might be expected.

"Upon the evidence in this case: *Held*, error for the court to refuse to charge the jury that if the injured employee knew of such usage and practice of the company, he could not recover."

See, also, former decision in the Olson case, where order overruling demurrer to the complaint was af-

firmed. The official syllabus in *OLSON, ADM'R, v. ST. PAUL, MINNEAPOLIS & MANITOBA R'Y Co.*, 34 Minn. 477 (February, 1886), states the case as follows: "Under a complaint, alleging, in general terms, that the defendant corporation carelessly and negligently ran its snowplough, with engine attached, upon and over the plaintiff's intestate, an employee of defendant, working on the railway track, at a time and place mentioned, and without fault or negligence on his part, the plaintiff is permitted to show that the accident was caused directly by the culpable negligence of the defendant, or its superior or managing officers, and not alone by the negligent act of a fellow-servant."

The case of *LARSON v. ST. P. M. & M. R'Y Co.*, presenting the same questions, was argued with the Olson case, and decided in the same manner. See 34 Minn. 477.

The trial of the Larson case resulted in dismissal of the action and order denying plaintiff new trial was *affirmed*. See *LARSON v. ST. PAUL, MINNEAPOLIS & MANITOBA R'Y Co.*, 43 Minn. 423 (June, 1890), where the accident was shown to be the same as that in the OLSON case, *supra*, and the ruling in the Olson case, 38 Minn. 117, *supra*, was followed.

liable for the negligence of the roadmaster resulting in injury to a section man, who with other sectionmen and section bosses were called from different sections, and put to work clearing a wreck under the direction of the roadmaster (1). The way in which the injury occurred is not stated; so that it does not appear whether or not there was substantial disparity between the roadmaster and the plaintiff in respect to the particular danger by reason of which the injury occurred. There is usually much disparity between the foreman and the inferior servants of such a wrecking crew. These servants are usually common laborers, possessing but little skill or experience in the unusual and temporary employment for which they are thus suddenly called together, and are wholly at the mercy of the foreman, who should possess much skill and experience.

1. In *BROWN v. WINONA & ST. PETER R. R. Co.*, 27 Minn. 162 (September, 1880), it was held that: "A master is not liable to one servant for injuries caused by the negligence of a co-servant in the same common employment. That the negligent servant is superior in authority, or an overseer of the one injured, does not take the case out of this rule." Opinion by GILFILLAN, Ch. J., who stated the facts as follows: "Plaintiff was employed as a sectionman on the railroad of defendant. One Jacks was employed by it as 'roadmaster.' They, with others, were engaged in raising several wrecked freight cars, when plaintiff received a serious injury, by reason, as the complaint alleges, of the negligence, carelessness and unskilfulness of Jacks. There is no allegation of negligence on the part of defendant in employing Jacks, nor of the use of improper, defective or insufficient machinery to raise the wreck; and it appears from the evidence, beyond any question, that Jacks was a competent and proper person for the work in which he was engaged, and that the machinery was proper and sufficient; so that plaintiff's claim to recover rests on the al-

leged negligence and carelessness of Jacks in the manner of doing or ordering the work. As appears from the evidence, the ordinary duties of sectionmen are, under their foreman, to keep the track within their section in order, and, when called on by the roadmaster, to assist in raising and removing wrecked cars, even though within another section. The business of the 'roadmaster' is to keep the track in order along the entire line, as we infer from the evidence, including the raising and removing of wrecked cars. For the purpose of performing his duties he has authority over the sectionmen. As to what he shall do, and when he shall do it, he is under the orders and control of the superintendent. He is the overseer of those he calls to assist them. In the manner of working, unless otherwise directed by the superintendent, he is left to his own judgment and discretion. But he has nothing to do with employing or discharging men, or providing machinery or tools to work with. Above him, in respect to authority, are first, the superintendent; next, the manager, and the president and directors of the company." * * *

The remarks of Judge Brewer in a case of this kind (*Borgman v. Omaha & St. L. R'y Co.*, 41 Fed. 667) are pertinent on this point: "It was a position of responsibility, requiring for the efficient discharge of its duties, ability, skill and experience. While it was not a continual, but only an occasional service, yet that fact does not diminish its importance to the company and to the public. It was also an isolated service. The wreck might be anywhere along the track, away from shops and stations, and where, in the nature of things, the master could be present only through him. * * * Again, the work is attended with danger. Machinery is to be employed, power of steam made use of, and all the risks that flow therefrom attend this service. There may be many kinds of work going on — men with shovels, men operating a derrick, engineer and fireman moving an engine. All these various employees, doing their different kinds of work in the one service of restoring the wreck, were, in this case, under the control and direction of the wreckmaster, Mr. Smothers. * * * The work * * * was of such importance to the company and the public, and of such nature in itself, as required that the company should put in charge some man of experience, information and character, and one for whose acts, in respect to the service, it should be held responsible." In the case of *Neal v. Northern Pac. R. Co.*, 57 Minn. 365, 59 N. W. 312, I had occasion to touch upon the application of the principles here discussed to cases where the servant in one department is injured by a servant in another department of the same general business, and such substantial disparity exists between the servant injured and his superiors, or some of them, whose negligence or want of proper supervision caused or contributed to his injury (1).

Applying the principles here advanced to the case at bar, I am of the opinion that there is sufficient evidence to sustain a verdict for plaintiff, but that the charge of the trial court is erroneous, and that for this reason the order denying a new trial should be reversed. The court charged the jury as follows: "The court is of the opinion, and so instructs you, that this Mr. Enger, the foreman — it is conceded in these proceedings that he was the foreman of the gang — that, from the undisputed evidence in the case, he represented the com-

1. See abstract of the NEAL case on page 267, *ante*.

pany, and the company would be responsible for his acts; that is, that he represented the company on the 8th of July, and the company would be responsible for his acts and orders on that occasion." This would make the foreman a vice-principal in every instance, whether there was substantial disparity between him and the servant injured or not. This is simply the Ohio doctrine. For this error, I am of the opinion that the order appealed from should be reversed, and a new trial granted.

CLARK, ADM'X V. ST. PAUL AND SIOUX CITY RAILROAD COMPANY.

Supreme Court, Minnesota, July, 1881.

[Reported in 28 Minn. 128.]

CONTACT WITH PROJECTING OBJECT — EMPLOYEE INJURED — DUTY OF MASTER TO PROVIDE PROPER APPLIANCES, ETC., FOR USE OF SERVANT — ASSUMPTION OF RISK. — The rule that, in the contract of employment in a dangerous occupation like that of operating a railroad, there is an implied obligation in law, resting on the employer or master, which requires him to use due care in supplying and maintaining the instrumentalities for the performance of the work which he requires of his servants, and renders him liable for injuries occasioned by neglect or omission to fulfill this obligation does not apply to injuries from perils which were known by the servant to exist, and to be incidental to the employment, when he entered upon it. If a servant enters into an employment involving dangers of personal injury which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service, and which he had no reason to expect would be obviated or removed. The principle applied to the case of a servant who was injured by coming in contact with a roof or awning projecting from the side of an elevator over a side track, upon which the servant was engaged in moving freight cars (1).

(Syllabus by the court.)

1. See, also, the following cases relating to injuries to railroad employees caused by objects near track or projecting objects:

Minor employee, a brakeman, knocked off car by trestle near track. — In *ROBEL, ADM'R, v. CHICAGO, MILWAUKEE & ST. PAUL R'Y Co.*, 35 Minn.

84 (March, 1886), the syllabus to the official report states the case as follows: A servant of the defendant had been three or four days engaged as a brakeman and as one of a station-yard crew, he being previously a stranger to the locality. While descending from a moving freight car

APPEAL by defendant from an order of the District Court for Scott County, Macdonald, J., presiding, refusing a new trial. The case is stated in the opinion. *Order reversed.*

E. C. PALMER, for appellant.

O'BRIEN & WILSON, for respondent.

Clark, J.—The plaintiff brought this action as the legal representative of James S. Clark, deceased, against the railroad company, defendant, for damages for negligently, and in violation of its duty, subjecting her intestate to the peril of being struck by a roof or awning projecting over its side track, from contact with which he met his death, while engaged in the service of the company. The plaintiff had a verdict, which the defendant claims is erroneous for two principal reasons:—First, the absence of any negligence or omission of duty caus-

by a side ladder, he was swept off by a trestle standing fourteen and one-half inches from the side of the car, and killed. Case considered sufficient to go to the jury upon the questions, 1, of defendant's negligence; 2, as to whether the servant knew this danger, or was chargeable with want of ordinary prudence if he had failed to inform himself of it, so that he should be deemed to have assumed the risk; and, 3, as to his contributory negligence.

"In a statutory action to recover for death caused by negligence, when the next of kin, for whose benefit the action is prosecuted, were so related to the deceased as to be entitled to his services, or to support from him (*e. g.*, the father of a minor son), the law presumes some loss. It appearing that the deceased was a man engaged in active employment, presumably remunerative, and that he was nine months less than twenty-one years of age, a recovery might be had, in behalf of the father, of more than merely nominal damages." Opinion by DICKINSON, J. Order refusing plaintiff new trial, after nonsuit in the District Court for Dakota County, *reversed.*

Brakeman on car struck by pile of stone near track.—In SMITH, ADM'X, *v.* WINONA & ST. PETER R. R. Co., 42 Minn. 87 (November, 1889), it was held that "a person employed as a brakeman on a section of four miles of railroad, and notified that there were stone piles beside the road, and so near to it that a person on the side of a car passing them would be struck, is to be deemed to have assumed the risk from that cause, although the precise location of the danger was not stated to him." Order granting new trial to defendant, after verdict in plaintiff's favor for \$5,000, was *affirmed.* The rule was reaffirmed "that a servant assumes, not only the risks ordinarily incident to his occupation but also such extraordinary risks as he may knowingly and voluntarily encounter." Citing several cases, among them being Fleming *v.* St. Paul & D. R. Co., 27 Minn. 111; Hughes *v.* Winona & St. P. R. Co., 27 Minn. 137; Clark *v.* St. Paul & S. C. R. Co., 28 Minn. 128; Greene *v.* Minn. & St. L. R'y Co., 31 Minn. 248; Sherman *v.* Chicago, M. & St. P. R'y Co., 34 Minn. 259; Cook *v.* St. Paul, M. & M R'y Co., 34 Minn. 45; Wilson *v.* Winona

ing the injury on the part of the defendant; and second, contributory negligence, or the voluntary assumption of the risk of the peril, from which the injury happened, on the part of the deceased. The evidence is all before us.

1. In the contract of employment in a dangerous occupation, like that of operating a railroad, there is an implied obligation in law resting on the employer or master which requires him to use due care in supplying and maintaining the instrumentalities for the performance of the work which he requires of his servants, and renders him liable for injuries occasioned by neglect or omission to fulfil this obligation. *Drymala v. Thompson*, 26 Minn. 40, 16 Am. Neg. Cas. 243, *ante*.

The verdict for the plaintiff involves a finding by the jury that the defendant violated its obligations or duty to the plain-

& St. P. R. Co., 37 Minn. 326, which cases are reported or noted in this volume of AM. NEG. CAS.

Brakeman descending from car struck by building near track.—In *FLANDERS v. CHICAGO, ST. PAUL, M. & O. R'y Co.*, 51 Minn. 193 (October, 1892), the official syllabus states the case as follows: "The negligence charged against the defendant was building a section house in such dangerous proximity to a side track that the eaves struck the plaintiff (a brakeman) while descending the ladder on the side of a moving freight car. The contributory negligence charged against the plaintiff was attempting to descend the ladder at an improper place. *Held*, that on both questions the evidence presented a case for the jury." Verdict for plaintiff in the District Court for Ramsey County for \$10,000 sustained, and order denying defendant new trial *affirmed*.

Switchman coming in contact with signal post near track.—In *JOHNSON, ADM'R, v. ST. PAUL, MINNEAPOLIS & MANITOBA R'y Co.*, 43 Minn. 53 (February, 1890), switchman killed in performance of duties, order granting new trial after verdict for plaintiff

for \$5,000 *affirmed*. The syllabus by the court (opinion rendered by VANDERBURGH, J.) states the case as follows:

"It is the duty of a railway company to place its structures and signal posts at a reasonably safe distance from its tracks so as not to be dangerous to brakeman and other operatives upon the trains, or to warn them of such dangers, if they exist. The employees are not presumed to assume the risk of such perils, in the absence of notice.

"Plaintiff's intestate, who had been employed for about two weeks in its yard, where were numerous tracks and constantly moving trains, was killed by coming in contact with a signal post while ascending the outside ladder of a box car. The post was four feet from the rail. There was evidence tending to show that the post was too near the cars to be practically safe for operatives, unless aware of the danger. *Held*, that, upon the evidence, the question of defendant's negligence in locating and maintaining the post was for the jury; and also that the court is not warranted in holding, as a matter of law, that the deceased was guilty of con-

tiff's intestate, by suffering the elevator roof or awning to be constructed and maintained in the position in which it was, with reference to the side track, upon which it was a part of the duty of the deceased, as a switchman or brakeman, to assist in moving freight cars. The roof or awning was built out from the side of an elevator at Shakopee, on the line of the defendant's railroad, and projected over a side track, upon which freight cars were accustomed to be moved, in such a position, and with such a downward pitch or inclination, that its lowest projection would strike a man of ordinary height, standing erect upon the center of the roof of an ordinary freight car moving under it, in the head, while it would not come in contact with a man standing eight inches or a foot aside from the center of the car. Its object was to protect grain from the

tributory negligence in not observing that the post was so near the cars as to be dangerous, and in not appreciating and avoiding the danger. But the evidence is held not so clearly to preponderate in favor of the verdict as to warrant a reversal of the order of the trial court granting a new trial."

Switchman slipping on ice and snow on track and striking against switch target.—In *LAWSON v. TRUESDALE* (RECEIVER OF MINNEAPOLIS & ST. LOUIS R'Y Co.), 60 Minn. 410 (March, 1895), switchman injured by striking against switch target, judgment for plaintiff for \$5,000 in the District Court for Hennepin County (he having consented to reduction from verdict rendered for \$7,150), and order refusing defendant new trial, *affirmed*. COLLINS, J., in delivering the opinion stated the facts as follows:

"There was little controversy over the facts. Plaintiff was an experienced switchman in defendant's employ, and had worked for more than two months in what was known as the 'middle yard' at Minneapolis. The 'lead' track in this yard ran northerly and southerly, and on its westerly side were several side tracks,

branching off and running in a northerly direction from the lead. There was a slight ascent on all of these side tracks, so that a car placed upon either had to have its wheels blocked or its brakes set, to prevent its return down grade towards the lead. The switch-stands for these side tracks stood sixty-seven feet apart on the opposite or easterly side of the lead track, were numbered, going northerly, from one upward, and surmounting the top of each switch-rod was the usual iron target, distant about two feet from a passing freight car. It was plaintiff's duty to 'catch' the cars as they were pushed or 'kicked' by a locomotive onto these side tracks, to stop them at the proper points, either to block the wheels or set the brakes, and, if necessary, to couple them onto other cars. He was the only man in the yard who did this particular work, and was usually busily employed. All of the switching to the side tracks in the yard was necessarily from a southerly direction, and from the evidence it appeared that it was customary and proper for all men engaged in this kind of work to catch the car while in motion, and ride to the place where it was to be

weather while loading from the elevator into the cars, and it projected a little beyond the center of the cars, so as to shed rain upon the roof, and so over them. It had been maintained in this position for eight years or more at the time of the accident. The duties of a brakeman, while engaged in moving cars, require him to pass over them, and a board about fifteen inches in width, called the "running-board," is placed along the center of the roof, to facilitate such passage, the roof of the cars being constructed with a slight pitch, and therefore difficult to pass or stand upon when wet or slippery. The plaintiff's intestate was struck by the projecting corner of the awning, while engaged in the line of his duty in moving freight cars upon the side track. He could only have been struck while standing erect on the running-board. If he had stood

left, and that in this particular yard it was customary and proper for plaintiff and others to take station on the easterly side of the lead track, where they could see the switch target, the switch being turned by another man, indicating the track to be used, and, of necessity, southerly from it, and there catch the coming car by first stepping on a truck oil box, and thence to the lower round of the side ladder of the car, sometimes riding in this position, and at other times taking place at the brakes on top of the car, thus riding to the point of destination, where, as before stated, they were required either to block the wheels or to set the brakes. When the car going upon the side track was the first to go there,—and that was the case with the car which plaintiff tried to catch when injured,—the imperative rule in this yard was to set the brakes.

"On the afternoon in question in the winter season, plaintiff walked across the side tracks, from the point where he had been with other cars, to the easterly side of the lead, there to catch a car which was to be kicked onto side track numbered 14. He took position opposite track num-

bered 11, and about 200 feet southerly of track 14. The car came along quite rapidly, the speed being estimated at eight miles or more per hour. The plaintiff seized a round of the ladder with his hands, and was about to spring upon the oil box of the car truck, when he slipped or stumbled, as he claimed, on a pile of ice and snow in dangerous proximity to the track, and lost his footing. Holding on with his hands, he was thrown against the side of the car, and almost instantly struck a switch target, which knocked him to the ground, inflicting the injuries complained of.

"The negligence of the defendant relied on was that it allowed this pile of snow and ice to remain in close and dangerous proximity to the lead track, along which it was necessary for the plaintiff to walk rapidly, or to run, in order to board the cars as they came up to him from the locomotive. There was evidence which would have justified the jury in finding that snow, or ice, or both, had been removed from the tracks, and from about the switch stands, and thrown into a pile within what may be called the 'switch line' not over

down upon the roof of the car, or stooped, he would have escaped. The evidence does not disclose any necessity for the construction and maintenance of the awning in such a dangerous position. Upon this state of facts, the jury would have been abundantly justified, under the rule above mentioned, in reaching a conclusion that the defendant had failed in its implied obligation and duty to the deceased as its servant, and was responsible for the injury, if the deceased had entered upon the service relying upon the obligation or duty of the company to use due care in the construction and location of its road with respect to this structure, and in ignorance that it had failed to do so, and had remained in ignorance of the neglect up to the time of the accident.

2. But the element of knowledge as to the real position of the side track with reference to the awning, and as to the exact nature and degree of the peril therefrom, by the deceased, when

two feet from a passing car, and there allowed to remain for a few days prior to the accident; that the pile, paralleling the track, was from fifteen to eighteen inches high, about two feet wide, and from seven to ten feet long, and that, the night before plaintiff was injured, it had been thinly covered with fresh snow, which had fallen or been blown upon it; that the plaintiff had not noticed it, and as he hastily stepped or ran along the side of the car, that he might spring up and board it in the usual and customary way, he slipped or stumbled on the pile, the slipping or stumbling being the proximate cause of his injuries." * * *

The points decided in *Lawson v. Truesdale*, *supra*, are set out in the official syllabus to the report of the case, as follows:

"In this latitude, where more or less snow falls and ice accumulates therefrom in the winter season, whereby it becomes necessary to remove it from railway tracks many times in order that a railway may be operated and also made safer for employees, the dangers to the latter in-

crease, and the risks assumed become more hazardous.

"When entering into the railway service in such a latitude, an employee assumes such risks as are usually and customarily incident to the falling of snow, the forming of ice, and the removal of the same from tracks and places where employees are required to work, where the removal or disposition thereof is done in a proper and reasonable manner, in the exercise of due and ordinary care for the safety of employees.

"Whether from the evidence it appeared that the snow and ice were removed from defendant's yard, in which plaintiff worked as a switchman when injured, in a proper and reasonable manner, in the exercise of due and ordinary care for the safety of employees, was a question of fact for the jury to determine."

"Held, that whether the plaintiff was guilty of contributory negligence when attempting to board a car in motion, in the usual and proper manner for discharging his duties, as he claimed, was also a question for the jury."

after the accident, he stated that the roof hit him, and knocked him off the car, and, in answer to a question if he did not know the roof was there, he said "Yes; but I did not think of it at the time." It does not appear that anything occurred to distract the attention of the deceased, or that he was interfered with in any respect by others, or that he stood, by the direction of any one, or by the force of any unusual circumstances, where he did when he was struck. The accident, so far as the evidence discloses, was the result of inattention to a known peril on the part of the deceased. Having entered the service with full knowledge of its existence and nature, he must be held to have taken the risk of injury from it on himself, and to have waived any obligation on the part of the defendant, so far as he was concerned, either to remove the peril, or to respond in damages for injuries from it.

The verdict cannot be sustained on the uncontroverted facts appearing from the testimony, and the order denying the defendant's motion is reversed, and a new trial granted.

FAY v. MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY.

Supreme Court, Minnesota, February, 1883.

[Reported in 30 Minn. 231.]

BRAKEMAN INJURED WHILE COUPLING CARS — DEFECTIVE CAR RECEIVED BY ONE RAILROAD FROM ANOTHER. — The defendant received into its service, from another railway company, a freight car which proved to be in disrepair, and which it neglected to inspect and repair within a reasonable time thereafter. The plaintiff, a brakeman, in attempting to couple the car in question with another car, was severely injured in consequence of its defective and imperfect condition, which was not known to him, but was discoverable on proper inspection. *Held*, that, as respects such defects, the company were answerable for the same degree of care and diligence in the management and use of a foreign car received into its service as in the case of its own cars in like circumstances (1).

1. See, also, the following cases relating to inspection of cars:

In *TIERNEY v. MINNEAPOLIS & ST. LOUIS R'Y CO. ET AL.*, 33 Minn. 311 (April, 1885), switchman injured

while coupling cars in a railroad yard owned by two companies, the plaintiff's leg being caught between a box car and a flat car, order of District Court for Freeborn County

MASTER'S DUTY TO FURNISH SAFE APPLIANCES CANNOT BE DELEGATED TO SERVANT.—The duty to provide suitable instrumentalities for its employees to work with cannot be delegated to a servant, so as to relieve the company from responsibility; and this duty extends to the machinery, cars, and railway track, upon or in connection with which they are employed.

RULES AND REGULATIONS—UNPUBLISHED AND UNENFORCED RULE.—An employee is not bound by a rule of the company which has not been properly published or brought to his attention, and which it has habitually neglected to enforce.

(*Syllabus by the court.*)

APPEAL by defendant from an order of the District Court for Ramsey County, refusing a new trial. The facts are stated in the opinion. *Order affirmed.*

J. D. SPRINGER and O'BRIEN & WILSON, for appellant.

O'BRIEN, ELLER & O'BRIEN, for respondent.

Vanderburgh, J.—The respondent, a brakeman in the employ of the railway company, appellant, while engaged in coupling cars, sustained an injury in his hand, caused by the

refusing defendant new trial after verdict for plaintiff for \$10,000, was *affirmed*. Opinion by VANDERBURGH, J. On the question of inspection it was held (as per official syllabus) as follows:

"It is incumbent upon a railway corporation, in the discharge of its duty as master, not only to provide machinery and instrumentalities for its employees which are suitable and safe, but also to use reasonable diligence to keep them so. Necessarily incident to those obligations is the duty of frequent inspection, and the corporation, acting by its servants in the discharge of such duty, is liable for their negligence.

"By a regulation governing the employees in the transfer yard of a railway company, car inspectors were required to inspect incoming cars immediately upon their arrival, and if out of repair to mark them 'in bad order,' indicating that they were to be sent to the 'repair track.' *Held*, that negligence on the part of the in-

spectors in failing to properly discharge this duty, by reason of which plaintiff was injured while attempting to couple a damaged car without notice of its condition, and without fault on his part, might be imputed to the company.

"It will not be presumed under such circumstances that the plaintiff assumed the risk of such negligent inspection, unless it appear that he undertook to handle cars in the course of his employment without reference to inspection."

See former appeal in the **TIERNEY** case, 31 Minn. 234.

In **MACY v. ST. PAUL & DULUTH R. R. Co.**, 35 Minn. 200 (May, 1886), yardmaster injured by defective car, verdict for plaintiff in the District Court for St. Louis County for \$2,500 (spine permanently injured), was sustained and order refusing defendant new trial *affirmed*. On the question of inspection the court followed the rulings in **Fay v. Minn. & St. Louis R'y Co.**, 30 Minn. 231 (the case at

he entered the employment, changed the nature of his employer's obligation to him. The employer had no right to subject him to an unnecessary peril without his consent; but it is well settled in the courts of this country and England that, if a servant chooses to enter into an employment involving dangers of personal injury which the master might have avoided, he takes upon himself the risk of all the hazards incident to the employment, the existence and nature of which were known to him when he entered the service, and which he had no reason to expect would be obviated or removed. If a servant accepts service with a knowledge of the position of structures from which he has occasion to be apprehensive of injury, he cannot require the master to make changes so as to obviate the danger, or hold him liable for damages in case of injury. These views are maintained in the following cases: *Fleming v. St. Paul & Duluth R. Co.*, 27 Minn. 111 (1); *Gibson v. Erie R'y Co.*, 63 N. Y. 449; *Dillon v. Union Pacific R. Co.*, 3 Dill. 319; *Owen v. N. Y. Cent. R. Co.*, 1 Lans. 108; *Hayden v. Smithville Manuf'g Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669; *Ill. Cent. R. Co. v. Welch*, 52 Ill. 183, 14 Am. Neg. Cas. 356n;

1. In *FLEMING, ADM'R, v. ST. PAUL & DULUTH R. R. Co.*, 27 Minn. 111 (August, 1880), fireman killed by reason of engine being thrown from track by running over a cow thereon, order refusing new trial after dismissal of action in the District Court for Ramsey County, was *affirmed*. Opinion by BERRY, J. The case is stated in the official syllabus as follows:

"Laws 1876, c. 24, sections 1-3 (Gen. Stat. 1878, c. 34, sections 54-56), entitled 'An act to compel all railroad companies within this State to build proper cattle-guards and fences,' and the amendment of section 4 of said chapter found in Laws 1877, c. 73 (Gen. St. 1878, c. 34, section 57), are applicable to the St. Paul & Duluth Railroad Company.

"The latter portion of section 55, declaring a failure to build and maintain cattle-guards and fences an act of negligence, has reference only to

the case of killing or injuring domestic animals.

"Section 57 makes failure to fence, etc., negligence *per se*, and makes the company operating the road liable for all damages to person or property resulting therefrom, subject to such qualifications as the general rules of law impose in analogous cases. As, for instance, in the case of injury to a fireman in the employ of a railroad company, in consequence of the throwing of a train from the track by running over a cow which had come upon the track, through the lack of a fence, the general liability of the company for damages under section 57 is subject to the qualification that it is competent for an employee to assume the risks of the company's service as he finds it. So that, if he enters and continues in such service, knowing that the road is not fenced, he cannot recover for an injury of the kind mentioned."

Devitt v. Pacific R. Co., 50 Mo. 302; *Baylor v. Del., L. & W. R. Co.*, 40 N. J. L. 23; *Clarke v. Holmes*, 7 Hurl. & N. 937; *Woodley v. Met. Dist. R'y Co.*, L. R. 2 Ex. Div. 384 (1).

With respect to the knowledge by the deceased of the particular peril from which the accident happened, the following uncontroverted facts appear from the testimony: The deceased was first in the employment of the company from August to November, 1878, as a car repairer and assistant switchman at Shakopee, and, while so employed, it was his duty and he frequently did assist in moving freight cars upon this elevator track under the awning. He knew the position of the awning was such that if he stood erect upon the running-board on a car passing under it, he would be struck; he had been observed to stoop when passing under it, and he cautioned his fellow-servants against the danger. He entered the service of the defendant again in January, 1879, in precisely the same employment, and continued in it until the accident. Immediately

1. In *CLARKE v. HOLMES*, 7 H. & N. 937, it appeared that plaintiff was employed by defendant to oil dangerous machinery. At the time plaintiff entered upon the service the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced. The defendant was held liable for the injury. This appears to affirm *Holmes v. Clarke*, 6 H. & N. 349.

In *WOODLEY v. MET. DIST. R'y Co.*, L. R. 2 Exch. Div. 384, it appeared that a railway company employed a contractor to do work upon a side of a dark tunnel at a point where the line was on a curve, so that workmen could not see a train approaching till it was within twenty or thirty yards of them. The space between the rail and the wall was just sufficient for a workman to keep clear of a train if sensible of its ap-

proach. Trains passed the spot every ten minutes, and when a train passed on the further line the noise would prevent a workman from hearing the approach of a train upon the line nearest to him. There was no light at the spot in question; no one was stationed to give notice of an approaching train, nor was the speed of trains slackened on approaching the spot, nor was any signal given by whistling or otherwise. The plaintiff was a workman in the service of the contractor so employed, and had been working in the tunnel, though not at precisely the same spot, for a fortnight, when he was struck by a train while reaching across the rails to find a tool which he had laid upon the ground. The jury found that there was negligence on the part of the company in not providing a look-out man or altering the usual mode of conduct in the traffic. *Held*, that the plaintiff, having continued the work, with full knowledge of its dangerous nature, had no remedy against the company.

4. The evidence disclosed fully the facts in reference to the manner in which the accident occurred, as well as the condition of the coupling attachment. The question of contributory negligence, raised by the defendant, was for the jury upon these facts, unless it be determined, as matter of law, that the plaintiff was guilty of contributory negligence in failing to comply with the above-mentioned rule. But it does not appear that the plaintiff was violating any duty while performing this service. It is not shown that the rule in question was ever properly published, so as to bring knowledge of it to the plaintiff, or that he was ever put upon inquiry as to its existence; and the usage and practice of the company would, on the contrary, tend to mislead him. *Wood on Master & Servant*, § 401; *Sprong v. Boston & Albany R. Co.*, 58 N. Y. 56. Notice to the yardmaster, or other officers or agents, was not, *per se*, notice to him of the existence of such a rule, and the plaintiff ought not to be permitted to suffer from the negligence of the company in the publication of its rules, or its laxity in their enforcement. In this view of the case it becomes immaterial to consider the question whether the rule was abrogated or not.

Order affirmed.

BRAKEMAN INJURED COUPLING CARS — ACTION UNDER IOWA STATUTE — LAW OF PLACE — CONSTITUTIONAL LAW — PUBLIC POLICY. — In **HERRICK v. MINNEAPOLIS & ST. LOUIS R'Y CO.**, 31 Minn. 11 (*July, 1883*), appeal by plaintiff from order of District Court for Freeborn county refusing new trial after dismissal of action, order was *reversed*. The opinion by MITCHELL, J., states the following facts: "The defendant owned and operated a line of railroad from Albert Lea, in this State, to Fort Dodge, in the State of Iowa. The plaintiff entered the service of defendant, in Iowa, as brakeman on one of its trains, to be operated wholly in that State. While coupling cars on his train in the discharge of his duty in that State plaintiff was injured through the negligence of the engineer in charge of the train, under such circumstances as to give him a right of action under a statute of Iowa, which makes every corporation operating a railway in that State liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by mismanagement of the engineers or other employes of such corporation, when such wrongs are in any manner connected with the use or operation of any railway on or

about which they shall be employed. Code of Iowa, 1873, tit. 10, c. 5, § 1307. This action was brought to recover damages for the personal injury thus sustained in that State (1). The court below dismissed the action, on the ground that the right of action thus accruing under the statute of Iowa could only be enforced in that State. The correctness of this ruling is the only question involved in this appeal." * * * The official syllabus states the rulings as follows:

"A cause of action which accrued in the State of Iowa, under a statute of that State, which makes every corporation operating a railroad in that State liable for all damages sustained by its employees in consequence of the negligence of other employees of such corporation, when such wrongs are in any manner connected with the use or operation of any railway on or about which they shall be employed, may be maintained and enforced in this State. It is not necessary that the law of the State where the right of action accrued, and the law of the forum where it is sought to be enforced, should concur in holding that the act done gave a right of action. The statute referred to is not against the public policy of the laws of this State, although differing from the common-law rule, which we retain.

"Neither does the fact that this statute only applies to corporations operating railroads under it, render it in conflict with the provisions of the Fourteenth Amendment to the Federal Constitution, that 'no State shall deny to any person within its jurisdiction the equal protection of the laws.'"

1. See, also, *NJUS v. CHICAGO, MILWAUKEE & ST. PAUL R'Y Co.*, 47 Minn. 92 (August, 1891), where plaintiff, a sectionman in defendant's employ, was injured in the State of Iowa, through the negligence of co-servants working with him in that State. The injury was caused by one of the men letting an iron bar drop from the car which they were unloading, and

plaintiff's thumb was injured. Verdict for \$1,500 was sustained. It was held that under the statute of the State of Iowa prescribing the liability of railroad companies for injuries caused by the negligence of its employees, as construed by the Supreme Court of that State, the plaintiff could recover.

HUTCHINS, ADM'R V. ST. PAUL, MINNEAPOLIS AND MANITOBA RAILWAY COMPANY.

Supreme Court, Minnesota, June, 1890.

[Reported in 44 Minn. 5.]

STATUTORY ACTION FOR CAUSING DEATH—ADMINISTRATION SOLELY TO PROSECUTE ACTION.—The probate court has jurisdiction to direct administration for the purpose of enforcing a cause of action arising under the statutes of this State for the death of a person caused by the wrongful act or omission of another, although the deceased was not an inhabitant of this State, and left no property therein.

DAMAGES RECOVERABLE.—In such action the damages are purely compensatory for pecuniary loss. No compensation can be given for wounded feelings, or for the loss of the comfort or companionship of a relative, nor for the pain and suffering of the deceased. The basis on which the damages are to be estimated is the probable pecuniary loss of the widow or next of kin by reason of the death of the deceased, in view of all the facts and circumstances in evidence, and, if the verdict is greatly in excess of the sum thus arrived at, the court should set it aside or reduce it.

EXCESSIVE DAMAGES—POWER OF COURT.—While the court has no right to substitute its own estimate of the damages for that of the jury, yet it has the right to determine the amount beyond which there is no evidence, upon any reasonable view of the case, to support the verdict, and to order a new trial, unless the plaintiff will consent to reduce the verdict to such amount.

DISTINCTION BETWEEN SUCH ACTION AND ACTION BY PERSON INJURED.—Actions under the statute, for injuries causing death, where the damages are wholly compensatory for pecuniary loss, distinguished from those for wilful torts or for personal injuries, in which punitive damages, or damages for injuries not pecuniary in their nature, such as injury to the feelings, or for mental and physical pain and suffering are allowed.

(Syllabus by the court.)

“ PLAINTIFF, as administrator of William Ferguson, brought this action in the District Court for Hennepin County, to recover damages for alleged negligence of defendant resulting in the death of his intestate. At the trial before Smith, J., the plaintiff had a verdict for \$3,500. The defendant appeals from an order refusing a new trial.” The case is stated in the opinion. *Order affirmed on conditions.*

BENTON & ROBERTS, for appellant.

WELCH, BOTKIN & WELCH, for respondent.

Mitchell, J.— This was an action under the statute to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant. Gen. St. 1878, chap. 77, § 2. Plaintiff's letters of administration were issued by the Probate Court of Hennepin county, in which the deceased received the injuries of which he there died. The gist of defendant's first and second assignments of error is that the Probate Court had no jurisdiction to direct administration, because the deceased was not an inhabitant of this State, and left no assets therein. See Gen. St. 1878, chap. 49, § 2. Without now considering whether letters of administration can be assailed collaterally on any such ground, we are of opinion that a cause of action under the statute first cited is to be deemed assets of the deceased, within the meaning of the statute last cited, so as to give the Probate Court jurisdiction to direct administration for the purpose of enforcing it, and distributing the proceeds. It is true that, strictly speaking, the cause of action did not belong to the deceased in his lifetime, but only accrued at his death; also that, when realized on, the proceeds form no part of his general estate, but belong to his next of kin. But the narrow and literal construction contended for by the appellant would often prevent the enforcement of the cause of action at all, because of the impossibility of securing a personal representative of the deceased to maintain it. Administration is a proceeding *in rem*, the *res* being the estate of the deceased; and we apprehend that, whether the deceased was a resident or a non-resident, the existence of assets is essential to administration, for it is the estate, and not the expired breath, of the deceased upon which administration operates. Hence it would seem to follow from appellant's logic, that if the deceased left no assets, strictly so called, no administration could ever be had, and consequently the statutory right of action for the benefit of the next of kin could never be enforced. The right of action is given in case of the death of any person, whether a resident of the State, or only temporarily sojourning in it, at the time of his receiving the injuries causing his death. The law will not allow it to be defeated for want of a party to maintain it. The fact that the statute gives such a right of action to the personal representa-

tive, and to him alone, implies the right to appoint, if necessary, an administrator to enforce it, and administer the proceeds in accordance with the statute. See *Hartford & N. H. R. Co. v. Andrews*, 36 Conn. 213.

The next error assigned is the refusal of the court to dismiss the action on the ground that the evidence conclusively showed that the deceased was guilty of contributory negligence. Ordinarily in case of an affirmance, a discussion of the evidence upon a question of this kind subserves no useful purpose, and we see nothing in the facts of the present case that takes it out of this general rule. Hence we content ourselves with saying that, in our judgment the question of the negligence of the deceased was, upon the evidence, for the jury.

The only remaining question requiring consideration is whether the damages awarded (\$3,500) were excessive. The only evidence bearing upon this question was the testimony of the mother of the deceased, who was evidently an unusually candid and honest witness, although, as was natural, her maternal affection may have inclined her to look with some partiality upon the character and conduct of her son. It appears that the deceased was nearly thirty-nine years of age at the time of his death, and that he had always been an able-bodied and healthy man. He commenced railroading when a mere boy, and continued in that business up to the time of his death, with the exception of six or eight months immediately preceding the close of the late Civil War, during which he was in the army. At the end of the war he resumed railroading, and very soon afterwards married, when only about seventeen years old. Shortly after his marriage he went to California, where he remained a year or two, leaving his wife at his mother's. What he did in California does not distinctly appear. His wife and he never lived together again, she having, for some cause, obtained a divorce. He remained single ever afterwards, so that for the last twenty years, at least, he had no family to support. He seems to have followed a somewhat roving life, never remaining permanently in any one place or in the employment of any one railroad company, as he had been in the service of a great many different roads in almost all the north-western States and Territories. He had been in the employment of the defendant only a day or two at the time of his death. At one time, years ago, he had occupied the position of locomotive engineer, but at the time of his decease he was

a freight brakeman, earning \$2.25 per day. He had accumulated no property, and left no estate whatever, except his clothing and a few books. He was in the habit of visiting his mother on an average, she says, of about twice a year, and when at home on these visits was always busy doing chores and fixing up things about the house for her comfort and convenience. She says he always did for her all he possibly could with the pay that railroads gave, and she estimated that what he gave her and what work he did when at home on visits, together averaged about \$50 a year; but when interrogated as to what money he ever gave her, she could only recall the sum of \$13 at one time, and \$5 at another, and a "little pocket change." She admitted that he never sent her any money by letter; also that he did not give her any the last time he was at home. She was somewhat advanced in life (about sixty-two years old), and living with her second husband, on an eighty-acre farm owned in part by herself and in part by her husband, and from which by hard work they made a very moderate living. Hence she was by no means above the need of more aid from her son, if he had the ability and disposition to give it. While it is apparent that he had a sincere attachment for his mother, yet it is evident from her testimony, colored somewhat, as it probably is, by her maternal love, that the pecuniary assistance which he gave her during all these last years was very meagre. We have made no reference to a bounty which she received when he enlisted in the army, as it has no bearing upon the question as to what pecuniary benefit she might have reasonably expected to derive in the future from the continuance of his life. We shall assume, as counsel have, that she is the sole beneficiary under the statute.

There is nothing better settled than that the principle on which damages are to be assessed under these statutes is that of pecuniary loss and not as a *solatium*. No compensation can be given for wounded feelings, or loss of the comfort and companionship of a relative, nor for the pain and suffering of the deceased. The true and only test is, what sum will compensate the next of kin for the pecuniary loss sustained by them by the death of the deceased? Or, in other words, what, in view of all the facts and circumstances in evidence, was the probable pecuniary interest of the beneficiaries in the continuance of the life of the deceased? A case under this statute is clearly dis-

tinguishable from one for a wilful or malicious tort, where punitive damages, or damages for injuries to the feelings, are allowable, or one for personal injuries to the plaintiff himself where compensation is allowed for mental and physical pain and suffering, as well as for probable future injury to health. In all such cases, the damages not being confined to strictly pecuniary loss, the estimate of them is necessarily so largely in the discretion of the jury that a court will not ordinarily interfere with their verdict, unless it is so excessive as to warrant a belief that they must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case. But, as already remarked, the damages under the statute are wholly compensatory for pecuniary loss, and exclude all punitive or exemplary elements, as well as all solace for loss of society, or compensation for the injured feelings of the survivors, or the suffering of the deceased. Hence it is not, in general, so difficult to estimate the damages; and for that reason courts will have less hesitancy in interfering with verdicts. The proper estimate can usually be arrived at with approximate accuracy by taking into account the calling of the deceased, and the income derived therefrom; his health, age, talents, habits of industry, his success in life in the past, as well as the amount of aid in money or services which he was accustomed to furnish the next of kin; and, if the verdict is greatly in excess of the sum thus arrived at, the court will set it aside or cut it down. 2 Thomp. Neg., 1291, 1292; *Rose v. Des Moines Valley R. Co.*, 39 Iowa, 246, 255, 9 Am. Neg. Cas. 332*n*; *Chicago & N. W. R'y Co. v. Bayfield*, 37 Mich. 205, 214, 16 Am. Neg. Cas. 87, *ante*; *Balch v. Grand Rapids & Ind. R. Co.*, 67 Mich. 394, 34 N. W. Rep. 884; *Howard v. Delaware & Hudson Canal Co.*, 40 Fed. Rep. 195, 198.

And, even as between different cases under the statute, these suggestions apply with special force to one like the present, where the deceased was not the head of a family, and left neither wife nor children. As was said in *Bolinger v. St. Paul & Duluth R. Co.*, 36 Minn. 418 (1), the value of the services of the head of a family in a pecuniary sense cannot be limited

1. *BOLINGER v. ST. PAUL & DULUTH R. R. CO.*, 36 Minn. 418 (1887), was an action for death of plaintiff's testate who while driving a sleigh was killed in collision with train at crossing. Judgment for plaintiff for \$5,000 was *affirmed*. See note of the case in 12 Am. Neg. Cas. 141.

to the amount of his earnings for their support. His constant attention and care in their behalf, in the relation of husband and father, is also to be considered in estimating the pecuniary loss to his family; and in such cases a court would perhaps very rarely feel warranted in setting aside or reducing the verdict. But, even in those cases, the determination of the amount of damages is by no means left to the uncontrolled discretion of the jury. Their estimate must be based on facts in evidence, and confined to those damages which are pecuniary in their nature, and result from the death of the deceased. The present case is not embarrassed by any such circumstances. The deceased had no family. The pecuniary benefit which the mother might reasonably have expected to derive from the continuance of the life of her son must have been almost exclusively confined to contributions of money or property for her support. Estimated on such a basis, it is impossible to see how her pecuniary interest in his life could have amounted to \$3,500. The future must be judged by the past. Here was a healthy, able-bodied man who had attained the age of thirty-nine years. He had no one but himself to support, aside from the paltry sums occasionally given to his mother, and yet he had accumulated nothing, and died almost absolutely penniless. He certainly was not in the line of promotion in his calling. True, it is possible that he might have become more thrifty, in future, but this was not at all probable, in view of his age and past history. He might have met with some extraordinary streak of good luck, such as discovering a valuable mine, or drawing a large prize in a lottery, but these contingencies are altogether too speculative to form any legitimate basis for an estimate of damages. If we take the mother's own liberal estimate of \$50 a year as the criterion of what she might have expected from him in the future had he lived, legal interest on \$3,500 would give a perpetual income nearly five times as great. At her age, the mother's expectation of life was about seven and a half years. Had the son contributed to her support \$50 a year for that length of time it would only amount to \$375, or, if he would have increased it to \$100 per year, it would only amount to \$750. Had he for that length of time given his mother his entire gross earnings, the present worth of their aggregate amount would hardly have equaled the amount of the verdict. In short, it is impossible,

upon any reasonable view of the evidence, to support the conclusion of the jury, that the pecuniary loss of the mother by the death of her son amounted to \$3,500. The verdict is wholly unsupported by the evidence. Within certain limits, much must be left to the sound judgment of the jury, and a court has no right to substitute its estimate for theirs; but we have a right to say that beyond a certain amount there is, on any reasonable view of the case, absolutely no evidence to sustain it.

The order appealed from should be reversed, and a new trial granted, unless the plaintiff shall, within twenty days after the filing of a remittitur in the District Court, file with the clerk of that court a stipulation, consenting that the verdict be reduced to the sum of \$2,000, in which case the order appealed from will be affirmed, and the verdict as thus reduced stand.

Order accordingly.

ENGINEER INJURED — COLLISION OF PASSENGER TRAIN WITH FREIGHT CARS ON MAIN TRACK — RULES AND REGULATIONS — DEGREE OF CARE — INSTRUCTION — HEAVY DAMAGES. — In **HALL v. CHICAGO, BURLINGTON & NORTHERN R. R. CO.**, 46 Minn. 439 (*July, 1891*), engineer injured in collision, order of District Court for Ramsey county refusing defendant new trial, on plaintiff consenting that the verdict of \$40,133.33 be reduced to \$25,000, was *affirmed*. **YOUNG & LIGHTNER**, appeared for appellant; **HARVEY E. HALL, JOHN A. LOVELY, and DAVIS, KELLOGG & SEVERANCE**, for respondent. The case is fully discussed in the opinion by **MITCHELL, J.**, and the points decided are stated in the official syllabus to the report of the case, as follows:

“Plaintiff, a locomotive engineer of one of defendant’s passenger trains, was injured by a collision of his train with freight cars which a switching crew were running on the main track, on the time of plaintiff’s train, contrary to the rules of the company. *Held*, that upon the evidence it was a question for the jury whether plaintiff was guilty of contributory negligence in not keeping a proper lookout for obstructions on the track; also that plaintiff did not assume the risks incident to such negligent obstruction of the track by other employees, merely because he entered defendant’s service with knowledge that they might be negligent in that respect, and that the company had adopted rules regulating the conduct of engineers for the purpose of preventing, as far as possible, collisions in such cases.

"If compliance with a general rule is rendered impossible by other and inconsistent orders given by the master to his servant, negligence cannot be imputed to the servant for not following the general rule.

"The court refused to instruct the jury that it was plaintiff's duty, as engineer of a passenger train, to use the utmost human care and foresight for the safety of his train, but instructed them that he owed the defendant the duty of exercising ordinary care and diligence in the performance of his duty, that is, such care as persons of ordinary prudence would exercise under the same circumstances; that whether plaintiff exercised that degree of care was to be determined in view of all the circumstances, such as the liability to danger at the time, the nature and extent of the danger, and the consequences that might be expected to result from a want of care; that the care must be commensurate with the risks of the situation. *Held*, that this correctly stated the rule of law applicable to the case.

"The verdict *held* not so excessive as to warrant this court in saying that it was the result of passion, prejudice, or any corrupt motive."

On the question of damages the court said: "While the verdict in this case is one of the very largest ever rendered in this State in a personal injury case, yet we find nothing in the record to indicate that it was the result of any passion or prejudice or undue influence. It is not a pleasant task to describe the terrible injuries which this plaintiff sustained, or the untold agony and suffering which he has endured, and which he will probably continue to a considerable extent to endure during life. He was an able-bodied young man, capable of earning a good income from his profession. He is now an almost helpless cripple and invalid for life. Life to him will hereafter be a burden rather than a pleasure. His heroic conduct in staying at his post of duty and hazarding his own life, in order to save the lives of his passengers, may have so commended itself to the jury that they awarded him somewhat more damages than they otherwise would, but we fail to discover anything indicating that they were actuated by passion, prejudice, or any corrupt motive. Neither do we construe the action of the trial judge in cutting down the verdict as expressive of an opinion that the jury were influenced by any such improper motives, but simply that he thought that however great the injuries there must be some limit to the amount of pecuniary compensation awarded, and that in this case the jury had exceeded that limit. Although the verdict is still very large, yet we can see no good reason for our interfering with it on that ground."

SWEENEY v. MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY.

Supreme Court, Minnesota, February, 1885.

[Reported in 33 Minn. 153.]

ENGINEER INJURED BY TRAIN RUNNING INTO WASHOUT—EXCESSIVE SPEED OF TRAIN—CONTRIBUTORY NEGLIGENCE. — The plaintiff, a locomotive engineer in the service of defendant, was running a train over its road immediately after a very heavy storm, which he knew had caused numerous slides and washouts along the whole line of road. He knew that no sectionmen had been along the line after the storm, and that he had to rely on his own watchfulness to guard against danger. He was going around a curve where he knew he was liable to meet dangerous places, but could not see or detect danger more than 130 feet ahead. He unnecessarily continued at a rate of speed so great that it was impossible for him to stop his train within the distance that he could see a washout, and consequently ran into it and received the injury complained of. *Held*, that the trial court was justified in dismissing the action, on the ground that it appeared that the plaintiff was guilty of contributory negligence (1).

(*Syllabus by the court.*)

APPEAL by plaintiff from an order of the District Court for Hennepin County, refusing a new trial. The facts appear in the opinion. *Order affirmed.*

1. See, also, the following case relating to a washout accident:

Fireman killed by locomotive being thrown from track owing to a washout.—In GATES, ADM'X, v. SOUTHERN MINNESOTA R'Y Co., 28 Minn. 110 (July, 1881), fireman killed in a "washout" accident, order of District Court for Houston County refusing defendant new trial after verdict for plaintiff was *reversed* for erroneous instructions as to duty of railroad company in guarding against washouts, landslides, etc. Opinion rendered by GILFILLAN, Ch. J. The ruling is stated in the official syllabus as follows:

"On the trial of an action against a railroad company to recover for an injury resulting in the death of one of

its employees, caused by the track being in an unsafe condition from sand having washed upon it in a storm, the court charged the jury, that it is the duty of those who use hazardous agencies to control them carefully, and to adopt every ordinary known and usually approved invention to lessen the danger and guard against every ordinary probable danger by such means as ordinary prudence would suggest or dictate; and railroad companies are bound to take notice of the topography of the country along their lines of road, and to take notice of the climate of the country in which their roads are, and about the storms and floods that annually occur in those localities, and make all necessary guards against

MERRICK & MERRICK and A. L. LEVI, for appellant.

D. J. SPRINGER, for respondent.

Mitchell, J.— This was an action for damages for injuries caused by the alleged negligence of defendant. The answer denied negligence on part of defendant, and alleged contributory negligence on part of plaintiff. When plaintiff rested, the court, on motion of defendant, dismissed the action.

We are inclined to think that there was evidence reasonably tending to prove that defendant was negligent in not properly protecting its roadbed at the place of accident by ditches and culverts for the passage of water. Hence the case should have gone to the jury, unless the evidence affirmatively showed negligence on part of plaintiff so clearly and palpably as to come within the rule laid down in *Abbett v. Chicago, M. & St. P. R'y Co.*, 30 Minn. 482. This presents the only question in the case. The plaintiff was in the service of defendant as locomotive engineer on a mixed train running between Waterville and Red Wing on what was known as the "Cannon Valley Division." At the time of the accident, July 21, 1883, he was making his third round trip, and had been over the road once on a former occasion. Hence, although not so well acquainted with the road or the topography of the country as one longer in the service, he must be presumed to have had a general

danger caused by ordinary and usually severe storms of the locality where the road is located. It was the duty of the defendant to so construct its road as to make it reasonably safe, and to guard against washouts, landslides, and obstructions which might endanger the lives of the passengers and employees passing over the same; and any neglect of the defendant in that behalf would make it liable to the plaintiff if such neglect caused the injury. It was also the duty of the defendant to keep its road in suitable and safe repair, and keep and maintain suitable ditches and culverts, at suitable and proper places, to carry off the surplus water naturally running down upon the track or road of the defendant company; and the neglect of the defendant to per-

form that duty, if such neglect was the cause of the accident, will make the defendant liable. *Held*, notwithstanding the court also in general terms charged the jury that the degree of care and prudence required of the defendant in the case was 'due and ordinary care,' 'reasonable care' and 'ordinary prudence,' that the charge, as a whole, was erroneous, for the jury may have understood from it that it was the absolute duty of the defendant, without regard to the degree of care used by it to effect the purpose, to make all necessary guards against danger caused by ordinary storms, and to guard against landslides, washouts, and obstructions which might endanger the lives of passengers and employees, and to keep its road in suitable and safe repair."

knowledge of both. On the day mentioned he started from Waterville in the morning, and arrived at Red Wing at 11:25 A. M., and left there on his return trip at 1:35 P. M. For the first few miles before he reached Red Wing it had been raining quite hard, and continued to rain for some time after he reached that place. Just before starting from Red Wing the conductor of the train read him "an order" to the following effect: "Look out for slide, seven miles east of Cannon Falls, for 200 feet on the track, a foot deep. Look out for washouts between switches at Cannon Falls, and a slide east of Morristown." When he got about a mile out of Red Wing, the train was signaled by a sectionman, who informed him that there was a washout a short distance ahead. Plaintiff and the conductor both got off and examined it. They concluded it was safe, and both of them got on the engine and passed over. Just beyond this was a stretch of bottom land for about two and one-half miles before coming to a curve. Across this bottom plaintiff went at the rate of eighteen to twenty miles an hour. The curve beyond this bottom was about half a mile long, and ran around or near the base of a hill, and cutting through a point of it. As he approached the curve, plaintiff shut off steam and called for brakes, so as to go slow around the curve, and kept, as he states, a sharp lookout ahead. His reasons for doing so, according to his own statement, were that the conductor told him they had to go slow "because there were bad places."

Plaintiff also says that although they had not yet got near the place where the "order" warned them of washouts and slides, yet he thought they would meet with danger "sooner than that" and "I thought there might be trouble. I was going round a curve where I could not see, and I wanted to be cautious." He "slowed" the train to seven or eight miles an hour, and was going at that rate when he first saw a washout about four car-lengths, or 125 or 130 feet, ahead. He called for brakes, and supposed they were applied, and "put the lever over on the back-motion, and gave her steam," but did not succeed in stopping the train before the engine struck the washout and was ditched, causing the injury complained of. He also testified that the train was still running at the rate of seven or eight miles an hour, until the engine was within ten or twelve feet of the washout, and was going at the rate of four or five miles an hour when it struck it.

There is no claim that plaintiff, on passing this curve, could not have slacked up to a rate of speed less than seven or eight miles if he had chosen to do so. The train had no steam or air brakes, and there is no pretense that the speed was not slackened as rapidly as could have been expected, with the appliances it had, after the washout was discovered; the only difficulty being that the washout was not discovered soon enough. Plaintiff does not state in what distance he could have stopped the train when going seven or eight miles an hour, but he says: "If everybody attends to business, going four miles an hour, with the appliances on that train, I could stop her in three car-lengths — about 100 feet." It follows that at seven or eight miles it would take a much greater distance. It also very clearly appears that plaintiff did not suppose that any sectionmen had been over this part of the road after the storm, and hence he was not relying on signals, but was "feeling his way."

From this statement of facts we think it almost conclusively appears that the plaintiff knew there had been a very heavy storm, which had caused slides and washouts at various places along the whole line of the road, and that he was liable to meet with them at almost any exposed point on the line; and that he had reason to believe, and did believe, that he was liable to meet with them in going around this very curve; and that he knew he had to depend upon his own care and watchfulness to avoid them; and that in going around this curve he could, even with vigilant watchfulness, see a washout a distance of only 125 or 130 feet ahead, but that he was still going at the rate of seven or eight miles an hour,—a rate so great that it would be impossible for him to stop his train within the distance at which he could discover danger. On the particular point involved, the case is not distinguishable from that of *Mantel v. Chicago, M. & St. P. R'y Co.*, 33 Minn. 62, decided at the present term. Under the circumstances, ordinary care demanded that plaintiff should have slackened his train to a rate of speed that would have enabled him to stop it within the distance that he could see danger ahead. The only excuse for not doing so is that he was required to make schedule time. This excuse is frivolous. No rules can compel engineers to run into imminent danger, and hazard the safety of themselves and their trains. On the contrary,

we apprehend that they are not only at liberty, but are required, when running over a road during or immediately after heavy storms, to run cautiously and without regard to "time-card time," and especially in places liable to slides or wash-outs.

From these considerations we have arrived at the conclusion that the court was justified in taking the case from the jury. We have done so with some hesitation, for the reason that it is perhaps almost a "border" case, and we recognize the caution that should be exercised in this class of cases, not to encroach upon the domain of the jury. It is sometimes an exceedingly close and difficult question to decide whether or not a case of this class should be submitted to the jury. In a case coming very near the line, we are disposed to give some weight to the judgment of the trial judge. This consideration has some additional weight in this case, from the fact that we have not the full benefit of the explanation of the topography of the country given in the court below by Spicer, the witness who made the map before us.

Order affirmed.

ENGINEER KILLED BY DERAILMENT OF TRAIN — DEFECTIVE RAIL — SUBSEQUENT REPAIRS — ASSUMPTION OF RISK — SIMILAR ACCIDENTS — EVIDENCE — DAMAGES. — In **MORSE, Adm'x, v. MINNEAPOLIS & ST. LOUIS R'Y CO.**, 30 Minn. 465 (*June, 1883*), engineer fatally injured by derailment of train caused by alleged broken rail and defective switch, order refusing defendant new trial after verdict for plaintiff in the District Court for Freeborn county was *reversed*. The opinion was rendered by MITCHELL, J., and the points decided are stated in the official syllabus to the report as follows:

"In an action for damages for injuries alleged to have been caused by the negligence of a railroad company in allowing its track to be and to remain out of repair and defective, the defects in that respect, which it is claimed caused the injury, consisting in a broken rail and imperfect switch at or near the place of the accident, it is error to admit evidence of other defects at other places on the road, there being nothing in the case tending to show that such other defects in any way contributed to the injury complained of, or were the result of a cause presumptively operating at the place of the casualty, or which might have caused the defect which produced the injury.

"Evidence that the defendant repaired or changed the switch

alleged to have been defective over a year after the accident, and after it had been removed to another place, is not admissible as an admission of previous negligence. This court, as well as some other courts, has held that such evidence is admissible as being in the nature of an admission of the previous unsafe condition of the thing repaired or changed, when the change or repairs were made so soon after the accident, and under such circumstances, as to indicate that they were suggested by it, and were made to remedy a defect which caused it. But it is now held (overruling *O'Leary v. City of Mankato*, 21 Minn. 65, and cases following it), that such acts are not admissible, under any circumstances, as an admission of previous neglect of duty, because they afford no legitimate basis for drawing any such inference from them.

"One of the acts of negligence relied upon as a ground of recovery was the order of defendant to plaintiff's intestate to couple two engines together, tender to tender, and use them in 'bucking' snow off the road, this being claimed to be a dangerous and unsafe practice. The undisputed evidence was that this was a general and common practice of the defendant and other roads in the State, well understood by all railroad engineers, including the defendant, and one which they were frequently called upon to engage in. *Held*, that under these circumstances the dangers incident to such a practice (assuming that the company was not negligent in the matter of keeping their track and engines in proper order) must be held to have been assumed by the deceased as included in the ordinary risks of the employment in which he engaged, and therefore it was error to submit that question to the jury.

"Where the sufficiency or safety of the instrument which is claimed to have caused the accident is in issue, evidence of similar accidents resulting from the same cause is competent. Such facts are in the nature of experiments to show the actual condition of the instrument, and how it served its purpose when put to the use for which it was designed, and that the common cause of these accidents was a dangerous or unsafe thing."

There was another appeal in the *MORSE* case, 33 Minn. 22, and the action was tried for a third time, and plaintiff had a verdict of \$2,500. Defendant appealed but the Supreme Court sustained the verdict and affirmed the order denying defendant new trial. The appeal is reported under the name of *CLAPP*, as plaintiff, in 36 Minn. 6.

The official syllabus to *CLAPP* (formerly *Morse*), *Adm'x, v. MINNEAPOLIS & ST. LOUIS R'Y CO.*, 36 Minn. 6 (*October, 1886*), states the decision in the third appeal in the *MORSE* case (per opinion by *VANDEBURGH, J.*), as follows:

"Where an accident caused by a broken switch rail resulted in

the derailment of an engine, and the death of the engineer in charge thereof, and the evidence tended to show that the rail was too weak and light to support the engine and rolling stock used on the road, *held*, that the risk of such defects was not to be deemed to have been assumed by the deceased unless it appeared that he had notice that the rail was unsafe.

"Proof of similar accidents at the same switch, under the same conditions, *held* admissible; following *Morse v. Minn. & St. L. R'y Co.*, 30 Minn. 465.

"That the charge of the court is indefinite, or omits material instructions, is not ground of exception, where the attention of the court is not specifically invited to the matter or special instructions asked.

"In an action, for the benefit of the widow and next of kin, for damages for injuries causing death, and as having reference to the question of the reasonable expectation of pecuniary benefit to them if the deceased had survived, it was not error for the court to instruct the jury that they might consider his age, health, capacity to earn money, and the injury to his business, as disclosed by the evidence."

ORTH V. ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

Supreme Court, Minnesota, November, 1891.

[Reported in 47 Minn. 384.]

**FIREMAN INJURED—ENGINE RUNNING INTO SNOWBANK—
—DEFECT IN LOCOMOTIVE—EVIDENCE—CONJECTURE—
PROOF REQUISITE TO CONNECT NEGLIGENCE AND INJURY.**

—In an action to recover for personal injuries alleged to have been caused by the negligence of the defendant, it is not necessary to establish with absolute certainty the connection of cause and effect between the negligent act and the injury. It is sufficient if the evidence furnishes a reasonable basis for satisfying the minds of the jury that the act complained of was the proximate and operating cause. But this conclusion must not rest on mere conjecture. A recovery cannot be had where the evidence merely shows that it is possible that the injury was produced by a cause for which the defendant would be responsible, but more probable that it was produced by a cause for which he was not (1).

(Syllabus by the court.)

1. ORTH *v.* ST. PAUL, MINNEAPOLIS & MANITOBA R'Y Co., 43 Minn. 208 (April, 1890), was an appeal by defendant from an order of the Stearns County District Court denying its motion to have the complaint made more definite and certain, in an action by one of its locomotive firemen for

APPEAL by defendant from an order of the District Court for Stearns County, refusing a new trial after a verdict of \$15,000 for plaintiff in an action for personal injuries. The case is stated in the opinion. *Order reversed.*

M. D. GROVER, for appellant.

D. T. CALHOUN and THEO. BRUENER, for respondent.

Mitchell, J. — This action was brought to recover damages for personal injuries. Plaintiff was employed by defendant as a locomotive fireman. He and one Smith, as engineer, left St. Cloud in the morning upon an engine having attached a snow plough in front and a caboose in the rear. Their object and duty was to clear the track of snow. They reached Fergus Falls between 3 and 4 o'clock, in the afternoon. After waiting there for a time, they started to clear the track on the Pelican branch to Elizabeth, a distance of about ten miles. They encountered considerable snow, and had made two or three stops, in or after passing through drifts, to get up steam. After passing through a large drift, and while running at the rate of from twenty-five to thirty miles an hour, and about seven miles out from Fergus Falls the engine "kicked" —that is, the furnace door was blown open,—and flames, fire, etc., from the furnace burst into the cab with such force as to compel the plaintiff, the engineer, and Deveney, the roadmaster, who was also aboard, to jump out. Deveney was not hurt, the engineer was killed, and plaintiff very seriously injured. The engine, with the snow plough and caboose attached, ran on until stopped in a snow bank, about a mile and a half from the place of the accident. No claim was made on the trial that the engine was defective. The theory upon which the plaintiff tried and submitted his case in the court below, and the only one upon which he seeks to sustain his verdict here, is as follows: First, that the engineer negligently allowed the engine to "work water," which means that he failed to close the injector when he ought to have done so, and thus permitted the boiler to fill with water, so that it overflowed into the dry pipe, and passed with the steam through the cylinder, and out of the exhaust nozzles into the smoke arch,

damages for injury sustained by reason of a defective smokestack on a locomotive which became so choked, clogged and stopped up that fire, smoke and steam were forced into the cab of the locomotive. The Supreme Court *affirmed* the order.

and through the smoke-stack and netting; second, that this water, with the smoke, possibly aided by oil from the cylinders, clogged up the netting of the smoke-stack, so as to prevent the exhaust, etc., from escaping through the stack; third, that this forced it through the flues in the boiler into the fire box or furnace with such force as to blow open the furnace door, and drive the flames and gas into the cab. In order to find a verdict for the plaintiff the jury must have found his contention true as to all three of those propositions; and the only question is whether the evidence justified the verdict.

The evidence is altogether too voluminous to permit us to do more than to summarize it, and state certain general conclusions at which we have arrived after a careful perusal of the entire record. One peculiarity of the case is that, aside from the testimony of plaintiff himself and the witnesses who testified to the condition of the engine when found in the snow bank after the accident, the evidence is mainly expert or opinion testimony, consisting largely of speculation or mere theory. The plaintiff testified that during the trip from Fergus to the place of the accident the engineer permitted the engine to work water. On his examination in chief he conveyed the idea that this was very frequent, although on his cross-examination he did not claim to have noticed it more than three or four times. He also testified that the engine was working water at the time of and immediately preceding the accident. It also appears from the testimony that, while this working of water is a very frequent occurrence, yet it is the duty of the engineer, when he discovers it, to shut off the water by closing the injector, for the reason that its effect is to impede the progress of the engine, and, if continued long enough, to injure the machinery and burst the cylinder. Certain witnesses testified that in their opinion this working of water would have a tendency to clog up the netting of the smoke-stack, but they admitted that they had never in their experience known of such an occurrence. They also testified that in their opinion, such clogging, if it occurred, would be a gradual process. Other witnesses testified, not only that they had never known of such occurrence, but that, in their opinion, it could not occur from such a cause while an engine was moving at the rate of twenty-five miles an hour, with 130 pounds of steam (as was this one at the time of the accident),

because, under such circumstances, the netting is very hot, and nothing will stick to it, and the force of the smoke would drive everything out. Certain expert witnesses testified to having, while operating locomotives, had this experience of the engine kicking, in some instances, of about the same severity as this, and that in none of these cases was the netting on the smoke stack clogged or obstructed.

It also appears quite conclusively from the plaintiff's own testimony that the draft in the furnace was good and unobstructed up to and including the last time when he put in coal, which was only a few seconds before the explosion. This would indicate pretty clearly that up to that time the netting was not materially obstructed, and if, as other witnesses testified, the process would be gradual, it could hardly have occurred in the few moments that subsequently elapsed. The plaintiff testified that he noticed after he put in coal the last time that no black smoke was coming out of the stack,—only some water. This is claimed to indicate that the netting was clogged. But, aside from the difficulty in understanding how smoke could not get out if water could, there was evidence tending to prove that there are two conditions in which black smoke (which is merely unconsumed carbon) may not appear, one when none of the hydrocarbon gas, distilled from the coal, is consumed, because of the non-admission of oxygen to burn the hydrogen, in which case the gas will escape in an invisible form; the other, when all of the gas is consumed. The evidence also shows that when the engine was examined, about an hour and a half after the explosion, the coal in the furnace was not wholly burned out, but was black and dead on top; also that the netting was obstructed or clogged up, so that the fire would not burn until it was cleaned out, which was accomplished by two or three blows of a hammer. 'This is greatly relied on as showing that the netting was obstructed at the time of the accident. But, as against this, there was evidence tending to show that this obstruction of the netting might have been produced by cinders, ashes, etc., being driven into the netting by the explosion itself, or that it might have occurred after the accident, while the engine was standing in the snow drift, from somewhat the same causes which often produce it after an engine is taken into the roundhouse. It is also urged that, if the clogging had been produced in the

manner claimed by plaintiff, the obstruction would have been a gummy substance closely adhering to the netting, which could not have been dislodged by two or three blows of a hammer.

Plaintiff's evidence also shows that the engine was being crowded a good deal, in order to get up steam enough to plow through the drifts of snow, and that coal was being put in almost constantly; that within a minute and a half or two minutes before the explosion he had thrown in some five shovelfuls of coal at three different times, a considerable part of which, perhaps two-fifths, was fine coal; that there was a large amount of coal in the furnace at the time of the explosion, which occurred immediately after the engineer threw forward the lever in order to increase the exhaust, and thus increase the power of the engine.

All this points very strongly to the conclusion that the accident was the result of the explosion of hydrocarbon gas distilled from the combustion of the coal, which formed faster than it could either escape or be consumed, and that the immediate cause of the explosion, which is merely instantaneous combustion, was the sudden forcing of a large quantity of additional air through the grates into the fire box, by the engineer's throwing forward the lever to increase the exhaust.

While this statement is incomplete, and may be, in some details, not exactly accurate, yet we think it fairly and fully outlines the probative force of the evidence, taken as a whole. And the result, in our judgment, is that while it may justify the conclusion that the engineer was negligent in sometimes allowing his engine to work water when he ought not to have done so, and while there is a possibility that this might have clogged the netting, and that this clogging might have been the cause of the accident, it is a mere matter of conjecture, not rising to the dignity of proof. We have the presence of all the conditions which might have produced the same result, without the presence of the cause assigned by the plaintiff. We find the same thing has happened on other occasions, when no such cause existed, and it does not appear that in the experience of any one any such result ever occurred from that cause under like circumstances. We have also evidence pretty clearly establishing certain facts which it is very difficult, if not impossible to reconcile with plaintiff's theory. In short,

the condition in which the evidence leaves the case is that it is possible that the accident was produced by the cause suggested by the plaintiff, but that the probabilities are against it. The burden of proof was on the plaintiff to establish his contention; and "proof" is logically defined as a sufficient reason for assenting to a proposition. It is, of course, not necessary to establish the connection between cause and effect with absolute certainty, for this is often impossible. Evidence furnishing a reasonable basis for satisfying the minds of the jury that the clogging of the netting, through the negligence of the engineer in the management of the engine, was the proximate and operating cause of plaintiff's injury, would have been sufficient. But this conclusion must not rest on mere conjecture (1). It is not even enough that the evidence leaves the matter in *equilibrio* as to whether the injury was produced by a cause for which the defendant was responsible, or by one for which it was not responsible; and, *a fortiori*, no recovery can be had if it is more probable that it was produced by the latter. In this case the evidence left the matter altogether too much in the domain of mere guess work to furnish a reasonable basis upon which to rest the verdict. Taking the view of the evidence most favorable to the plaintiff, the question as to the operating cause of this accident was, in the expressive phrase of one of the witnesses, a "theoretical problem" left wholly to conjecture.

Order reversed.

1. In *ELLISON v. TRUESDALE* (RECEIVER OF MINNEAPOLIS & ST. LOUIS R'y Co.), 49 Minn. 240 (April, 1892), where plaintiff's intestate, nineteen years old, employed by defendant as a brakeman on a freight train, while going between moving cars in the night-time to uncouple them, was run over and killed, it was held, upon the

evidence, that the theory that the accident was caused by his stepping in a shallow hole, found in the vicinity, rested upon the conjecture, and was not so probable as to justify a verdict to that effect. Verdict directed for defendant in the District Court for Hennepin County *affirmed*. Opinion by DICKINSON, J.

CHRISTIANSON v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY (1).

Supreme Court, Minnesota, December, 1896.

[Reported in 67 Minn. 94.]

SECTIONHAND FALLING FROM HAND CAR — EXCESSIVE SPEED — PROXIMATE CAUSE — CONTRIBUTORY NEGLIGENCE — RELEASE. — Evidence considered, and *held* sufficient to justify the jury in finding: 1. That defendant's servants were negligent. 2. That such negligence was the proximate cause of plaintiff's injury. 3. That plaintiff was not guilty of contributory negligence. 4. That he had not settled and released his claims against the defendant for damages.

PROXIMATE CAUSE. — Where an act is negligent, the person committing it is liable for any injury proximately resulting from it, although he could not have reasonably anticipated that injury would result in the form or way in which it did, in fact, happen.

(Syllabus to official report.)

APPEAL by defendant from an order of the District Court for Jackson County, denying a motion for a new trial, after a verdict in favor of plaintiff for \$1,995. The facts appear in the opinion. *Order affirmed.*

LORIN CRAY, for appellant.

L. F. LAMMERS and T. J. KNOX, for respondent.

Mitchell, J. — This action, which was here on a former appeal (61 Minn. 249, 63 N. W. 639), was brought to recover for personal injuries caused by the alleged negligence of defendant's servants. The defenses interposed were, 1, that defendant was not guilty of any negligence; 2, that plaintiff was guilty of contributory negligence; 3, accord and satisfaction.

The plaintiff was in defendant's employ as a sectionhand. On the day in question, he and two other sectionmen started easterly on a hand car, to meet their section foreman. In the meantime, another section crew, with plaintiff's section foreman, had started westerly from another point, on another hand car. When the two cars came within a short distance of each other, those on the west-bound signaled those on the east-bound car to go back. Thereupon those on the latter

1. See former appeal in the Christianson case, 61 Minn. 249.

car turned back, and both cars proceeded westerly, the car on which plaintiff was going ahead, and the other car following. It appears from the evidence that those on the rear car had, before starting out that morning, imbibed several drinks of whiskey; and that, while both cars were going westerly, some of them once or twice signaled to those on the forward car as if wanting them to go faster. The only significance of this is that it may in part, at least, account for the conduct of those on the rear car.

This part of the railroad was a downgrade of from fifty-two to fifty-eight feet to the mile, and the track was wet and somewhat slippery. The cars were running down this grade at a rate of speed variously estimated at from ten to twenty miles an hour. The front car, on which was plaintiff, was of old style, not capable of as great a rate of speed as the rear car; and, owing to the nature of its gearing, the handles attached to the lever moved very rapidly; so much so that it was difficult for one standing on the car to hold on to them. Plaintiff was standing on the rear end of the car, with nothing to hold on to except these handles. The other two men were on the front end of the car where the brake was. The usual distance at which hand cars kept apart, according to the rules of the company, was "three telegraph poles," which would be 540 feet. At the rate of speed at which it was going, the rear car could not have been brought to a stop by the application of the brake in less than 100 feet. The cars had traveled in this way about a mile and a quarter, the rear car gaining on the forward one, until it got within sixty feet of it.

The plaintiff testified that at this point he looked back, and, seeing the other car so near, and going so fast, became dizzy, lost his balance, and fell off. It is perhaps unimportant whether his fall was the result of fright caused by seeing the other rapidly moving car so near, or whether he accidentally lost his hold on the handle of the lever, and lost his balance. The fact is undisputed that he did fall off. We think the evidence shows that, after the men on the rear car saw him fall, they did all they could to stop their car; but going, as they were, at so great a rate of speed, and being within sixty feet of the front car, it was impossible for them to avoid colliding with the plaintiff. The result was that the car ran upon him while lying on the track, and inflicted very severe injuries.

We fail to discover any evidence of contributory negligence on plaintiff's part. The only thing which it is suggested that he ought to have done was to have made some effort to slacken the speed of the car on which he was riding. As the most imminent source of danger would seem to have been the close proximity of the rear car, it is not apparent how this would have helped matters. Moreover, it appears that plaintiff was an ignorant man, with little or no experience in railroad work; and that those on the rear car, of whom his own foreman was one, were signaling the front car to go faster. The very most that can be claimed for the evidence is that the question of plaintiff's contributory negligence was for the jury.

2. That, under the evidence, the question of the negligence of those on the rear car was for the jury, we have no doubt. The usual practice, in accordance with the rules of the company, for hand cars, when going in the same direction, to maintain a distance between them of "three telegraph poles," was founded upon the plainest dictates of common prudence. The faster the cars were going, and the greater the distance required to stop the rear car, the greater was the necessity for the observance of this rule, so as to avoid injury in case of accident to the front car of those riding upon it. But in this case, although the cars were going at a high rate of speed on the downgrade and a slippery track, those on the rear car allowed it to come within only a little over half the distance of the front car in which they could have stopped had any accident befallen the front car or its occupants. The jury were amply justified in finding that, in so doing, the occupants of the rear car were guilty of negligence.

3. The main contention, however, of defendant's counsel, is that, conceding that those on the rear car were negligent, yet plaintiff's injuries were not the proximate result of such negligence; or, perhaps to state his position more accurately, that it is not enough to entitle plaintiff to recover that his injuries were the natural consequence of this negligence, but that it must also appear that, under all the circumstances, it might have been reasonably anticipated that such injury would result. With this legal premise assumed, counsel argues that those on the rear car could not have reasonably anticipated that plaintiff would fall from the car.

It is laid down in many cases and by some text writers that, in order to warrant a finding that negligence (not wanton) is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, and that it (the injury) was such as might or ought, in the light of attending circumstances, to have been anticipated. Such or similar statements of law have been inadvertently borrowed and repeated in some of the decisions of this court, but never, we think, where the precise point now under consideration was involved. Hence such statements are mere *obiter*. The doctrine contended for by counsel would establish practically the same rule of damages resulting from tort as is applied to damages resulting from breach of contract, under the familiar doctrine of *Hadley v. Baxendale*, 9 Exch. 341 (1). This mode of stating the law is misleading, if not positively inaccurate. It confounds and mixes the definition of "negligence" with that of "proximate cause."

What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then, of course, the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that if the act is one which the party ought, in the exercise of ordinary care, to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening efficient cause, from the original negligent act, are natural and proximate; and for such consequences the original wrongdoer is responsible, even

1. The rule in the *Baxendale* case (*Hadley v. Baxendale*, 9 Exch. 341) is, that the amount of damages recoverable from a carrier is such as would naturally result from the breach of the contract, whether as the ordinary consequence of such a breach, or as a consequence which may, under the circumstances, be presumed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

though he could not have foreseen the particular results which did follow. 1 Bevan, Neg. 97; Hill v. Winsor, 118 Mass. 251; Smith v. Railway Co., L. R. 6 C. P. 14 (1). For citation of cases on this question, see 16 Am. & Eng. Enc. Law, 436 *et seq.*; also, Shearman & R. Neg., § 28 *et seq.*

Tested by this rule, we think that it is clear that the negligence of those on the rear car was the proximate cause of plaintiff's injuries; at least, that the evidence justified the jury in so finding. Counsel admitted on the argument that if, by derailment or other accident, the front car had been suddenly stopped, and a collision and consequent injuries to plaintiff had resulted, the negligence of those on the rear car would have been the proximate cause. But we can see no difference in principle between the case supposed and the present case. The causal connection between the negligent act and the resulting injury would be the same in both cases. The only possible difference is that it might be anticipated that the sudden stoppage of the car was more likely to happen than the falling of one of its occupants upon the track.

4. The only remaining question is whether the evidence justified the verdict upon the issue of accord and satisfaction.

It stands practically undisputed that, prior to the commencement of this action, the plaintiff received from the defendant

1. In SMITH v. LONDON & SOUTH WESTERN R'Y Co., L. R. 6 C. P. 14, it appeared that some workmen employed by the defendant company, after cutting and trimming the hedges bordering the railway, placed the trimmings in heaps between the hedge and the line, and allowed them to remain there for several days during very hot weather. A fire broke out between the hedge and the rail, and burnt some of the heaps of trimmings, which spread to a stubble field and from thence was carried by a high wind to plaintiff's cottage, which was 200 yards from the place where the fire broke out, destroying the cottage. Evidence was given as to one of defendant's engines having passed the spot shortly before the fire broke out, but there was nothing to show

that the engine had emitted any sparks, or that the fire began in the heaps of trimmings. *Held*, that it being common knowledge that engines do emit sparks there was evidence for the jury that the fire originated in sparks from the engine that had passed the spot shortly before the fire occurred; and that there was evidence that defendants were negligent in leaving the dry trimmings so exposed, and that the trimmings either originated or increased the fire, causing it to spread. *Held*, also, that if defendants were negligent they were responsible to plaintiff for the injury sustained, although they could not have reasonably anticipated such injury would result from their conduct. Judgment for plaintiff was *affirmed*.

\$25, and signed a formal instrument in writing releasing and discharging the defendant from all claims or demands, of every name and nature, arising or to grow out of the injuries received by being struck by the hand car. The substance of his testimony is to the effect that he was told that the railroad company was giving him the \$25 "because he was poor," or "out of kindness," and that he was told and believed that the paper which he signed was merely a receipt for that sum of money, and that he did not understand that it was a release of his claims against the defendant. This excuse is so often resorted to as a means of avoiding a settlement whenever the party subsequently thinks or is told by some interested party that he has settled too cheaply, that it is always to be scrutinized with great care. The mere fact that a man has made a poor bargain is no ground for setting it aside. Neither can a settlement of a controversy be avoided because of a mistaken conception of its effect by one of the parties, unless it be shown that he was induced to agree to it by some act of the other party which would amount to a fraud upon his rights; and where a party has, for a valuable consideration, executed a solemn instrument of release, there ought to be pretty strong and clear evidence impeaching it to warrant a court or jury in avoiding it (1).

I. In *SOBIESKI v. ST. PAUL & DULUTH R. R. Co.*, 41 Minn. 169 (July, 1889), it was held that the "voluntary payment of money to an employee, injured by the negligence of the defendant, merely as 'wages' during the period of disability, does not constitute a satisfaction of the cause of action." Opinion by DICKINSON, J.

The Sobieski case, *supra*, was that of a switchman who, while running upon the track at station grounds in performance of duties, was overtaken and injured by a locomotive moved without the customary signal of ringing the bell. Verdict for plaintiff for \$7,000 affirmed. Plaintiff was thirty years of age at time of accident, with family dependent upon him for support. Injuries sustained: loss of one arm below the elbow.

On the question of release it appeared that, after the injury, an agent of defendant paid Sobieski \$250, and persuaded him to sign a release, discharging the defendant from any further liability. Only the plaintiff and his wife were present. Neither of them could read or write in the English language. Their testimony is to the effect that the defendant's agent proposed to pay this sum for wages for four months, and stated that when the plaintiff should be so far recovered as to enter upon duty again the company would give him such employment as he could perform; that they understood this release, although it was read to them, to be a receipt for money paid as wages; and that the agent so represented to them." * * *

The evidence tends to show that plaintiff is quite an ignorant man; and, if we are to judge from his testimony contained in the record, so weak intellectually as to be almost imbecile. Whether this is strictly true, or whether his ignorance and forgetfulness were partly stimulated for effect, the court and jury, who saw and heard him, were much better judges than we. Among the injuries which he received were very severe ones on the head; and there was some evidence tending to show that these had impaired his mind down to the time of trial, although it is true that there was evidence to the contrary. When he was injured, he was carried to his boarding place at the house of defendant's section foreman, where he was confined to his bed for about thirteen weeks, during which time he was attended by the defendant's surgeon, and waited on by one of defendant's sectionmen, in the capacity of nurse. He was apparently a man without relatives or advisers, and during his long illness does not appear to have come in contact with any one except the physician, nurse, and the section foreman at whose house he was. We do not refer to these facts as implying any wrongdoing on part of the defendant, but merely for the purpose of characterizing plaintiff's condition and surroundings when he executed the release.

It does not appear that he had ever as much as considered the question of his claim against the defendant, or that there had been any negotiations whatever on the subject between the parties. In this condition of affairs, while plaintiff was still confined to his bed, and about six weeks after the accident, the defendant's claim agent went to the section foreman's house with a draft for \$25, and a formal instrument of release already prepared, and, through the section foreman as interpreter (for plaintiff could not speak or read English), tendered the \$25 for plaintiff's acceptance, and this instrument of release for his signature. Of course, if the defendant was liable at all to the plaintiff, the sum tendered was a most inadequate trifle compared with what he was entitled to. This of itself is not sufficient ground for avoiding a settlement, but we think it is a circumstance entitled to some weight in determining whether there was any fraudulent overreaching or unfair advantage taken of plaintiff's condition in securing his signature to the release, and as to whether he understood that he was releasing all claim against the company. It does not appear that there were any negotiations of this interview as

to how much defendant should pay; and although, as already stated, the amount tendered was grossly inadequate if defendant was liable for anything, yet, according to defendant's witnesses, plaintiff accepted it without as much as making a suggestion that he ought to have more.

The strongest evidence against the plaintiff is the testimony of several witnesses that he afterwards made statements to the effect that he had settled with the company, or that, if he had not settled, he could recover big money, etc. Some of these statements he denies, and as to others he testified that he did not remember. But there is one fact which would considerably detract from the force of these statements even if made. Most of them were made after this action was brought, and after the defendant had set up this release as a defense. Hence there is room for the hypothesis that the statements had reference to the effect upon the result of the action of the release by which the company claimed he had settled, rather than an admission as to what he had, in fact, done.

It is impossible, as well as impracticable, to attempt to state all the evidence, direct and circumstantial, bearing on the issue; but our conclusion is that notwithstanding the testimony of the section foreman, corroborated by the sectionman, that he did fully and correctly translate and explain the release to the plaintiff, and that he seemed to understand it, the evidence upon the issue of accord and satisfaction made a case for the jury.

Order affirmed.

SWITCHMAN INJURED WHILE COUPLING CARS — AGENT — DECLARATIONS — EVIDENCE — DEFECTIVE RAILS — CUSTOM — NOTICE OF DEFECT — ASSUMPTION OF RISK — PROXIMATE CAUSE. — In **DOYLE v. ST. PAUL, MINNEAPOLIS & MANITOBA R'Y CO.**, 42 Minn. 79 (*November, 1889*), switchman injured, order refusing defendant new trial after verdict for plaintiff for \$7,573 in the District Court for Kandiyohi county was *reversed*. The syllabus by the court states the case and points decided (per DICKINSON, J.), as follows:

"The plaintiff, an employee of a railroad company, having been injured while coupling cars, an agent sent by the company to obtain from the plaintiff a statement of the circumstances of the accident is not authorized by such agency to bind the company by his own declarations as to such circumstances. Proof of such declarations would be mere hearsay evidence.

"The issue being as to whether the conduct of a railroad company not obviously dangerous and culpable (the use of partially worn rails for side tracks at a railway station) is negligence, proof may be made that the conduct in question is in accordance with the general custom of others (railroad companies) under like circumstances. (Citing *Kolsti v. Minn. & St. L. R'y Co.*, 32 Minn. 133.)

"The question being whether the plaintiff's foot was caught by a splinter on the inside of a railroad track or rail, and as to whether the defendant is chargeable with negligence therefor, danger from such cause not being self-evident, it is competent for the defendant to show by experienced witnesses that such accidents have been unknown. (Citing *Phelps v. City of Mankato*, 23 Minn. 276, 279; *Kelly v. So. Minn. R'y Co.*, 28 Minn. 98; *Morse v. Minn. & St. L. R'y Co.*, 30 Minn. 465.)

"Liability for an accident for such a cause is not established, unless it is shown that the defendant had notice of the defect, or that in the exercise of reasonable care the defendant should have known it, or should have apprehended it, and that it was dangerous.

"Evidence considered as not justifying the conclusion that the defendant should have apprehended danger from such a cause.

"A servant who knows the condition of the appliances or place in connection with which he is employed, or who in the exercise of ordinary observation ought to have known, and who knows, or ought to have known, the danger to which he may be thereby exposed, is to be deemed, in general, to have taken upon himself the risk. (Citing *Wuotilla v. Duluth Lumber Co.*, 37 Minn. 153; *Wilson v. Winona & St. P. R. Co.*, 37 Minn. 326; *Hughes v. Winona & St. P. R. Co.*, 27 Minn. 137.)

"The plaintiff claiming to have been injured (run over) by reason of having his foot caught by a splinter in the rail while coupling cars, and complaining also that the freight on one of the cars (railroad iron) had been negligently suffered to project over the end of the car: *Held*, that a recovery could not be had for the latter cause, the plaintiff not having been injured thereby."

EMPLOYEE FATALLY INJURED WHILE ASSISTING IN COUPLING CARS — CONDUCTOR'S ORDERS — SCOPE OF AUTHORITY — VOLUNTEER — FELLOW-SERVANT — LIABILITY OF MASTER. — In **EVARTS v. ST. PAUL, MINNEAPOLIS & MANITOBA R'Y CO.**, 56 Minn. 141 (*January, 1894*), order of District Court for Hennepin county denying defendant's motion for new trial after verdict for plaintiff for \$5,000, was *affirmed*. The opinion by MITCHELL, J., states the case as follows:

"This was an action to recover damages for the death of plain-

tiff's intestate, caused by the alleged negligence of the defendant. At the time of his death the deceased was in the employment of the defendant as assistant timekeeper, his duties being to keep an account of the time of men at work upon, and to make measurements of materials used in, construction work. It was no part of his duty to assist in the operation of trains, nor had any conductor of a train authority to direct or employ him to assist in any such work. Neither had he any experience, as brakeman or otherwise, in the operation of trains. On the day of the accident he was sent by his superior officer from the office to a yard about a mile distant, with an order to the conductor of a construction train to bring certain car loads of stone to a place where construction work was going on. Having delivered this message he boarded the construction train for the purpose of riding back to the office. The train consisted of thirty-five cars, six flat cars loaded with stone and twenty-nine empty dump cars. The train was moving easterly, and was made up as follows: At the west end was the engine, with the pilot facing east; then came the dump cars, and then six cars loaded with stone; the engine facing the cars and pushing them, the stone being on the front end of the train as it moved east. The deceased was riding on the rear car of stone next to the dump cars. When the train approached the destination of the stone, the conductor in charge desired to put the six cars of stone upon one track, and the twenty-nine dump cars upon another parallel track, without bringing any portion of the train to a full stop. This was to be done after the cars had attained a sufficient rate of speed, by uncoupling the stone cars, and then reversing the engine, which would check the speed of the dump cars, while the stone cars would continue at the previous rate of speed, and pass the switch, onto the desired track, before the dump cars reached it. To accomplish this the conductor signaled the engineer to 'kick' the train, in obedience to which the latter pushed the train rapidly ahead at the rate of from seven to ten miles an hour. Immediately upon giving this order to the engineer the conductor, as the jury found, ordered Evarts to pull the pin between the stone cars and the dump cars, and, in obedience to this order, Evarts stepped down between the stone car and the dump car next to it and stooped down and pulled the pin. While the evidence is not entirely conclusive on the point, yet it would seem that Evarts, while pulling the pin in this stooping position, stood with one foot on each car. Meanwhile, the conductor had signaled the engineer to reverse his engine. The engineer promptly obeyed. This, of course, suddenly checked the speed of the dump cars with a jerk as the slack between them was taken up. This jerk occurred while Evarts, still partially in a stooping position, was in the act of straightening himself up, holding the pin

in one hand. The consequence was that he was thrown upon the ground and run over by the cars and killed. The evidence is not very clear whether at this time Evarts still had one foot on each car, or, while in the act of straightening himself up he had placed both feet on the end of the dump car. The defendant claims that the evidence shows that the latter was the fact. As we view the case, the question is not one of importance; but we think the jury would have been at least justified by the evidence in finding that, so suddenly did the whole thing occur, Evarts was still substantially in the same position when thrown from the cars as when the conductor signaled the engineer to reverse his engine. The evidence was also ample to justify the jury in finding that the conductor knew Evarts' position when he gave the signal to reverse. In any event there is no assignment of error that raises the question of its sufficiency.

"The negligence charged against defendant is the act of the conductor in signaling the engineer to reverse the engine when, as is claimed, he either knew, or ought to have known, that the result would be to endanger the life of Evarts.

"The theory of the law, and doubtless the correct one, upon which the case was submitted to the jury, was that, as to the acts he was then performing, Evarts was a mere volunteer, and that the defendant owed him no contractual duty as master.

"The learned trial judge, over and over again, in the most explicit manner, instructed the jury that plaintiff could not recover unless the conductor, at the time he gave the signal to reverse the engine, knew, or in the exercise of ordinary care ought to have known, that the giving of the signal 'would result in jerking Evarts from the train;' 'would necessarily produce injury to Evarts;' 'would result in injury to Evarts.'

"This was but another way of saying that plaintiff could not recover, unless, with knowledge that Evarts was in a dangerous position, the conductor, who controlled the movements of the cars, failed to exercise reasonable care to avert the danger. This is the law even as to trespassers. *Hepfel v. St. Paul, M. & M. R'y Co.*, 49 Minn. 263 (1). This duty rests on no contract obligation, but is founded upon the dictates of common humanity, to avoid inflicting a wilful or wanton injury on another. Had Evarts been a mere trespasser, and the conductor had seen him in such a position of danger, it would have been the duty of the conductor to exercise reasonable care to avert it, and, if he failed to do so, the defendant would have been liable. We fail to see why a volunteer should have any less rights than a mere trespasser. Because a man is a

1. The Heppel case relates to an accident to a boy, twelve years old, stealing a ride.

trespasser or a volunteer he is not therefore an outlaw so as to permit others to wilfully or recklessly do him an injury.

"It is no doubt the law, as repeatedly held, that if a person volunteers to assist the servant of another, the master, as such owes him no duty; that he assumes all the ordinary risks incident to the situation; and that he cannot recover from the master for an injury caused by a defect in the instrumentalities used, or by the mere negligence of the servants. *Church v. Chicago, M. & St. P. R'y Co.*, 50 Minn. 218 (1).

"But it seems to us that this is not inconsistent with the further proposition that if, after discovering such volunteer has placed himself in a position of danger, even through his own negligence, the servants fail to exercise reasonable care to avert the danger, the master will be liable. Such must be the law unless, as already suggested, a volunteer occupies a less favorable position than a trespasser. There is nothing in the *CHURCH* case inconsistent with this; and while we have found no case precisely in point, there is nothing inconsistent with it in any of the cases cited by counsel. It is sometimes given as a reason why a master is not liable to a volunteer for the negligence of a servant that a servant cannot by his officious conduct impose a greater duty on the master than that which the latter owes his servant, and that a master is not liable to a servant for the negligence of a fellow-servant. If there is anything in this 'fellow-servant' doctrine that has any bearing on the question, it is at least inapplicable in this State as to railway companies" (2). * * *

1. In *CHURCH v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co.*, 50 Minn. 218 (June, 1892), order of District Court of Ramsey County denying plaintiff's motion for new trial was affirmed. The official syllabus (per opinion by MITCHELL, J.) states the case as follows: "A construction train of defendant, in charge of a conductor, having pulled into a station, the conductor temporarily left the train to attend to his usual duties at the station, leaving the trainmen to do some switching so as to transpose some of the cars; one of the brakemen, called 'head brakeman,' having charge of the switching movements of the train. At the request of that 'head brakeman' the plaintiff, a bystander at the station, got on the cars to assist in the switching, and

while doing so sustained injuries caused by the movement of certain car trucks which were loaded on one of the cars, and which were not properly blocked. *Held*, that the brakeman had no authority to employ additional men to assist in switching. The fact that the existing force might have been insufficient to do the work did not, under the circumstances, give him any implied authority to do so; that, if any one on the ground had such authority, it was the conductor. The plaintiff was a mere volunteer, and assumed all the risks of the situation."

2. *The Minnesota "Fellow-Servant" Act.*—Laws of 1887, c. 13 (G. S. 1894, sec. 2701): "Every railroad corporation owning or ope-

The points decided in the EVARTS case, *supra*, are stated in the official syllabus to the report as follows:

"If a person volunteers to assist the servant of another, the master owes him no contract duty, and he assumes all the ordinary risks incident to the situation, and cannot recover from the master for an injury caused by a defect in the instrumentalities used, or by the mere negligence of the servants.

"But, if, after discovering that such volunteer has placed himself in a position of danger, even through his own negligence, the servants fail to exercise reasonable care to avert the danger, the master will be liable.

"This liability does not rest on any contract obligation, but on the general duty not to inflict a wanton or wilful injury on another. As respects this duty a volunteer cannot occupy a less favorable position than a trespasser."

FUNK, ADM'X, v. ST. PAUL CITY RAILWAY COMPANY.

Supreme Court, Minnesota, June, 1895.

[Reported in 61 Minn. 435.]

STREET RAILWAY—NEGLIGENCE OF FELLOW-SERVANT—RAILROAD—DEFINITION—STATUTE—CONSTRUCTION.—

Laws 1887, c. 13 (G. S. 1894, § 2701), provides that every railroad corporation owning and operating a railroad in this State shall be liable for damages sustained by an agent or servant by reason of the negligence of any other agent or servant. *Held*, that this law is not applicable to a street-railway corporation, although its line is operated by cable (1).

rating a railroad in this State shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of another agent or servant thereof without contributory negligence on his part when sustained within this State * * *."

1. See, also, the following cases arising out of injuries sustained by street-railway employees:

Motorman killed by "bucking of electric car—Railway company liable.—In BEARDSLEY v. MINNEAPOLIS STREET R'Y Co., 54 Minn. 504 (Sep-

tember, 1893), where plaintiff's intestate, a motorman on one of defendant's electric cars, was thrown over the dashboard to the ground in front and run over and killed, caused by the car "bucking" (suddenly coming to a halt, and as suddenly starting up), verdict for plaintiff in the District Court for Hennepin County for \$5,000 was sustained and order denying defendant's motion for new trial affirmed. Opinion by COLLINS, J. *Defective track—Derailment of street car—Motorman injured—Railway liable.*—In HARRIS v. HEWITT

Where the language of a statute is in any manner obscure or of doubtful meaning, we may recur to the history of the time when it was enacted, and seek in that history for the mischief and defect which the statute was intended to remedy; and "when the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view." Potter's Dwar. St. 195, note 13.

Where there are several material issues tried, and the verdict is a general one, it cannot be upheld if the trial court gave the jury an erroneous charge upon any one of the issues.

(Syllabus by the court.)

APPEAL by defendant from an order of the District Court for Ramsey County, denying a motion for a new trial after verdict for plaintiff for \$2,500. The case is stated in the opinion. *Order reversed.*

MUNN, BOYESEN & THYGESON, for appellant.

GEORGE C. LAMBERT and S. P. CROSBY, for respondent.

Buck, J. — A material and difficult question for us to deter-

(RECEIVER OF STILLWATER STREET RAILWAY COMPANY), 64 Minn. 54 (January, 1896), motorman injured by car leaving track owing to a broken rail slipping from its place, order of District Court for Washington County denying defendant's motion for new trial after verdict for plaintiff for \$3,000 (reduced, by consent, to \$1,200), was *affirmed*. The decision is stated in the official syllabus as follows: "The case of *Greene v. Minn. & St. L. R. Co.*, 31 Minn. 248, followed, to the effect that where a servant has knowledge of the defective instrumentality furnished for his use by the employer, and gives him notice thereof, who promises that it shall be remedied, but neglects to do so, and induces the servant to remain in his employ, and who is subsequently injured by reason of such defect within the time fixed when such defect was to be remedied or within which time it might reasonably be remedied, the employer is liable if the instrumentality was not so imminently and immediately dangerous that a man of ordinary pru-

dence would have refused to longer use it, and that the question of contributory negligence by reason of such use by the servant after such notice and promise to repair is not one of law, but of fact, to be settled by the jury." Opinion by BUCK, J.

Track repairer struck by street car — Negligence of motorman — Fellow-servant. — In *LUNDQUIST v. DULUTH STREET R'y Co.*, 65 Minn. 387 (July, 1896), order of District Court for St. Louis County denying plaintiff's motion for new trial was *affirmed*, the official syllabus stating the case as follows: "The defendant, a street railway company, required by its rules that its employees in charge of its cars should give timely warning by proper signals to its employees engaged in track repairing, of the approach of its cars. The plaintiff in reliance on such rules, and while at work repairing the track of the defendant, as its employee, was struck and injured by a car, by the failure of the motorman to give such signals, and by his running the car at a rate of speed prohibited by

mine is whether Laws 1887, c. 13 (G. S. 1894, § 2701), in regard to damages arising by reason of a fellow-servant, is applicable to the case under consideration. That law reads as follows: "Every railroad corporation owning or operating a railroad in this State shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof without contributory negligence on his part when sustained within this State."

The defendant is the St. Paul City Railway Company, and in the complaint it is described as the owner of the Seventh street cable line in the city of St. Paul, which said line of cable railway extends from Wabasha street eastward to a point on Dayton's Bluff in said city, and that the cars and grip cars running thereon are operated by means of a cable, which cable runs in a conduit underneath the tracks of the car line. It is also alleged that the plaintiff's intestate was a plasterer by trade, and employed by the defendant to plaster the inner

law. *Held*, that the plaintiff and the motorman were fellow-servants, and that the defendant is not liable to the plaintiff for his injuries resulting from the negligence of the motorman." Opinion by START, Ch. J.

Conductor of cable car injured — Defective coupling apparatus. — In *DELUDE v. ST. PAUL CITY R'Y CO.*, 55 Minn. 63 (October, 1893), conductor on defendant's cable car injured by leg being caught between cars owing to alleged defective coupling apparatus, order denying defendant's motion for new trial in the District Court for Ramsey County after verdict for plaintiff for \$2,750, was *affirmed*. Opinion by VANDERBURGH, J.

Conductor of street car injured — Defective brake. — In *NEWHART v. ST. PAUL CITY R'Y CO.*, 51 Minn. 42 (August, 1892), conductor of street car injured by alleged defective brake, order of District Court of Ramsey County denying defendant's motion for new trial after verdict for plaintiff for \$1,665, was *affirmed*. DICKINSON, J., stated the facts as follows: "In March, 1888, plaintiff was in the

service of the defendant as a conductor on its street cable line, running on Selby avenue and other streets. He prosecutes this action to recover for an injury which he claims to have received in applying a brake on a passenger coach. The responsibility of the defendant is placed upon an alleged defective condition of the brake of the car. This brake was of a common kind, consisting of 'shoes' which were drawn against the wheels by means of levers beneath the car, connected by a chain to the lower end (beneath the car platform) of an upright brake staff. The upper end of the brake staff was turned in the form of a crank. The power was applied to this crank, the turning of the brake staff on its axis causing the chain to wind up on it until the brake shoe came in contact with the wheels. It is alleged, in substance, that the brake was so defective that the application of ordinary force would not stop the car; that on the occasion here referred to, it becoming necessary for the plaintiff to stop the car, and the usual

walls of the conduit through which the cable runs, and that while so engaged he was killed, solely through the negligence of the defendant. The jury returned a verdict in favor of the plaintiff for the sum of \$2,500, and the defendant appeals.

The defendant is a street railway corporation, but whether it is included in the term "railroad," as used in the law of 1887, is a debatable question. The common understanding of a railroad is that it is a graded road or way on which rails of iron or steel are laid for the wheels of cars to run upon, carrying heavy loads, usually propelled by steam. Railroads in a rude form were in use as early as 1676, but it was not until 1829, when successful experiments in the use of locomotives were made, that they began to be extensively constructed; and it is only within recent years that another class of railroads, namely, those laid down in the streets of towns and cities, have become very numerous. 2 Bouv. Law Dict. tit. "Railroads."

exertion being ineffectual, he put both hands on the handle or crank, pressing also against the same with his breast, exerting his full strength; that the unusual exertion and the resistance thereto by the defective brake produced internal injury and a hemorrhage of the lungs." * * *

Conductor on street car injured—Defective motor.—In *LORIMER v. ST. PAUL CITY R'Y Co.*, 48 Minn. 391 (February, 1892), order refusing defendant new trial, after verdict for plaintiff for \$1,500, was reversed. The Supreme Court (per DICKINSON, J.) stated the facts as follows: "The plaintiff, while acting as a conductor on the defendant's electric street railway, was injured by reason of his foot being caught between the irons by which the electric motor car is coupled to the coach in its rear. This occurred at the end of the road, where the cars are uncoupled and switched from one track to another. Negligence on the part of the man operating the motor car is assigned, in that he backed the car when he should have gone forward. But it was

further alleged that the defendant was chargeable with negligence in providing cars with a defective motive power. The electric motor in use on this car was what is called the 'Sprague motor,' and the only ground of complaint in this particular, as disclosed by the case, is that a device which is designated as a 'resistance coil' was not employed as a part of the electrical apparatus on the car." * * * The rulings of the court are stated in the official syllabus as follows:

"Evidence held insufficient to justify a finding of negligence because of the defendant's failure to adopt and provide on its electric street cars a 'resistance coil,' at a time when, so far as appears, no such device had been discovered or its practical utility demonstrated.

"The Statute of 1887, subjecting railroad companies to liability to their servants for the negligence of fellow-servants, does not change the rule as to the burden of proof of contributory negligence."

Judge Robertson, in *Louisville & P. R. Co. v. Louisville City R. Co.*, 2 Duv. (Ky.) 175, says: "A railroad is for the use of the universal public in the transportation of all persons, baggage and other freight. A street railway is dedicated to the more limited use of the local public for the more transient transportation of persons only, and within the limits of the city. In the technical sense, therefore, a street railway is not a railroad. * * * A 'railroad' and a 'street railroad' or way, are, in both their technical and popular import, as distinct and different things as a road and a street, or as a bridge and a railroad bridge; and it has been authoritatively adjudged that the simple term 'bridge' means a viaduct in a road dedicated to common use, and that the qualified phrase 'railroad bridge' means a viaduct constructed for the exclusive use of railroad transportation." This decision was made in 1865, and involved the construction to be given to a provision in a railroad charter which provided that no other railroad should be constructed between two named points in a city, the court holding that such provision did not prohibit the construction of a street railway between the points named.

Perhaps it may be conceded that, technically speaking, the term "railroad" would include a street railway, so far as its roadbed is made of iron or steel rails for wheels of cars to run upon; but where there is doubt about the true meaning of the word or term used in the law, the legislative intent is not to be determined from that particular expression, but from the general legislation upon the same subject-matter.

It is claimed by the appellant's counsel, and not denied by the counsel for the respondent, and such we believe to be fact, that on February 24, 1887, when the general law of that year was passed, there were no cable or electric street railways in existence in this State. If so, what was the legislative intent in using the word "railroad" in the law of 1887, to be deduced from the whole and every part of the statute taken together, upon the subject of railroads? "When the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view." *Potter's Dwar. St.* 94, note 13. What was the mischief felt which resulted in the passage of this law? Was it a danger known, or one unknown? Was it a danger then felt and realized, or

one that might possibly arise in the future? We must assume that it was dealing with, and acting upon, existing facts within its knowledge. Of course, if the language used was entirely free from ambiguity, and broad enough to include unknown things which might spring into existence in the future, they would be deemed to come within, and be subject to, the evident meaning of the terms used.

Following this line of thought, we quote the case of *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, in which Mr. Justice Miller uses this language: "It does not follow that when a newly invented or discovered thing is called by some familiar word, which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word. * * * The track upon which the steam cars now transport the traveler or his property is called a road, sometimes, perhaps generally a railroad. The term road is applied to it, no doubt, because in some sense it is used for the same purpose that the roads had been used. But until the thing was made and seen, no imagination, even the most fertile, could have pictured it from any previous use of the word road. Some call the inclosure in which passengers travel on a railroad a coach, but it is more like a house than a coach, and is less like a coach than are several other vehicles which are rarely, if ever, called coaches. It does not, therefore, follow that when a word was used in a statute or a contract seventy years since, that it must be held to include everything to which the same word is applied at the present day."

And where the language of a statute is in any manner obscure or of doubtful meaning, we may recur to the history of the time when it was enacted, and seek in that history for the mischief and defect which the statute was intended to remedy. In the case of *United States v. Union Pac. R. Co.*, 91 U. S. 72, the court said: "Courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it." See, also, *Smith v. Townsend*, 148 U. S. 490, 13 Sup. Ct. 634; *Aldridge v. Williams*, 3 How. 924; *Preston v. Browder*, 1 Wheat. 115.

But if we assume that, at the time of the passage of the law of 1887, the history of street cars was generally known, and

gence of a fellow-servant or not. It may be that the jury founded their verdict upon the erroneous instructions of the court that the defendant would be liable for the negligence of a fellow-servant under the law of 1887. There were several issues tried, and where there was such an erroneous instruction in regard to a vital one, it cannot be disregarded by this court upon the ground that possibly the jury might have founded their verdict upon some other issue.

As to whether the defendant was guilty of negligence in operating its railroad we express no opinion. That issue can be determined in the new trial, which must be granted by reason of the erroneous ruling of the court below upon the question we have discussed.

The order appealed from is reversed.

Mitchell, J. — In concurring in the foregoing opinion, my only excuse for adding anything is the importance of the question involved. The question is wholly one of legislative intent. Did the legislature intend to include street railroads within the provisions of the Act?

In its original literal sense the word "railroad" means a road with rails laid on it, upon which the wheels of carriages or vehicles run. In this sense it would, of course, include street railroads. But according to common popular usage the word "railroad" without any qualifying or explanatory prefix, is generally understood as referring exclusively to ordinary commercial railroads, used for the transportation of both passengers and freight, and whenever street railroads are referred to, the word "street" is prefixed. This is also the general legislative use of the words. In all the legislation of this State I have found no Act (unless this be an exception) in which the word "railroad" or "railway" standing alone, was not evidently intended to apply exclusively to ordinary commercial railroads. Neither have I found an Act (unless this be an exception) which had reference to street railroads in which the word "street" was not prefixed. I do not claim that there might not be a law enacted where it would be evident from its subject-matter and object that the word "railroad" was intended to include street railroads. But, in my opinion, this is clearly not such a case.

The occasion for enacting this law was the peculiar risks incident to the operation of railroads, and especially those re-

sulting from the negligence of fellow-servants. The remedy sought to be attained was better protection to railroad employees from these peculiar hazards. The peculiar conditions which were considered to require peculiar legislation for the protection of employees engaged in the operation of railroads are too familiar to require repetition. Generally, it may be stated that the most cogent ones were the high rate of speed at which trains are run, the great momentum acquired by long and heavy trains, where an accident to one car is liable to wreck the entire train; the peculiar dangers incident to the operation of freight trains; that the roads are often built upon high embankments or trestles where an accident would be peculiarly dangerous; the dangers of collisions, owing to the fact that numerous trains are operated over the same tracks; the vast number of employees of different grades, engaged in different lines of work, many of whom are necessarily personally unknown to the others.

The mere fact that steam was used as a motive power was not, in and of itself, either the occasion, or the justification, for the enactment of a law establishing for railroad companies a special rule of liability for the negligence of their servants. If one of these companies was to substitute electricity for steam as its motive power, it would still be subject to the provisions of the act. In the case of street railways, whatever be the motive power, the peculiar conditions above referred to either do not exist at all, or, at most, exist only in a very modified degree. This is a fact of such common knowledge that it need not be more than stated. The question is not whether the legislature had the power to place street railroads in the same class with ordinary commercial railroads, but whether they have in fact done so.

The difference in conditions affecting the risks to which employees are exposed is sufficiently substantial to authorize the legislature to make the law applicable to ordinary commercial railroads alone, and furnishes, in my judgment, ample reason for concluding that they so intended, and that they used the word "railroad" in its ordinary popular sense, and in the sense in which they themselves had generally used it in other statutes.

It may be said that in the case of some short line of railroad, exceptionally situated, the conditions involving dangers

to employees might be exactly similar both in kind and degree to those existing on some lines of street railway. It is difficult to conceive of such a case. But it is a sufficient answer to the suggestion to say that it simply shows that a classification of this sort, like everything else human, cannot be wholly perfect, and that in a class which is marked by substantial characteristics in varying degrees it will often happen that those of one member of a class may scarcely differ at all from those of some members of another class. But the line must be drawn somewhere; and if the difference in conditions generally existing between ordinary commercial railroads and street railroads is substantial, that is all that constitutional rules require as a basis of classification. Neither can I see any middle ground between excluding all street railways from the operation of the Act and including them all, which would be maintainable on principle, or capable of convenient practical application.

MIKKELSON v. TRUESDALE (RECEIVER OF MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY).

Supreme Court, Minnesota, December, 1895.

[Reported in 63 Minn. 137.]

ENGINE WIPER INJURED — EVIDENCE — FELLOW-SERVANT — LIABILITY OF RECEIVER — STATUTE. — Evidence considered, and *held* that the alleged negligence of the respective parties in this case was a question for the jury.

The plaintiff was a wiper in the defendant's roundhouse, and was injured while assisting in coaling an engine, by its being negligently moved, as he claims, by a co-employee. *Held*, that he was injured by reason of exposure to the hazards peculiar to the operation of railroads (1).

Held, further, that a receiver operating a railroad under the appointment and direction of a court of equity is within the provisions of G. S. 1894, § 2701, known as the "Fellow Servant Act," and is liable to an employee who is injured by the negligence of a co-employee.

(Syllabus by the court.)

1. In **RAHMAN v. MINNESOTA & NORTHWESTERN R. R. Co.**, 43 Minn. 42 (February, 1890), "wiper" in roundhouse of defendant while attempting to couple cars as directed by his superior struck by backing locomotive, verdict for plaintiff for \$2,406.25 was sustained and order denying new trial *affirmed*.

APPEAL by defendant from an order of the District Court for Freeborn County granting plaintiff's motion for a new trial. The case is stated in the opinion. *Order affirmed.*

ALBERT E. CLARKE and WILBUR F. BOOTH, for appellant.

JOHN A. LOVELY and HENRY A. MORGAN, for respondent.

Start, Ch. J. — This is an action against the receiver of the Minneapolis & St. Louis Railway Company to recover damages for a personal injury.

The defendant, at the close of the evidence, moved the court to instruct the jury to return a verdict for the defendant, on the grounds: "First. There is no evidence of negligence on the part of the defendant. Second. The injury complained of and alleged to have been sustained by the plaintiff, resulted from the negligence of a fellow-servant of the plaintiff. Third. The plaintiff's own negligence contributed to and caused the injury and accident complained of. Fourth. The service in which the plaintiff was engaged was not of such a character as to make the defendant liable under the statute for an injury resulting from the negligence of a fellow-servant (1)." The

1. See, also, the following cases in which the Minnesota Fellow-Servant Act is passed upon:

Cases within the statute:

In *STEFFENSON v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co.*, 45 Minn. 355 (February, 1891), sectionhand injured by being pushed off hand car, order refusing plaintiff a new trial after verdict for defendant was *reversed*, it being held that "a railroad sectionhand whose duties require the use of a hand car and who is injured through the negligence of a fellow-servant in operating it, may recover from the railroad company." Opinion by GILFILLAN, Ch. J.

A new trial in the *STEFFENSON* case resulted in verdict for plaintiff for \$2,000. Defendant excepted to certain refusals to charge as requested, and also to refusal to grant new trial. The Supreme Court *reversed* the order and granted new trial. See *STEFFENSON v. CHICAGO, M. & ST. P. R'y Co.*, 48 Minn. 285 (February,

1892). According to the complaint, the negligence relied upon to establish plaintiff's cause of action was: 1, in overloading the car at the outset with the sectionmen and their belongings, and in further overloading by taking on another employee later; 2, in the careless and negligent pushing or crowding of plaintiff from the car by the employee at the brake. It was held there was no evidence as to such alleged overloading, and it was error to refuse to so instruct the jury.

In *BLOMQUIST v. GREAT NORTHERN R'y Co.*, 65 Minn. 69 (June, 1896), order of District Court for Hennepin Court sustaining demurrer to complaint was *reversed*, the official syllabus stating the case as follows: "Plaintiff, with others, was employed as a sectionman in repairing defendant's main track, by taking up rails, putting in new ties, and then replacing the rails. The work had to be done with great and extraor-

court granted the motion; and instructed the jury to return a verdict for the defendant upon the ground, as we infer from the record, that the fellow-servant statute of this State did not apply to receivers of railroad corporations, to which instruction the plaintiff excepted, and subsequently moved the court for a new trial, and the defendant appealed from an order granting the plaintiff's motion.

1. The defendant contends that the court erred in granting a new trial, because there was no evidence that the defendant was negligent in the premises, but that the evidence establishes the fact that the plaintiff was guilty of contributory negligence, and therefore its instruction to the jury to return a verdict for the defendant was correct. As we understand the

dinary haste, in order to avoid danger to trains that were, or might be, approaching. While engaged in performing this work with this degree of haste, and while he and another sectionman were carrying a heavy iron rail, plaintiff was injured by his fellow-servant's negligently releasing his hold on the rail and letting it fall. *Held*, that plaintiff's employment involved an element of hazard or danger which contributed to the injury, and which was peculiar to the 'railroad business,' and that, therefore, G. S. 1894, § 2701, making railway companies liable to their servants for the negligence of their fellow-servants, applied." Opinion by MITCHELL, J.

In *LEIER v. MINNESOTA BELT-LINE RAILWAY & TRANSFER CO.*, 63 Minn. 203 (December, 1895), order of District Court for Hennepin County overruling demurrer to complaint, was *affirmed*. The official syllabus states the case as follows: "The plaintiff was employed in defendant's stock yards. When a stock train arrived, his duty was to step from a high platform upon the top of the cars as they drew up opposite the platform, and pull bundles of hay from the platform upon the top of the cars. The conductor of the train

negligently ordered him to step from the platform upon the top of a passing car while it was going at too great a rate of speed to enable him to do so with safety—a fact which was unknown to the plaintiff. Owing to the dangerous rate of speed of the car, plaintiff, while stepping upon it, was thrown to the ground, and his arm run over by the wheels of a car. *Held*, that he was injured by reason of exposure to hazards peculiar to the operation of railroads, and that G. S. 1894, § 2701, making railroad companies liable to their servants for injuries caused by the negligence of their fellow-servants, applied." Opinion by MITCHELL, J.

Cases not within the statute:

In *PEARSON v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.*, 47 Minn. 9 (July, 1891), order refusing plaintiff new trial after dismissal of action in District Court for Hennepin County was *affirmed*. The official syllabus states the case as follows: "A crew of sectionmen, of which plaintiff was one, was engaged in loading railroad iron from the ground upon a flat car, when some of the crew negligently let one of the iron rails fall upon plaintiff's arm. *Held*, that the injury was not the result of

record, the trial court had never passed upon the evidence, so far as it relates to the question of the negligence of the defendant and the contributory negligence of the plaintiff. We have, however, examined the evidence, and are of the opinion that the instruction of the trial court cannot be sustained upon the ground either that there was no evidence tending to establish the negligence of the defendant, or that the evidence shows that the plaintiff was guilty of contributory negligence, and therefore its instruction to the jury to return a verdict for the defendant was correct. As we understand the record, the trial court has never passed upon the evidence, so far as it relates to the question of the negligence of the defendant and the contributory negligence of the plaintiff. We have, however,

any danger peculiar to or directly connected with the use and operation of the railroad, and hence not within the provisions of Laws 1887, c. 13, making railroad companies liable to an employer for injuries caused by the negligence of a co-employee."

Opinion by MITCHELL, J.

IN LAVALLEE, ADM'R, v. ST. PAUL, MINNEAPOLIS & MANITOBA R'Y CO., 40 Minn. 249 (March, 1889), it was held (as per official syllabus) that: "Chapter 13, Laws 1887, making railroad companies liable to an employee for injuries caused by the negligence of a co-employee, applies only to those employees engaged in operating the railroads, and so exposed to the peculiar dangers attending that business." It appeared that plaintiff's intestate "was employed as a boiler-maker's helper in defendant's shops at St. Paul, and was directed by the boilermaker to pick up some rubbish lying near a 'dead' locomotive then standing on a track which ran into the boiler shop. While so engaged, the smokestack of the locomotive (which two men were engaged in removing) fell upon him, inflicting the injuries of which he died. At the close of the plaintiff's testimony, the action was dismissed, on defendant's motion, on the ground that the negli-

gence, if any, which occasioned the accident was that of the decedent's fellow-servants, and that the case was not within Laws 1887, c. 13. A motion for a new trial was denied, and the plaintiff appealed." Order *affirmed*.

IN JOHNSON v. ST. PAUL & DULUTH R. R. CO., 43 Minn. 222 (April, 1890), appeal by plaintiff from dismissal of action and order refusing new trial, the order of the trial court was *affirmed*. The syllabus by the Supreme Court (opinion by MITCHELL, J.) states the case as follows:

"Held (following Lavallee v. St. Paul, M. & M. R'y Co., 40 Minn. 249) that Laws 1887, c. 13, applies only to employees of railway corporations exposed to the peculiar hazards connected with the use and operation of the road.

"A crew of men, of which plaintiff was one, was engaged in repairing a bridge on defendant's road, and in performing the work it was necessary to leave the draw partly open. Through the negligence of one of the crew, the draw was left unfastened, and was blown shut by the wind, and injured the plaintiff while at work between the stationary part of the bridge and draw. *Held*, that defendant was not liable."

examined the evidence, and are of the opinion that the instruction of the trial court cannot be sustained upon the ground either that there was no evidence tending to establish the negligence of the defendant, or that the evidence shows that the plaintiff was guilty of contributory negligence. So far as these questions are concerned, the evidence is such as to require their submission to the jury.

2. It is further claimed by defendant that the plaintiff was not injured while engaged in the operation of a railroad, or by any hazards incident to such operation. The plaintiff was a wiper, whose duty it was to keep the engines at the roundhouse clean and to assist the "hostler" whose duty it was to take the engines in and out of the roundhouse, and take them to the coal shed for coal. The plaintiff was injured while assisting in the coaling of an engine, by its being negligently moved, as he claims, by the hostler. If his claim is correct, he was injured by reason of exposure to the hazards peculiar to the operation of railroads. *Nichols v. Chicago, M. & St. P. R. Co.*, 60 Minn. 319, 62 N. W. 386 (1).

3. The last claim of the defendant is that the employees of a receiver temporarily operating a railroad are not within the protection of the fellow-servant statute of this State (G. S. 1894, § 2701), which reads as follows: "Every railroad corporation owning or operating a railroad in this State shall be liable for all damages sustained by an agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained within this State, and no contract, rule, or regulation

1. In *NICHOLS v. CHICAGO, MILWAUKEE & ST. PAUL R'Y Co.*, 60 Minn. 319 (February, 1895), order denying plaintiff new trial after verdict directed for defendant, was *reversed*, the official syllabus (as per opinion by CANTY, J.), stating the case as follows: "The plaintiff was employed by the defendant railroad company as a wiper in its roundhouse, and was called by the foreman to assist in straightening a wire cable used to pull a plow in unloading gravel from flat cars in repairing the road. The cable was being pulled by a locomotive engine, to which one

end of it was attached, while the other end was attached to a fixed object. The cable caught on the end of a tie, and became taut. A fellow-servant pulled it off the end of the tie, when it swung with great force against plaintiff, and broke his leg. *Held*, the plaintiff was injured by reason of exposure to hazards peculiar to the repair and operation of railroads, and under Laws 1887, c. 13, the railroad company is liable for the negligence of its other servants, if plaintiff was injured by reason of such negligence."

between such corporation and any agent or servant shall impair or diminish such liability." * * *

It is true that the word "receiver" is not used in this statute, and that its language is, "every railroad corporation owning or operating a railroad;" but the statute is a police regulation intended to protect life, person, and property, by securing a more careful selection of servants and a more rigid enforcement of their duties by railroad companies, by making them pecuniarily responsible to those of their servants who are injured by the negligence of incompetent or careless fellow-servants. It is remedial in its nature, and must be construed, if not liberally, certainly in accordance with its obvious purpose and spirit. It would be a most unreasonable construction of the statute, if we were to adopt the one claimed for it by the defendant. We are aware that able courts have adopted such a construction of similar statutes, but we are of the opinion that they have taken a narrow view of the statute, and we must decline to follow their conclusions.

If this police regulation does not apply to receivers of railroad corporations, it is difficult to see why such receivers are not absolved from a compliance with each and all of the police regulations made applicable by statute to railroad corporations. Can it be true that a railroad corporation whose road is operated for it by a general manager is, and one whose road is managed for it by a receiver is not, subject to the police regulations of the State? or that the employees of the one have, and those of the other have not, a remedy, when injured by the negligence of a fellow-servant? or that the employees of a corporation whose road is operated by a general manager to-day have such remedy, but if injured to-morrow they will have it not, because a receiver has taken the place of the manager? It would seem that an affirmative answer must be given to these questions, if we held that this statute has no application to receivers of railway corporations.

Manifestly, such is not the fair and reasonable construction to be given to the statute. It is only in a technical sense that a receiver manages a railroad for the court appointing him. He operates it subject to the discretion of the court, not for its benefit, but for the owners of the road — the corporation and its creditors. In doing so he necessarily exercises the franchises, rights and powers of the corporation, and discharges

its functions as a common carrier, and appropriates the income received from the operation of the road for the benefit of the corporation; and it logically follows that in so operating the road the receiver stands, in respect to duty and liability, just where the corporation would if it was operating the road.

A distinction in this respect has been made between the common-law duties and liabilities of the corporation and those imposed on it by statute, but there can be no distinction in principle, for wherein is the duty and liability more imperative or sacred in the one case than in the other? A receiver cannot, while exercising the franchises and powers of a corporation, claim immunity from the police regulations and liabilities which have been imposed upon the corporation by the State.

These general considerations lead to the conclusion that the provisions of the fellow-servant statute, here in question, apply to a receiver operating a railroad under the appointment and direction of the court.

Order affirmed.

EMPLOYEE OF ANOTHER COMPANY INJURED BY DEFECTIVE LADDER ON FREIGHT CAR. — In **SAWYER v. MINNEAPOLIS & ST. LOUIS R'Y CO.**, 38 Minn. 103 (*January, 1888*), plaintiff injured by defective step-ladder on one of defendant's freight cars, order granting defendant new trial after verdict for plaintiff for \$8,000 was *affirmed*. The official syllabus states the case as follows: "The plaintiff was injured in consequence of a defective step-ladder on one of defendant's freight cars. He was not at the time in the service of the defendant, but of another company, which was then using the car in its own business. The car had been sent over the road of the latter company, which connects with that of the defendant, consigned to a point in another State; but, on its return, it was transferred beyond the point of junction at which it should have been returned to defendant, and was loaded with freight consigned to a distant point on such connecting road. *Held*, that the defendant owed no duty to the plaintiff in respect to the condition of the car growing out of contract or otherwise, and that this action cannot be maintained."

SWITCHMAN OF ONE RAILROAD COMPANY STRUCK BY ENGINE OF ANOTHER COMPANY — ADJOINING TRACKS. — In **JORDAN v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y CO.**, 58 Minn. 8 (*June, 1894*), it was held that "the rule that one who attempts to cross or places himself upon a railroad

track without looking and listening, when, by so doing, he may discover the danger from an approaching train, is guilty of negligence *per se*, does not apply to the case of one who is employed in a railroad yard, and whose duties frequently make it necessary for him to go upon the tracks." *Held*, also, that "where, in a railroad yard, there are tracks of several companies, and the employees in the yard of one company are accustomed to go, in performing their duties, upon the track of another, the jury may find a license from the latter to do so." The plaintiff's intestate, Jordan, was a switchman in the employ of the Wisconsin Central Railroad Company in its railroad yard, the defendant company also having a parallel track to that company, and while engaged in his duties, having stepped upon defendant's track, was struck by one of the defendant's engines, and died from the injuries. The administrator, the plaintiff, brought action, and the District Court of Ramsey county ruled that no actionable negligence was shown, and that the deceased was guilty of contributory negligence, but granted plaintiff new trial on the ground that there was evidence on the question of negligence to go to the jury. Defendant appealed from the order, but the order was *affirmed* by the Supreme Court.

EMPLOYEE OF STEAMBOAT COMPANY CAUGHT BETWEEN LANDING STAGING AND UNCOUPLED CAR — RAILROAD COMPANY LIABLE. — In **CARROLL v. MINNESOTA VALLEY R. R. CO.**, 14 Minn. 57 (*January, 1869*), judgment for plaintiff in the Common Pleas for Ramsey county for \$1,500 was *affirmed*. Plaintiff was an employee of the N. W. U. Packet Company, on the steamboat Mollie Mohler, which was engaged in carrying freight and passengers on the Minnesota river. BERRY, J., in his opinion, said: "It is undisputed that the boat Mollie Mohler, on which the plaintiff was employed as carpenter, was moored alongside of a side track of the defendant's railroad to receive and discharge passengers and freight, and that for that purpose its staging was run out over the side track; that there was a loose box car on the track below the staging, and an engine, tender, and two box cars in a train on the track above the staging; that the train came down the side track within a few feet of the staging, and then ran up the track a short distance and stopped; that it came down a second time and struck the staging and shoved it against the car below; that the train then ran up the track again a short distance and stopped, and that while so running up the hindmost car of the train uncoupled and stood upon the track eight or ten feet above the staging; that the plaintiff then went upon the track for the purpose of removing the staging, and while standing upon the track with his back to the train, engaged in attempting to

remove the staging, the train came down a third time, the uncoupled car struck the staging, and the plaintiff was caught between the car and the staging and severely injured." * * *

See, also, former decision in the CARROLL case, 13 Minn. 30, where defendant was awarded a new trial.

CONTRACTOR'S SERVANT WORKING ON RAILROAD TRACK STRUCK BY PASSING TRAIN — SIGNAL — RAILROAD COMPANY LIABLE. — In **ERICKSON v. ST. PAUL & DULUTH R. R. CO.**, 41 Minn. 500 (*October, 1889*), order refusing defendant new trial after verdict for plaintiff for \$6,000 (in the District Court for St. Louis county), was *affirmed*. The opinion was rendered by MITCHELL, J., and the case is stated in the official syllabus as follows:

"The plaintiff and others were lawfully, and with defendant's knowledge, engaged in grading for a new railway track alongside of and parallel to defendant's original or main track. The ordinary duties of the work frequently required them to be in such close proximity to defendant's original track as to be liable to be struck by passing trains. It had been the uniform practice of those operating trains on the railroad to give these workmen warning of their approach by signals. *Held*, that the defendant owed the workmen the duty of active vigilance in giving them proper signals of the approach of trains, and that they had, under the circumstances, the right to rely on the continued performance of this duty, without the necessity, while engrossed in their work, of themselves keeping a constant lookout for approaching trains. The duty of defendant in this respect would be the same whether the workmen were in its employment or that of its contractor.

"It would not ordinarily be the duty of those operating a train to stop it or slack its speed, provided they gave the proper signals. They would have a right to presume that the workmen would heed the warning and remove from the place of danger. But if the trainmen saw that they did not hear the signals, and were making no effort to escape, it would then be their duty to stop the train, if there was still time to do so, before injuring them."

SERVANT OF THIRD PARTY INJURED WHILE BLASTING ROCK WITH RAILROAD EMPLOYEE — FELLOW-SERVANT. — In **CORNEILSON v. EASTERN RAILWAY COMPANY OF MINNESOTA**, 50 Minn. 23 (*May, 1892*), the official syllabus states the case as follows: "The plaintiff, a servant of a third party, was engaged, under the direction of a servant of the defendant, in blasting rock. The two men pursued a method of withdrawing from the rock an unexploded charge of powder, which

method proved to be dangerous. The two men worked together in this operation. *Held*, that the defendant was not responsible to the plaintiff for injury suffered by him upon the ground that the act was dangerous." *Held*, also, that the two men were fellow-servants. Verdict directed for defendant in the District Court for Pine county was sustained, and order denying plaintiff's motion for new trial *affirmed*.

SIDE TRACKS TO PLANING MILLS, ETC. — EMPLOYEES OF MILLS INJURED BY CARS — RAILROAD LIABLE. — In **MARK, Adm'r, v. ST. PAUL, MINNEAPOLIS & MANITOBA R'Y CO.**, 30 Minn. 493 (*June, 1883*), new trial was granted to plaintiff. Plaintiff's intestate was employed in a planing mill. Defendant had laid a side track to the mill and a furniture factory to receive and deliver furniture and lumber from the factory and mill. The cars were "kicked" on the side track from the main track. While on the track plaintiff's intestate was struck and killed by a "kicked" car which was sent in on the track at an unusual speed — as high as nine miles an hour. The question of negligence of the parties was for the jury. *Held*, that the charge on contributory negligence was erroneous. The ruling (as per official syllabus) is as follows: "Where one, without his own fault, is, through the negligence of another, put in such apparent peril as to cause in him terror, loss of self-possession, and bewilderment, and, as a natural result thereof, he, in attempting to escape, puts himself in a more dangerous position and is injured, the putting himself in such more dangerous position is not, in law, contributory negligence that will prevent him recovering for the injury." Opinion by GILFILLAN, Ch. J.

In **JACOBSON, Adm'r, v. ST. PAUL & DULUTH R. R. CO.**, 41 Minn. 206 (*July, 1889*), order of District Court for Carlton county refusing defendant new trial after verdict for plaintiff for \$5,000 was *affirmed*. Plaintiff's intestate was engaged in loading a box car of defendant with lumber, on a side track, in front of a planing mill in the yard of his employer, when one of defendant's engines struck a loaded car, which it tried to couple, with such force as to drive it against the decedent's car, setting that in motion and crushing him under the wheels. Defendant held liable for engineer's carelessness.

Side track to brick yard.

In **ILTIS, Adm'r, v. CHICAGO, MILWAUKEE & ST. PAUL R'Y CO.**, 40 Minn. 273 (*March, 1889*), laborer employed in brick yard engaged in pushing cars on a spur or side track in said yard fatally injured by being caught and crushed between cars, caused by

alleged negligence of defendant's employees in charge of switching the cars in said yard, order of District Court for Carver county refusing defendant new trial after verdict of \$2,000 for plaintiff *affirmed*. Opinion by COLLINS, J.

Side track to coal house.

In **DEISEN, Adm'r, v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y CO.**, 43 Minn. 454 (*June, 1890*), laborer engaged in unloading coal from a flat car on side track to a coal house, run over and killed, order refusing defendant new trial, after verdict in the District Court for Jackson county in favor of plaintiff for \$3,500, was *affirmed*. Opinion by MITCHELL, J. "On the day the deceased was killed he was engaged in unloading coal into a coal house out of a flat car which had been run by defendant on one of its side tracks opposite a coal house, for the express purpose of enabling the owner of the coal to unload it. Defendant's station agent knew that the deceased was engaged in that work. There were on the same side track, and east of the coal car, several box cars, notably one large one attached to the flat car, which would prevent a person on the coal car from seeing cars approaching from that direction. In this condition of things an engine from a freight train was run in from the main track upon this side track, and from the east, for the purpose of getting out some empty box cars. It struck and set in motion the cars east of the coal car, which in turn struck and set in motion the coal car, the wheels of which ran over and killed the deceased." * * *

ASSAULT BY PHYSICIAN IN EMPLOY OF RAILROAD COMPANY — SCOPE OF EMPLOYMENT — RAILROAD NOT LIABLE. — In **CAMPBELL v. NORTHERN PACIFIC R. R. CO. et al.**, 51 Minn. 193 (*December, 1892*), order of District Court of Crow Wing county overruling demurrers to the complaint was *reversed*. The official syllabus states the case as follows: "Where a physician and surgeon employed by a railway company to attend to sick and injured persons committed to his charge is alleged to have wilfully and maliciously assaulted an assistant, it is presumptively an independent tort, for which the master is not liable, and a bare statement or allegation that it was done in the course of his employment, and while in the discharge of his duty, is insufficient, by itself, to charge the master with liability."

RAILROAD COMPANY NOT LIABLE FOR FIRE NEGLIGENTLY SET BY SECTIONMEN — SCOPE OF EMPLOYMENT. — In **MORIER v. ST. PAUL, MINNEAPOLIS & MANITOBA R'Y CO.**, 31 Minn. 351 (*January, 1884*), order of District Court for

Polk county refusing defendant new trial was *reversed*, the case being stated in the syllabus to the report as follows: "Sectionmen, under the charge of a section foreman, were in the employment of a railroad company in repairing its railroad track. Their work being, on the day in question, distant from their boarding house, they carried their dinner with them. When they quit work at noon to eat it they kindled a fire on the company's right of way, for the purpose of warming their coffee. After eating they resumed work, negligently leaving the fire unextinguished, which subsequently spread and ran on to plaintiff's land and destroyed his property. There was no evidence that the company was boarding these men, or that it was any part of its duty to prepare their meals, or that the company either knew of or authorized the kindling of a fire for any such purpose. Nor was there any evidence that these section men had any supervision over the right of way, or that it was any part of their duty to extinguish fires that might be ignited thereon. *Held*, that the railroad company was not liable; that, in kindling this fire to warm their meal, the men were not acting in the course of or within the scope of their employment in connection with the company's business, but, for the time being, were acting for themselves and as their own masters, and exclusively pursuing their own ends; and hence the act was their own personal act and not that of the company. Neither was it material that the section foreman assisted in or directed the act. In doing so he was as much his own master and doing his own business as were the sectionmen." Opinion by MITCHELL, J.

NOTES OF MINNESOTA CASES ARISING OUT OF INJURIES TO EMPLOYEES IN SERVICE OF RAILROAD COMPANIES.

1. Brakemen.

- a. COUPLING CARS.
- b. DEFECTIVE APPLIANCE.
- c. DEFECTIVE TRACK.
- d. FALLING BETWEEN CARS.

2. Car repairer.

3. Conductors.

4. Engineers.

5. Section and trackhands.

- a. HAND CAR ACCIDENTS.
- b. STRUCK BY TRAINS.

6. Mechanics, etc.

7. Laborers.

- a. DEFECTIVE APPLIANCE.
- b. TRAINS.
- c. MISCELLANEOUS.

Among the numerous Minnesota Railroad cases relating to injuries to employees, not reported elsewhere in this volume of AM. NEG. CAS., are the following:

I. Brakemen injured.

a. COUPLING CARS.

Brakeman injured by drawhead of car.

In *STEWART v. ST. PAUL, MINNEAPOLIS & MANITOBA R'y Co.*, 43 Minn. 268 (May, 1890), brakeman's hand injured by the drawheads of a caboose as he was attempting to couple cars, verdict for plaintiff for \$2,000 was sustained, and order refusing new trial was *affirmed*.

Brakeman coupling cars injured by defective drawhead.

In *McKNIGHT v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co.*, 44 Minn. 141 (July, 1890), where plaintiff, a brakeman on one of defendant's freight trains, while coupling a locomotive to a stock car, had his hand caught between the draught-iron on the car and that on the locomotive, order denying defendant new trial, after verdict for plaintiff in the District Court for Mower County, for \$300, was *affirmed*.

Brakeman uncoupling engine from train injured by collision between detached parts of train which broke in two.

In *WOOD v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'y Co.*, 66 Minn. 49 (September, 1896), the official syllabus states the case as follows: "The plaintiff, a brakeman on one of defendant's freight trains, while engaged in attempting to uncouple the engine from the train while in motion, was injured by reason of the train breaking in two, and a subsequent collision between the detached parts. *Held*, that under the evidence it was a question for the jury whether the "swingman," who was on top of the car next the engine, exercised reasonable care in watching the rear of the train and in keeping a lookout in that direction for signals from the conductor." Opinion by MITCHELL, J. Order denying plaintiff new trial in the District Court for Ramsey County *reversed*.

b. DEFECTIVE COUPLING APPLIANCES.

Yard brakeman killed — Defective brakestaff on flat car — Assumption of risk.

In *KELLEY, ADM'X, v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'y Co.*, 35 Minn. 490 (September, 1886), judgment of dismissal of action in District Court for Hennepin County was *affirmed*. The official syllabus states the case as follows: "The plaintiff was a yard brakeman, whose business and employment it was, among other things, to handle disabled cars which had been withdrawn from ordinary service, and removed to what was known as the repair track. *Held*, upon the facts of the case, that he must be taken to have assumed the risks of handling such cars arising from their disabled condition, as also the risk of the negligence of his fellow-servants in handling the same." The brakestaff of the flat car which plaintiff's intestate attempted to board gave way, and he fell and the car ran over and killed him. The ruling in *Fraker v. St. Paul, Minn. & M. R'y Co.*, 32 Minn. 54, was followed.

Defective flat car — Yard brakeman injured — Assumption of risk.

FRAKER v. ST. PAUL, MINNEAPOLIS & MANITOBA R'y Co., 32 Minn. 54 (April, 1884), seems to have been a case arising out of a similar accident as in the **KELLEY** case (preceding paragraph), and an order refusing defendant new trial after verdict for plaintiff for \$1,000 was *reversed*, on the ground of assumption of risk of fellow-servant's negligence, etc. Fraker was a brakeman in defendant's yard, and was engaged in moving cars, including damaged or broken cars, to be transferred to repair track. While removing a damaged car, and in the act of uncoupling it from an engine, his hand was injured by alleged defective coupling apparatus. He was working with others, under direction of foreman who was subject to orders of yardmaster and division superintendent.

Run over in railroad yard — Defective brakes on car.

In **GOLTZ v. WINONA & ST. PETER R. R. Co.**, 22 Minn. 55 (July, 1875), where an employee engaged in repairing cars in defendant's yard was run over by a car caused by alleged defective brakes, etc., order refusing plaintiff a new trial after verdict for defendant, was *affirmed*. The trial court, among other things, instructed the jury that there was a distinction between, 1, negligence of plaintiff himself—that is to say, acts of omission or commission on his part, independent of defendant's negligence—and, 2, conduct of the plaintiff in exposing himself to, and failure to avoid, the known risks and dangers of defendant's negligence, without objection, and without being induced by defendant to believe that its negligence would be remedied; that the *former* was *contributory* negligence; and the *latter* was a waiver by plaintiff of any right to hold defendant responsible for the consequences of negligence to which plaintiff had voluntarily and knowingly exposed himself. The jury found a general verdict for defendant, and, in answer to specific questions, found that defendant was guilty of negligence which produced the injury to plaintiff, and that plaintiff was not guilty of any negligence, or want of ordinary care, which "contributed to produce" such injury. The Supreme Court held that these special findings were not inconsistent with the general verdict, in view of the distinction drawn by the trial court, in its charge, between contributory negligence and waiver.

*c. DEFECTIVE TRACK.**Killed while coupling cars in railroad yard — Unprotected frogs.*

In **SHERMAN, ADM'X, v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co.**, 34 Minn. 259 (November, 1885), employee in railroad yard engaged in coupling cars, killed by reason of frog or space between main rail and guard rail not being properly protected, the order of District Court for Freeborn County refusing defendant new trial, after verdict for plaintiff, was *affirmed*.

Defective track — Brakeman coupling cars fatally injured.

In **FRANKLIN, ADM'R, v. WINONA & ST. PETER R. R. Co.**, 37 Minn. 409 (November, 1887), brakeman falling into open and uncovered spaces between the ties over a culvert while making a coupling, and fatally injured, order refusing defendant new trial, after verdict for plaintiff for \$1,500 was *affirmed*, the defendant being liable for the neglect of its duty to cover the culverts.

Brakeman coupling cars falling through opening in trestlework — Assumption of risk.

In *WOODS v. ST. PAUL & DULUTH R. R. Co.*, 39 Minn. 435 (November, 1888), brakeman injured while coupling cars of coal train which, after being detached and passed over scales and weighed, were "kicked" onto track beyond the scales which was built upon a platform and trestlework upon a descending grade. Judgment of dismissal of action in District Court for Hennepin County was *affirmed*, on the ground of assumption of risk. It appeared from plaintiff's testimony that at the time of the injury complained of he was proceeding as usual behind the last car, preparing to couple the succeeding one, when he observed one coming from the scales more rapidly than usual; and he turned back to get out of the way, and in doing so fell through the opening in the trestlework, and was overtaken by the car and dragged along several feet, and in the emergency he put out his hand to save himself, and it was caught and injured between the cars. He was used to the business, but was working in that place for the first time that day, and had been so engaged two or three hours." * * *

Gravel train derailed — Defective track — Brakeman injured.

In *MADDEN v. MINNEAPOLIS & ST. LOUIS R'y Co.*, 32 Minn. 203 (July, 1884), order of District Court for Waseca County refusing defendant new trial was *affirmed*, the official syllabus stating the case as follows: 'The road of the defendant having got into bad condition, it was engaged in general repairs of the same by resurfacing and taking up the old and putting down new ties and rails. Plaintiff was in its employment as brakeman on a gravel train engaged in drawing gravel for the purpose of such resurfacing, and while so employed was injured by a car, on which he was acting as brakeman, running off the track in consequence of its bad condition. *Held*, that the rule that it is the duty of a master to use care and skill to furnish his servants safe and suitable instruments and means to perform the service in which they were engaged, applies to the case. In that regard the duty of the master and assumption of risk by the servant are the same in case of employment to make repairs as in any other employment.'

d. FALLING BETWEEN CARS.

Brakeman stepping on slippery ties on freight car and falling between cars.

In *ROGERS v. TRUESDALE* (Receiver of Minneapolis and St. Louis R'y Co., 57 Minn.⁴ 126 (April, 1894), appeal by defendant from order of District Court of Waseca County overruling demurrer to complaint in action by plaintiff for damages for negligent killing of her husband, a brakeman in defendant's employ, who while attending to his duties stepped upon some slippery ties loaded on freight car and fell between the cars and was run over, the order of the District Court was *affirmed*.

2. Car repairer injured.

Working under car — Fellow-servant's negligence.

In *OLESON, ADM'X, v. CHICAGO, BURLINGTON & NORTHERN R'y Co.*, 38 Minn. 412 (May, 1888), car repairer fatally injured by cars backing in upon the

track and against the car under which he was working, order granting defendant a new trial was *affirmed*, because of error in a refusal of the trial court to charge the jury according to a request of the defendant, namely: "If you find that Oleson and Wilson were working together, and were instructed that one should keep watch to warn the other, then it was contributory negligence for them both to go under the car together, and if you find that, having been so instructed, they were both under the car together, then plaintiff cannot recover." The evidence warranted such an instruction.

3. Conductors injured.

Conductor of freight train injured coupling cars — Defective apparatus.

In *LE CLAIR v. FIRST DIVISION OF THE ST. PAUL & PACIFIC R. R. Co.*, 20 Minn. 9 (April Term, 1873), order of District Court for Ramsey County denying defendant's motion for new trial, after verdict for plaintiff for \$6,500, was *affirmed*. Plaintiff was injured by being crushed between a tender and a car which he was attempting to couple together, the negligence charged being defective coupling apparatus. The court (per RIPLEY, Ch. J.) discussed the case and points at length. Exceptions to the general rule that one servant cannot recover from master for injuries caused by negligence of fellow-servant are, where master is at fault in not employing safe and competent servants, and where the master is at fault in employing defective machinery.

Conductor killed in collision — Train breaking apart.

In *RANSIER, ADM'X, v. MINNEAPOLIS & ST. LOUIS R'y Co.*, 32 Minn. 331 (July, 1884), verdict for plaintiff in the District Court for Ramsey County for \$5,000 was sustained and order denying defendant new trial *affirmed*. It appeared that "in the operation of a freight train in the night, the train broke apart, and the forward part of the train, being afterwards stopped, was run into by the detached rear cars, including the caboose, and the conductor (plaintiff's intestate), who was in the caboose, was killed by the collision.

Conductor run over and killed in railroad yard — Defective track.

In *WILSON, ADM'X, v. WINONA & ST. PETER R. R. Co.*, 37 Minn. 326 (July, 1887), conductor engaged in switching and making up trains in defendant's yard, run over and killed, order granting new trial, after dismissal of plaintiff's action, was *reversed*, the syllabus by the court stating the case as follows: "Where the foreman or yardmaster, who had charge of the switching of cars and the making up of trains in the yard of a railroad company, was familiar with the situation of the tracks in the yard, and knew that a certain 'frog' was not properly blocked or filled, and was unsafe and dangerous to persons engaged in switching cars: *Held*, that he took upon himself the risk of its condition as incident to his employment."

4. Engineers injured.

Engineer injured in collision — Station agent and engineer fellow-servants.

In *BROWN v. MINNEAPOLIS & ST. LOUIS R'y Co.*, 31 Minn. 553 (March, 1884), where plaintiff, while running defendant's passenger train, was injured

by his engine (without apparent fault on his part) running into some box cars standing upon the main track at a station, order denying plaintiff new trial in the District Court for Hennepin County was *affirmed*. Opinion by BERRY, J. The official syllabus states the ruling as follows: "In the absence of controlling evidence to the contrary, an ordinary railway station agent is presumed to have general charge of the tracks in and about his station. As respects such charge he is the fellow-servant of an engineer engaged in running a locomotive upon any of such tracks, and hence the common master of the two is not responsible to the engineer for injury which he may receive in consequence of the negligence of the station agent as respects the charge of such tracks."

Baggage-master and switch-tender fellow-servants.

In ROBERTS, ADM'X, v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y Co., 33 Minn. 218 (February, 1885), where train was derailed in consequence of a misplaced switch and baggage-master was killed, order denying plaintiff's motion for new trial in the District Court for Ramsey County was *affirmed*. It was held that: "A baggage-master on a passenger train and a switch-tender were fellow-servants, within the rule exempting the master from liability for an injury resulting to one servant from the negligence of another while engaged in the common service; following *Brown v. Minn. & St. L. R'y Co.*, 31 Minn. 553" (see preceding paragraph).

Engineer injured in collision — Attempting to escape — Defective engine.

In GREENE v. MINNEAPOLIS & ST. LOUIS R'Y Co., 31 Minn. 248 (November, 1883), where plaintiff, an engineer upon defendant's freight train, collided with another train, and, in attempting to escape, was caught between the engine and the tender, the defects in the "chafing irons" causing the engine to override the tender, and close up the gangway through which he was attempting to escape, order denying defendant new trial in the District Court for Freeborn County, after verdict for plaintiff for \$5,900, was *affirmed*. The court also sustained verdict for \$75 for plaintiff for injury sustained in another collision, at another time, the accident being caused by the gross negligence and recklessness of defendant's superintendent in ordering the movement of trains in disregard of orders of train dispatcher.

Defective rail on locomotive — Engineer injured.

In ROGERS v. CHICAGO GREAT WESTERN R'Y Co., 65 Minn. 308 (June, 1896), engineer injured by falling from engine caused by defective railing on left side of locomotive, his left knee being injured, verdict for plaintiff for \$3,000 in the District Court for Ramsey County was sustained, and order denying defendant new trial was *affirmed*.

5. Section and trackhands injured.

a. HAND CAR ACCIDENTS.

Collision between hand car and train — Trackhand killed — Headlight of engine not lighted — Negligence of fellow-servant.

In COLLINS, ADM'X, v. ST. PAUL & SIOUX CITY R. R. Co., 30 Minn. 31 (November, 1882), track repairer riding on hand car after nightfall fatally injured

by train running into hand car, the headlight on engine not being lighted, dismissal of action and order denying new trial was *affirmed*, the negligence being that of a fellow-servant who failed to light the headlight.

Sectionman injured by engine striking hand car.

In *BRITTON v. NORTHERN PACIFIC R. R. Co.*, 47 Minn. 340 (November, 1891), sectionman while engaged with others, under direction of foreman, in pushing hand car off track in order to avoid collision, injured by moving engine striking the car, knocking it several feet, and striking plaintiff on his body, judgment for plaintiff in the District Court for St. Louis County for \$750 was *affirmed*.

Sectionhand removing hand car struck by engine.

In *SMITH v. ST. PAUL & DULUTH R. R. Co.*, 51 Minn. 86 (August, 1892), sectionhand, a minor employee, while attempting to remove hand car from track, under direction of foreman, struck by engine, order denying plaintiff new trial after verdict for defendant in the District Court for Hennepin County, was *affirmed*.

The first trial of the *SMITH* case resulted in verdict for plaintiff for \$4,000, but a new trial was granted which, on appeal, was *affirmed*. See 44 Minn. 17.

Collision between hand car and freight train — Sectionhand injured.

In *SLETTE v. GREAT NORTHERN R'y Co.*, 53 Minn. 341 (May, 1893), sectionman riding on hand car injured in collision with freight train, the plaintiff being struck by the car as he and his foreman were trying to take the car off the track before the engine struck it, and his leg was broken, order denying defendant's motion for new trial after verdict rendered for plaintiff in the District Court of Yellow Medicine County, was reversed on ground of excessive damages. The verdict was for \$4,100, the injury being only a transverse fracture of the thigh bone. Plaintiff was thirty years old at the time of the injury, earning \$35 a month, and the evidence did not show that his future earning capacity would be much, if any, impaired. Later the order was modified to the extent that if plaintiff should file consent that verdict and judgment be reduced to \$2,100, the order denying new trial should stand and be *affirmed*.

Defective handle on hand car — Sectionhand thrown from car and run over.

In *ANDERSON v. MINNESOTA & NORTHWESTERN R. R. Co.*, 39 Minn. 523 (December, 1888), sectionhand injured by defective appliance on hand car, verdict for plaintiff for \$1,750 in the District Court for Dodge County was sustained and order denying new trial *affirmed*. Opinion by VANDERBURGH, J., who stated the facts as follows: "The plaintiff was in the employ of the defendant, and was one of a gang of sectionmen, seven or eight in number, including their foreman. They had charge of a hand car, which they used to transport themselves and their tools to and from different points on the section of the railroad upon which they worked. At the time of the injury complained of, they were returning on the car from their work, and the men were all engaged in operating it — three on one side, and four, including the plaintiff, on the other. The car was moving up grade, and against the

wind, and it required vigorous exertion to drive it forward. While so working under the direction of the foreman, that portion of the wooden handle which plaintiff held parted at the iron clasp or ring through which it passed to work the levers operating the car, and he was suddenly precipitated forward on the track, and was run over and seriously injured.

b. SECTIONHANDS STRUCK BY TRAINS.

Section or trackhand killed by backing train—Negligence of fellow-servant.

In *CONNELLY, ADM'R, v. MINNEAPOLIS EASTERN R'Y Co.*, 38 Minn. 80 (December, 1887), section or trackhand struck by backing train and fatally injured, order refusing new trial on dismissal of action was *affirmed*, the injury being caused by the negligence of a fellow-servant. An engineer or brakeman of a train and a sectionhand or trackman held to be fellow-servants.

Sectionman run over—Assumption of risk.

In *BENGTSON, ADM'X, v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y Co.*, 47 Minn. 486 (December, 1891), sectionman at work on track trying to get out of way of approaching engine stepping over pile of logs lying parallel with track and stumbling over same and his legs extended over the track and run over by engine, judgment for plaintiff in the District Court for Ramsey County for \$1,000 was *reversed*, on the ground of assumption of risk by the injured servant. Rehearing denied, January, 1892.

Sectionman killed by train.

In *SCHULZ v. CHICAGO, MILWAUKEE & ST. PAUL R'Y Co.*, 57 Minn. 271 (May, 1894), sectionman working on or near track struck and killed by passing train, order of District Court of Ramsey County denying plaintiff's motion for new trial after dismissal of her action for damages for death of her intestate, was *reversed*, as the questions of negligence of the parties as to warning given of approach of train, the speed, etc., were for the jury.

6. Mechanics, etc., injured.

Carpenter injured by fall of staging—Incompetency of foreman.

In *BUNNELL v. ST. PAUL, MINNESOTA & MANITOBA R'Y Co.*, 29 Minn. 305 (July, 1882), carpenter in defendant's employ injured by fall of staging, verdict for plaintiff in the Hennepin County District Court was sustained and order refusing defendant new trial was *affirmed*. Plaintiff was engaged in building a depot. He, with other carpenters, was employed for this work by John H. Palmer, who acted as foreman, and also assisted in the construction of the depot, and who had been employed for defendant by John H. Palmer, who was "master builder" and "superintendent of construction of buildings on the new lines of defendant," and whose "duty it was to hire and discharge men." Plaintiff was engaged in shingling the roof, and was supported by staging built around the depot under the directions of John H. Palmer, when the staging gave way and he was precipitated to the ground, a distance of twenty-five feet, injuring his legs and feet. The complaint alleged the incompetency of the foreman for the work, as was known to defendant, and the unskilful and careless construction of the staging.

Blacksmith's eye injured by flying object—Incompetency of fellow-servant.

In *LYBERG v. NORTHERN PACIFIC R. R. Co.*, 39 Minn. 15 (1888), the official syllabus states the ruling as follows: "A servant who has been promised by the master that an incompetent and unsafe fellow-servant shall be removed, may remain for a time in the service, without being conclusively chargeable, as a matter of law, with contributory negligence, even though without such promise, he would have been so chargeable. So considered as to a blacksmith (plaintiff) in the employ of the defendant with an incompetent assistant; and that the question of the plaintiff's negligence was proper for the jury." Opinion by DICKINSON, J. Plaintiff was a blacksmith in defendant's employ and was injured in the latter's shops, due to alleged incompetency of an assistant or "helper" assigned to him. Plaintiff had previously complained of the incompetency of the assistant and defendant's foreman had promised to give him another. At the time of the injury "plaintiff was at work upon a piece of hot iron on his anvil, and holding a cold-chisel for the purpose of cutting the iron. Allen (the assistant), in striking the cold-chisel with his sledge, brought it down upon the edge of the chisel so that the sledge then turned and struck the sharp edge of the anvil, breaking particles from the latter, which were driven forcibly into the plaintiff's eye, seriously injuring it. The plaintiff's recovery in this action rests upon the incompetency of Allen for such service, and the defendant's knowledge of that fact." Order of District Court for Hennepin County refusing defendant new trial was *affirmed*. Rehearing denied.

Boiler-maker's helper injured by falling object—Defective appliance—Fellow-servant.

In *LING v. ST. PAUL, MINNEAPOLIS & MANITOBA R'y Co.*, 50 Minn. 160 (1892), the official syllabus states the ruling as follows: "A master *held* not responsible to a servant for the act of a fellow-servant, in negligently selecting a defective instrument—an iron hook—to which to attach a pulley to raise a heavy weight in a boiler shop; that being a proper detail of the work in which the servants were engaged." Plaintiff was a boiler-maker's helper or assistant in defendant's repair shop and while assisting in raising a flue sheet—a heavy sheet of iron to be placed in front end of the fire box of a locomotive then in the shop for repairs—was injured by the hook to which the raising apparatus was attached breaking, causing the flue sheet to fall. Order of District Court of Clay County denying plaintiff's motion for new trial was *affirmed*. Opinion by DICKINSON, J. On a former trial of the *LING* case in June, 1890, plaintiff had a verdict for \$12,000. Defendant's motion for new trial was refused on condition that plaintiff stipulated to reduce verdict to \$4,000, but on refusal to so stipulate, an order was entered granting new trial. The result of the second trial was a verdict directed for defendant.

7. Railroad laborers injured.**a. DEFECTIVE APPLIANCE.***Clothing catching on defective appliance to pile driver.*

In *STEEN v. ST. PAUL & DULUTH R. R. Co.*, 37 Minn. 310 (July, 1887), where plaintiff was injured while in defendant's employment and engaged,

with others, in operating a pile driver, order refusing defendant new trial, after verdict for plaintiff for \$4,000, was *affirmed*. The official syllabus states the case as follows: "Evidence considered as justifying findings by the jury that the defendant was chargeable with neglect of duty to provide reasonably safe instrumentalities for the use of its servant, the plaintiff, and that the plaintiff was not chargeable with contributory negligence, or the voluntary assumption of the peculiar risk arising from the defendant's neglect; the apparatus being a pile driver so defectively constructed that the wire rope for lifting the hammer would drop out of a pulley over which it should run, whereby it became ragged, catching the mitten of the plaintiff, and drawing his hand under the pulley."

Defective appliance to pile driver.

In *KENNEDY v. CHICAGO, MILWAUKEE & ST. PAUL R'y Co.*, 57 Minn. 227 (May, 1894), order of District Court of Wabasha County denying defendant's motion for new trial *affirmed*. Plaintiff was in defendant's employ as a laborer, and while attempting to spring the top of a pile into position, a pile bridge being repaired, the head of a jackscrew split owing to a crack causing the pile to spring back and throw plaintiff off the bridge, a fall of eight or ten feet, to the ground, seriously injuring him. There was a verdict for \$5,000; reduced to \$4,000. While verdict, even as reduced, was large, it was not so excessive as to call for interference of Supreme Court, the court below having evidently carefully scrutinized the verdict. Evidence showing impaired hearing, sight and memory, health and strength much broken, injuries being permanent.

Defective ice tongs.

In *NEUBAUER v. NORTHEMN PACIFIC R. R. Co.*, 60 Minn. 130 (January, 1895), the facts were stated in the opinion by CANTY, J., as follows: "The plaintiff was a servant of defendant, employed by it in its warehouse, and occasionally in 'icing' its refrigerator cars. Its ice house was beside the track. At one side of the ice house was a shaft or tower in which the ice was raised. It was then pulled out on a slide or skid to a platform, and there chopped into smaller pieces. These pieces were then conveyed on another skid into the car. The platform was about eleven feet above the ground, and there were no guards or rails around it. On the day in question the plaintiff was engaged in pulling the ice out of the shaft upon the platform, and chopping it into smaller pieces. The pieces, as they came from the shaft, weighed several hundred pounds. He seized them with a large pair of ice tongs, and pulled them along on the skid. He seized one piece, which he testified weighed between 400 and 500 pounds, endeavored to pull the same upon the platform, when the tongs lost their hold, which caused him to lose his balance and fall off the platform, down upon the ground, by reason of which he was injured. He brought this action to recover damages for such injury, and alleges that the tongs were defective and insufficient, which caused them to lose their grip on the piece of ice, and that defendant was negligent in failing to furnish him with proper tongs. On the trial plaintiff recovered a verdict for \$400, and from an order denying a new trial defendant appeals." * * * Judgment of District Court for Ramsey County *affirmed*.

Railroad employee injured between tenders of engine—Defective turntable.

In *McDONALD v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R'Y Co.*, 41 Minn. 439 (October, 1889), railroad employee injured by arm being caught between tenders of engine, caused by defective turntable, order of the District Court for Ramsey County, refusing a new trial to defendant after verdict of \$6,000, was *affirmed*. The official syllabus to the report of the case states the facts (the opinion being rendered by VANDERBURGH, J.) as follows:

"The plaintiff, an employee of defendant, was engaged in turning an engine upon a turntable, with the assistance of another engine upon an adjoining track, a stick being placed between them, which was held by the plaintiff. When the pressure was applied, the engine upon the table slid or ran off, and became fast in the curb. The stick broke, and plaintiff was injured between the engines as they were suddenly brought together. The evidence tended to show that the turntable was in bad order and unsuitable for the use required, and that the manner of operating it by the aid of another engine was authorized by the defendant. *Held*, under the evidence in the case, that whether the defendant was guilty of negligence in respect to the condition and use of the turntable, and whether the plaintiff was chargeable with contributory negligence, were questions properly submitted to the jury. *Held, also*, upon the case made by the evidence, that it was open for the jury to find that the plaintiff did not know or appreciate the risk of the work upon which he was engaged, and that in the exercise of reasonable care he was not bound to understand or appreciate the same."

b. LABORERS INJURED BY TRAIN.

Derailment of construction train—Defective track.

In *ROSENBAUM v. ST. PAUL & DULUTH R. R. Co.*, 38 Minn. 173 (February, 1888), employee injured by derailment of car on defendant's construction train, order refusing new trial to defendant was *affirmed*. *Held*, that while plaintiff assumed the ordinary risks of riding on such a train, yet where he is injured by reason of defective track and without fault on his part, he may recover damages.

Railroad laborer in trench struck by passing train.

In *RUTHERFORD v. CHICAGO, MILWAUKEE & ST. PAUL R'Y Co.*, 57 Minn. 237 (May, 1894), order denying plaintiff new trial, after dismissal of action in District Court of Ramsey County, was *affirmed*. Plaintiff sued defendant as administrator of a deceased employee, who while engaged as a common laborer in cleaning out a trench for foundation of stone wall on side of track near defendant's bridge, was struck and killed by a passing train. *Held*, that deceased placed himself unnecessarily in danger and was negligent, and if he went on track in course of his work he assumed the risks.

c. MISCELLANEOUS CASES.

Employee injured while moving heavy stone—Assumption of risk.

In *WALSH v. ST. PAUL & DULUTH, R. R. Co.*, 27 Minn. 367 (December, 1880), order of District Court for Ramsey County refusing plaintiff new trial was *affirmed*. Opinion by BERRY, J. The official syllabus states the ruling as follows: "In performing the duties of his place, a servant is bound to

take notice of the ordinary operation of familiar laws of gravitation, and to govern himself accordingly. If he fails to do so, the risk is his own. If the instrumentalities furnished by the master for the performance of the servant's duties are defective, and the servant is aware of this, though not aware of the degree of defectiveness, he is bound to use his eyes to see that which is open and apparent to any person using his eyes, and, if he fails to do so, he cannot charge the consequences upon his master." Plaintiff was employed by defendant to work in and about its warehouse or freight depot. It appeared from his testimony that he commenced working in the warehouse about six years before the action hereinafter mentioned; that for four years before the accident he had not been away from it "any length of time," and that at the time of the accident he was twenty-five or twenty-six years of age. While engaged with other employees of defendant in moving a millstone from the scales in the warehouse to a car standing by the outside platform of the warehouse, he received the injury for which he seeks to recover damages in this action. The stone weighed from 1,500 to 2,000 pounds, and, being a top stone, it had a "bulge" on one side, the other being flat. The floor of the warehouse and of the platform at the place where the stone was rolled on its way to the car were uneven.

Employee injured by incompetency of co-employee.

In **CRANDALL v. McILRATH (RECEIVER OF THE SOUTHERN MINNESOTA RAILROAD COMPANY)**, 24 Minn. 127 (September, 1877), an action by plaintiff for damages for injuries sustained by him while in defendant's employ, caused by alleged negligence of defendant in employing an unskilled engineer, order of District Court for Freeborn County refusing defendant new trial after verdict rendered for defendant was *affirmed*. Opinion by BERRY, J. The official syllabus states the ruling as follows: "Where a servant seeks to charge his master for negligence in employing an unfit fellow-servant, through whose unfitness the former is injured, the proper rule of proof is that when the unfitness is shown to have existed at the time of employment, a *prima facie* case of negligence is made out against the master, and the burden is upon him to disprove negligence." Rehearing denied.

DERAILMENT OF TRAIN — DEFECTIVE TRACK — ENGINEER INJURED — FELLOW-SERVANT — STATUTE. — In **NEW ORLEANS, JACKSON & GREAT NORTHERN R. R. CO. v. HUGHES**, 49 Miss. 258 (*October Term, 1873*), appeal by defendant from verdict and judgment for plaintiff for \$17,500 in the Circuit Court of the First District of Hinds county, and from order refusing new trial, judgment was *reversed*. The statement of facts embodies the exceptions and all the evidence in the case (1).

1. The HUGHES case (the case at bar) is a leading Mississippi case on the law of master and servant, especially in its decision on the fellow-servant rule, following the common law principles, but a subsequent statute appears to have abolished the common law fellow-servant rule in its application to railroad employees. See Miss. Constitution of 1890, § 193, and Code 1892, § 3559. This statute (making servant's knowledge

The statement of the case and exceptions and the testimony of the plaintiff are as follows:

On August 14, 1871, appellee instituted in the court below an action of trespass on the case, alleging that he had been in the employment of the said company, as engineer on a passenger train, running over the whole road; that, whilst so employed, and without any neglect on his part, but through the neglect, carelessness

of defects in the machinery, ways and appliances, a defense by railroad corporation) was by Laws 1896, p. 97, chap. 87, extended to the employees of all corporations. The latter statute was amended by Laws 1898, p. 84, chap. 66 (Code of 1892, § 3559), which confirmed the extension of the Railroad Employees' Fellow-Servant Statute. The ruling on the fellow-servant question is fully set out in the case of *BROOKS v. MISSISSIPPI COTTON OIL Co.*, 76 Miss. 874 (1899), a decision rendered entirely on the statutory defense of servant's knowledge of defective machinery.

The Mississippi Fellow-Servant Act (section 193 of the Constitution of 1890) is as follows:

"Every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the act or omission of said corporation or its employees as are allowed by law to other persons not employees, where the injury results from the negligence of a superior officer or agent, or of a person having the right to control or direct the services of the party injured, and also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work. Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to

an action for injury caused thereby, except as to conductors and engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them. Where death ensues from an injury to employees, the legal or personal representatives of the person injured shall have the same right and remedies as are allowed by law to such representatives of other persons. Any contract or agreement, express or implied, made by any employee to waive the benefit of this action shall be null and void; and this action shall not be construed to deprive any employee of a corporation or his legal or personal representative, of any right or remedy that he now has by the law of the land. The legislature may extend the remedies herein provided for to any other class of employees." Sec. 3559, Code of 1892, is an exact copy of this constitutional provision, omitting the last sentence, thereby limiting the fellow-servant rule as thus defined to railroad corporations and their employees. In the year 1896 (Laws 1896, chap. 87), § 3559, Code of 1892, was amended by conferring upon the employees of any corporation the rights and remedies theretofore enjoyed by railroad employees only. By an act of the legislature subsequently enacted (Laws 1898, chap. 66), § 3559, Code of 1892, as amended by Laws of 1896, chap. 87, these rights and remedies were preserved undisturbed to the employees of any corporation.

and omission of duty on the part of the railroad company in suffering the cross-ties and structure of the railroad to become rotten, dangerous and unsafe, the locomotive and tender conducted and managed by appellee were thrown from the track, by the spreading of the track, by which he was greatly injured and crushed in body, and rendered, thereby, forever incapable of afterwards pursuing his profession of locomotive engineer. The damages were laid at \$30,000.

After due service of process, the appellants, at the return term, filed a demurrer to the declaration, stating the following grounds of demurrer: 1. That plaintiff below, being a mere servant of the railroad company, had no right, in law, to recover for the occurrence related in the declaration. 2. That the declaration shows that the run-off was caused by the fellow-servants of plaintiff, and by their neglect. 3. That the declaration does not aver any default or negligence on the part of appellants, whereby the accident was produced. This demurrer was overruled, and leave given to plead within thirty days.

At May term, 1871, defendants below filed a plea of the general issue, to which was appended a notice of the special matters which they would prove under the plea.

Plaintiff below likewise gave notice, in reply, that he would offer proof in support of all his averments in the declaration and to show that the injury was caused by neglect on the part of the company, by their agents and servants, employed in a department of labor distinct and separate from that in which plaintiff below was engaged.

After one continuance of the case, defendants below, at September Term, 1872, filed an affidavit and made a motion for a continuance of the case, for reasons set forth in the affidavit, which motion was overruled, and thereupon a jury was impaneled to try the case. A special bill of exceptions was thereupon filed to the order of the court, overruling the motion for a continuance of the case.

After plaintiff below had closed his evidence, defendants below offered to read, on their part, the whole deposition of one T. S. Williams, but plaintiff objected to the reading of certain portions thereof, which objection was sustained, and the objectionable part of said deposition was excluded. To that order of the court below defendants excepted and filed their special bill of exceptions, in which is embraced the whole deposition of said Williams, with a designation of that portion of said deposition which was thus excluded from the jury.

After several days, during the investigation, and after the jury had been adjourned from day to day, they finally, on the 13th of

September, 1872, rendered a verdict for plaintiff below, and assessed his damages at the sum of seventeen thousand five hundred dollars (\$17,500). Various instructions were given to the jury, before the argument of the case, on the part of both parties, some being modified and some refused; all of which instructions are contained in the record with a statement of the disposition made of them by the court.

Defendants below made a motion for a new trial based upon the following grounds: 1. That the verdict is excessive. 2. That the court erred in giving instructions for plaintiff below, and in refusing and modifying instructions asked for by defendants below. 3. That the verdict is against the law and evidence. 4. That the court improperly forced the defendants to go to trial in the absence of an important witness. 5. That the court erred in excluding parts of T. S. Williams' deposition. This motion for a new trial was overruled, and the action of the court excepted to, and a bill of exceptions thereto filed.

Special bill of exceptions No. 3 relates to the action of the court in refusing to permit one Moorman, a witness of defendants below, to give his mere opinion, from an inspection of the road, at the point where the run-off occurred, as to what caused the accident.

Special bill of exceptions No. 4 relates to the giving of instructions for plaintiff below, and to refusing and modifying the instructions of defendants below, and in that bill of exceptions (No. 4) all the instructions, with the action of the court, in giving, refusing and modifying the same, are again set out in the record.

A fifth bill of exceptions, setting forth all the evidence in the case, after the motion for a new trial was overruled, was filed by defendants.

John P. Hughes, plaintiff below, testified substantially as follows:

That he was engineer on the train going south, in the night-time running on or about the schedule time, say fifteen or twenty miles an hour, at his proper position on the engine, with his hand on the lever, at the time the accident occurred; that he had, just before, shut off steam and blew down brakes, supposing that a wood yard was near; that the engine and tender ran off the road; the ties at the point being rotten, had spread, and caused the run-off; that witness was badly injured and fainted, but got up and examined the track to see what caused the run-off; that no warning or signal had been given of the danger; that it had been raining; that witness had no knowledge whatever of the danger at this point, or of the rottenness of the cross-ties; that it is the duty of the section boss to flag trains when there is danger; that, had the track been good, the accumulation of sand at this point would not have caused the run-off as the engine would have run safely through the sand;

that a locomotive can go safely through miles of sand six inches deep when the sand is not much packed and dried, and when the track is in good repair and sound; that engines have been safely run through two feet of sand on the rails; that the track, where the accident occurred, had spread out on one side by reason of the rottenness of the cross-ties; that the hands, that day, had been working on the road there, having put in some fifty or sixty new ties; the section house was three-fourths of a mile from where the run-off occurred; that witness had three of his ribs broken by the accident; was confined for three months to his bed and room; was internally injured — his bladder injured so that urine could not be retained; that he was ruptured on both sides by the accident, on one side permanently; that the accident has rendered witness forever incapable of pursuing his profession of engineer. Witness also said that he was at his station on the engine when the run-off occurred, using all due care, and running only about fifteen miles an hour; that witness had not acted as engineer on any road since receiving said injuries, and never can do so hereafter; that the headlight was burning, but the night was dark, and he could not have seen danger on the track in time to check the train; that, before this accident, he was a stout, healthy active young man, weighing 190 pounds, and never had been sick, but is now ruined for life; that witness was a regular engineer, getting a salary of \$140 a month; that witness has followed engineering some fifteen years; that engineers never stop a train for a few inches of sand on the rails; that it is the duty of the road-master to keep the track in good repair; that engineers have no control over the road-master's department; that the spikes drew out of the cross-ties because the cross-ties were rotten, and the spikes could not hold in consequence; that the run-off occurred in a cut with banks of sand and clay on each side; that it is the duty of an engineer, when he has cause to suspect danger, to check up and examine; that the section boss, for some cause unknown to witness, was discharged the evening following the accident; that witness is a saloon keeper now at \$80 a month; spikes never pull out when the cross-ties are sound. * * *

After the testimony of the witnesses for plaintiff and defendant was in (which is set out at length in the report of the case), the plaintiff, John P. Hughes, in rebuttal, said: "That he never told George Moorman, or anybody else, that the sand threw his engine from the track — never told any passenger so; knew, indeed, always, that sand did not throw the engine off, but the cause really was the rotten ties in the road-bed. In reference to T. S. Williams' deposition he deposed that he (witness) did converse with Williams, at his office in New Orleans, in reference to this run-off; that Williams then said to witness, you are the last engineer I would have sup-

posed to run off; and witness replied, stating that the cross-ties were rotten at the point, causing the track to spread, and thus threw the engine off; that witness never did say to Williams that he (witness) was really nearer the dangerous place than he (witness) had supposed; witness did tell Williams that he (witness) had shut off steam, to get wood at the steam shovel, and Williams found no fault with witness, nor did he admonish him to be more cautious; that witness is friendly with the witness Mr. Williams, and considers him to be a truthful gentleman; that witness is not on friendly terms with witness George Moorman, and knows but little about him, but Moorman is very bitter against witness, and told witness that he (Moorman) would see that witness should have no place on any railroad, and that he (Moorman) would work witness out of every place on any road in the interest of McComb; since witness began this suit Moorman has threatened that he should never have a place on any road."

The following are assigned as errors in the judgment and proceedings of the court below:

1. The court erred in overruling the motion for a continuance, made at the September Term, 1872, of the court. 2. The court erred in sustaining the objections taken to the deposition of T. S. Williams, and in refusing to allow parts of that deposition to be read. 3. The court erred in not allowing the deposition of T. S. Williams to be read as it was taken and offered. 4. The court erred in giving the instructions for defendant in error, and in refusing to give the third, eighth, tenth, eleventh and twelfth instructions asked by plaintiff in error, and in modifying the fifth and sixth instructions. 5. The court erred in sustaining the objection to the question asked George Moorman, a witness for plaintiff in error. 6. The court erred in overruling the motion for a new trial. 7. The court erred in overruling the demurrer to the declaration.

The opinion of the Supreme Court, reversing the judgment of the court below, was delivered by SIMRALL, J., who discussed at length the law of master and servant with especial reference to the fellow-servant rule, the points being sufficiently set out in the syllabus to the official report of the case (1). A. H. HANDY and

1. In *HOWD v. MISSISSIPPI CENTRAL R. R. Co.*, 50 Miss. 178 (April Term, 1874), an action by plaintiff to recover damages for the death of her husband, a conductor in defendant's employ, who was killed by alleged negligence of defendant in failing to keep its roadbed and track and engine and cars, in good repair, whereby

several of the cars of the train were derailed, judgment for defendant in the Circuit Court of Marshall County, was *affirmed*, the fellow-servant rule as set out in the *HUGHES* case (the case at bar) being applied. Opinion by SIMRALL, J.

In *DOWELL v. VICKSBURG & MERIDIAN R. R. Co.*, 61 Miss. 519 (April

W. P. HARRIS, appeared for plaintiff in error (defendant below); JOHNSTON & JOHNSTON and T. J. & F. A. R. WHARTON, for defendant in error.

The syllabus to the official report of the HUGHES case (*supra*), states the points decided as follows:

1. ASSUMPTION OF RISK — FELLOW-SERVANT. —

The general principle which prevails in England, and most of the American States, is, that a servant accepting employment for the performance of specific duties takes upon himself the natural and ordinary perils incident to the service, of which, are exposures from the negligence of fellow-servants in the same common employment. *Priestley v. Fowler*, 3 Mees. & W. 1; *Murray v. So. Car. R. R. Co.*, 1 McM. (S. C.) 398.

2. LIABILITY OF RAILWAY COMPANY TO EMPLOYEES FOR CONDUCT OF FELLOW-EMPLOYEES. —

Where there are several servants or agents, and each stipulates for

1884), section or track hand in defendant's employ, a young man about twenty years of age, injured while trying to board a moving construction train, the negligence alleged being a broken step on the engine which caused plaintiff to fall, and an unskilful person in charge of the engine, judgment on verdict directed for defendant in the Circuit Court of Lauderdale County was *affirmed*, on the ground of contributory negligence. The court, per CAMPBELL, Ch. J., said: "Without deciding any other question under the second count, we hold that the plaintiff was not entitled to recover because the statute on which it is based, § 1047, Code of 1880, does not embrace employees among those to whom a right of action is given by it. This section and others in connection with it were brought forward from the Code of 1857, and it was held in *New Orleans, J. & G. N. R. R. Co. v. Hughes*, 49 Miss. 258 (the case at bar), that one of the sections did not include employees, and it must follow that the section under consideration does not embrace them. Aside from authority, we consider it better policy to deny to employees a right to recover for

violations of law in which they are themselves the actors. The statute forbidding a greater speed than six miles an hour in towns is more likely to be observed by employees on trains if they are required to take all risk of violating it. To permit them to violate the statute and to derive advantage from it would serve to tempt to disregard it."

In *SHORT v. NEW ORLEANS & NORTHEASTERN R. R. Co.*, 69 Miss. 848 (April, 1892), minor employee, nineteen years old, a brakeman on defendant's freight train, killed by falling between the cars, the cause and manner of his falling being unknown, judgment on verdict directed for defendant in the Circuit Court of Clarke County was *affirmed*. Plaintiff failed to make out a case under § 193 of the Constitution of 1890. Negligence must be shown. The rule applicable in case of injury to passengers does not apply to an employee. Neither does the Statute (§ 1059, Code of 1880), existing prior to the Constitution, embrace employees. *New Orleans, etc., R. Co. v. Hughes*, 49 Miss. 258; *Dowell v. Vicksburg & M. R. Co.*, 61 Miss. 519. Opinion by CAMPBELL, Ch. J.

the performance of his several part, they are not liable to the railway company for the conduct of each other, nor is the company liable to one for the misconduct of another. *Farwell v. Boston & W. R. Co.*, 4 Met. (Mass.) 49 (15 Am. Neg. Cas. 407).

3. LIABILITY OF RAILROAD COMPANY FOR ACTS OF ITS AGENTS. — If the injury results from the negligence or misconduct of an agent of a railroad company, liability upon the company can be imposed by showing incompetency of the agents, and the want of reasonable care and prudence in his selection or his continuance in place, after notice of his unfitness.

4. WHO ARE FELLOW-SERVANTS WITHIN THE RULE. — Those who are co-working in the same common enterprise, under the same master and compensated by him. Differences in wages or work do not affect the question if the general business is the same. *Wilson v. Madison R. R. Co.*, 18 Ind. 226; *Ponton v. Wilmington, etc., R. Co.*, 4 Jones (N. C.) 247; *Coon v. Syracuse, etc., R. Co.*, 1 Seld. (5 N. Y.) 492.

5. EFFECT OF ARTICLE 43, CODE 1857. — This statute does not embrace, nor was it so intended, the agents and employees of a railroad company, but they stand upon their common-law rights. *Sullivan v. M. & M. R. Co.*, 11 Iowa, 421 (1); *Carle v. Bangor, etc., R. Co.*, 43 Me. 269 (15 Am. Neg. Cas. 305).

6. NEGLIGENCE OF CO-EMPLOYEES — ERRONEOUS INSTRUCTIONS. — The court below erred in granting the first and third instructions, because they assume that the plaintiff can recover, if the injury may be referred to the carelessness of other agents and servants of the defendant, employed in a department distinct from that in which the plaintiff was engaged and over whom he had no control. *Coon v. Syracuse, etc., R. Co.*, 1 Seld. (5 N. Y.) 492; *Hayes v. Western R. Co.*, 3 Cush. (Mass.) 270 (15 Am. Neg. Cas. 505n.).

1. The court said that the statute was declaratory of the common law as to railroad companies' responsibilities to the public.

See, on this point, *Foley v. Chicago, R. I. & Pac. R'y Co.*, 64 Iowa, 644, 14 Am. Neg. Cas. 630, 632, where *Sullivan v. M. & M. R. R. Co.*, 11 Iowa, 421, and other Iowa cases are cited on the common-law and statutory liability. The *Sullivan* case is also cited in the Iowa cases reported in 14 Am. Neg. Cas. 575, 587, 642, 644, where the common law was declared to be that the employer was not liable for injuries sustained by an employee

through the negligence of a co-employee, but after that decision in 1862, the Iowa legislature passed a statute making railroad companies liable for all damages sustained by "any person," in consequence of the neglect of its agent or its managers, including employees of the company. In 1868, the Iowa Supreme Court ruled that the express words "including employees" gave them the action, like a stranger, which they did not have before. See *Hunt v. C. & N. W. R. R. Co.*, 26 Iowa, 370 (14 Am. Neg. Cas. 605n.).

FIREMAN KILLED IN COLLISION — FELLOW-SERVANT — RIGHT OF ACTION — PARTIES — STATUTE.—In **ILLINOIS CENTRAL R. R. CO. v. HUNTER et al.**, 70 Miss 471 (*October, 1892*), fireman on defendant's locomotive fatally injured in a collision (1), caused by alleged negligence of defendant's telegraph operator in failing to deliver an order of the train dispatcher to the crew of a freight train, judgment for plaintiffs in the Circuit Court of Copiah county for \$2,500 was *reversed*, the plaintiffs having no statutory right of action. The action was brought by the widow and child of the deceased. The opinion by CAMPBELL, Ch. J., is as follows: "Section 193 of the Constitution of 1890 gives to an employee of a railroad corporation a right of action in certain states of case specifically defined by it, and, where death ensues, gives a right of action to the '*legal or personal representatives*' of the person injured. We think a fireman on an engine and a telegraph operator are engaged in different departments of labor, or 'about a different piece of work,' in the meaning of the constitution. An action for an injury resulting in death, based on the constitutional provision mentioned, must be brought by the executor or administrator of the decedent. The primary meaning of the term 'legal or personal representative' is the executor or administrator, and there is nothing in the constitution to suggest that they were used in a different sense in the section under consideration.

1. *Fireman killed in collision — Fellow-servant*—In **MILLSAPS, ADM'R, v. LOUISVILLE, NEW ORLEANS & TEXAS R'y Co.**, 69 Miss. 423 (*October Term, 1891*), the declaration alleged that the deceased, Sidney Millsaps, while acting as fireman on one of defendant's locomotives, was killed in a collision occurring through the negligence of defendant's train dispatcher, who was charged with the duty of directing the movement of trains. It further alleged that the intestate was at the time acting as fireman, with the permission of the defendant, for the purpose of learning the business, and thus fitting himself for efficient service as fireman. The defendant demurred, because it appeared that the negligence alleged was that of a fellow-servant. The demurrer was sustained, and the cause dismissed, whereupon plaintiff appealed. Judgment of Circuit Court of Franklin

County *affirmed*, the fireman and the train dispatcher being fellow-servants. Opinion by COOPER, J.

As to the *fellow-servant rule*, see, also, **MCMASTER v. ILLINOIS CENTRAL R. R. Co.**, 65 Miss. 264 (brakeman injured); **LOUISVILLE, N. O. & T. R'y Co. v. PETTY**, 67 Miss. 255 (brakeman injured), and **LAGRONE v. MOBILE & O. R. R. Co.**, 67 Miss. 592 (sectionman injured), where it is held that employees engaged in operating moving trains are fellow-servants.

Brakeman injured — Negligence of engineer — Fellow-servant.—In **EVANS v. LOUISVILLE, NEW ORLEANS & TEXAS R'y Co.**, 70 Miss. 527 (*March, 1893*), brakeman injured by negligence of engineer who had signaled for brakes, and while they were being applied caused a movement of the train, without proper warning, whereby plaintiff was hurt, judgment

The constitution does not give the right of action it creates to parent or child, or husband or wife, but to the executor or administrator. Because the plaintiffs have no right of action the judgment is reversed, and cause remanded."

STATUTORY RIGHT OF ACTION.— See, also, **McVEY, Adm'r, v. ILLINOIS CENTRAL R. R. CO.**, 73 Miss. 487 (*October, 1895*), on the rights of parties under the statute. The syllabus to the official report (opinion by COOPER, Ch. J.), is as follows:

" 1. Neither under section 1916, Code 1892, by which the right to maintain all personal actions survives to the personal representative of a decedent, nor under section 193, Constitution 1890, providing that 'where death ensues from any injury to (railway) employees, the legal or personal representatives of the person injured shall have the same rights and remedies as are allowed by law to such representatives of other persons,' can an action be maintained by an administrator of a deceased railway employee for injuries causing the death of his intestate, if the death was instantaneous. *Illinois Central R. R. Co. v. Pendergrass*, 69 Miss. 425, cited.

" 2. A cause of action that, under section 1916, Code 1892, survives to the personal representative as one that the deceased might have sued on cannot be joined with the cause of action vested in the widow, by section 663, Code 1892, in cases of wrongful death;

for defendant in the Circuit Court of Warren County was *affirmed*, the brakeman and engineer being fellow-servants. "While engaged in their routine duties in the operation of the train, the engineer is not 'the superior agent or officer,' or 'person having the right to control or direct the services' of the brakeman, within the meaning of § 193, Constitution 1890." Opinion by CAMPBELL, Ch. J.

See, also, *LOUISVILLE, NEW ORLEANS & TEXAS R. R. Co. v. CONROY*, 63 Miss. 562 (1886), laborer employed by contractor injured by derailment of defendant's car caused by colliding with cow on track, where judgment for plaintiff was *affirmed*, it being held that plaintiff was not a fellow-servant of the engineer running the train. Reported in 9 AM. NEG. CAS. 491.

See, also, *R. R. Co. v. REESE*, 61 Miss. 581, on the question of independent contractor.

Among other cases relating to injuries to RAILROAD EMPLOYEES, see *R. R. Co. v. THOMAS*, 51 Miss. 637; *VICKSBURG & M. R. R. Co. v. WILKINS*, 47 Miss. 404; *R. R. Co. v. DOYLE*, 60 Miss. 977 (engineer injured in collision); *LOUISVILLE, N. O. & T. R'y Co. v. THOMPSON*, 64 Miss. 584; *ILLINOIS CENTRAL R. R. Co. v. BOWLES*, 71 Miss. 994, and 1003 (defective cars); *ILLINOIS CENTRAL R. R. Co. v. PENDERGRASS*, 69 Miss. 425 (employee ground to pieces by car wheels during continuance of the accident, question as to right of action for instantaneous death); *ILLINOIS CENTRAL R. R. Co. v. DANIELS*, 73 Miss. 258 (conductor and foreman of construction train injured by improper use of appliance on car for which it was not intended; company not liable; judgment for plaintiff *reversed*.)

and where a widow sues as administratrix, alleging in her declaration that she was appointed administratrix for the purpose of bringing suit, the action will be treated as one brought by the personal representative. *Vicksburg & M. R. R. Co. v. Phillips*, 64 Miss. 693, cited; *R. R. Co. v. Cook*, 63 Miss. 38, explained."

Referring to the *COOK* case, the learned judge said: "We are not to be understood as assenting to the proposition of counsel, that recovery may be sought in one action for the injury done to the deceased and that done to the next of kin. An examination of the statement of facts in *R. R. Co. v. Cook*, 63 Miss. 38, which is cited by counsel in support of this suggestion, shows that an agreement had been entered into between the parties by which 'all questions of law and fact were eliminated,' except as stated by the parties, and it was agreed that, 'if, in either (any) phase of the case, the Supreme Court shall be of opinion that the plaintiff is entitled to a recovery,' the judgment should be affirmed."

In the *McVEY* case, *supra*, the evidence showed that the deceased employee was found dead under a railroad wreck a few minutes after the accident. The Circuit Court of Clay county gave a peremptory instruction to find for the defendant. Plaintiff appealed. *Judgment affirmed.*

SWITCHMAN INJURED COUPLING FOREIGN CARS — FAILURE TO INSTRUCT EMPLOYEE AS TO EXTRA HAZARDS. — In **ILLINOIS CENTRAL R. R. CO. v. PRICE**, 72 Miss. 862 (*March Term, 1895*), switchman injured while coupling foreign cars, judgment for plaintiff in the Circuit Court of Pike county for \$6,500 was *affirmed*. Opinion by WOODS, J. A servant assumes the ordinary risks of his employment, but where an inexperienced servant is required to perform work involving extra hazards, it is the duty of the master to warn and instruct him as to the danger, unless the danger is plainly apparent, and for injury to the servant for failure of the master to so instruct the master is liable. So applied where inexperienced switchman was required to couple foreign cars whose coupling appliances were more dangerous to handle than those of defendant's cars. The Constitution of 1890, section 184, which requires railroad companies to receive and transport each other's cars, does not require a company to receive foreign cars plainly defective and dangerous to its employees, nor does such statute exempt the company from liability to injured employees caused by receiving such defective foreign cars without inspection. "A verdict for \$6,500 in favor of plaintiff, a switchman twenty-six years old, earning \$60 per month, for injuries received in coupling cars and resulting in the loss of his right arm, will not be disturbed by this court as excessive, there being nothing to show passion or prejudice on the part of the jury."

SWITCHMAN INJURED — DEFECTIVE FOOTBOARD OF ENGINE — RAILROAD LIABLE. — In **WELSH v. ALABAMA & VICKSBURG R'Y CO.**, 70 Miss. 20 (*October, 1892*), switchman riding upon footboard of switch engine in performance of duty to open and close switches and couple cars, injured by falling from footboard, insecure fastening of same causing it to give way when he stepped upon it, judgment was ordered for plaintiff on verdict rendered for him in the Circuit Court of Warren county for \$500. The verdict and judgment were set aside by the trial court and new trial awarded. On the second trial the evidence was the same, but the court gave peremptory instruction for defendant and overruled plaintiff's motion for new trial. On appeal the Supreme Court held the action of the trial court in setting aside the first judgment was erroneous and re-established the judgment. Section 193, Constitution of 1890, abolishes the defense of contributory negligence where no wilful or reckless negligence of the injured employee is shown. The section reads: "Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily occupied by them." In such case it was held that the question whether the employee was wilfully negligent was for the jury. Opinion by Woods, J.

SECTION FOREMAN INJURED — DEFECTIVE WHEEL AND LEVER ON HAND CAR — STATUTE — CONTRIBUTORY NEGLIGENCE — DEFENSE — LESSOR AND LESSEE. — In **BUCKNER v. RICHMOND & DANVILLE R. R. CO. et al.**, 72 Miss. 873 (*March Term, 1895*), section foreman injured while operating a hand car on the Georgia Pacific Railway which, at the time, was under the management of the Richmond & Danville R. R. Co., as lessee, both companies being made defendants, the trial court (Circuit Court of Clay county) sustained demurrer to declaration and gave judgment for defendants. The Supreme Court (per CAMPBELL, Special Judge), sustained the ruling as to the Georgia Pacific Railway Company, holding that, as lessor, it was not liable, but *reversed* the judgment as to the Richmond & Danville R. R. Co., holding that the declaration showed a cause of action against that company. The syllabus to the official report states the case and rulings as follows:

"In an action against a railroad company by a section foreman, to recover for personal injuries sustained in operating a hand car, the declaration is not demurrable on the ground of not showing negligence, when it avers that the hand car furnished him was

defective in having a broken wheel and a lever that made its operation dangerous to those on it, and that these defects were the direct and immediate cause of the injury.

"Section 193, Constitution 1890, which provides that knowledge of employees of the defective or dangerous condition of machinery or appliances shall not be a defense to a railroad company in an action for injuries thereby caused, does not destroy the defense of contributory negligence. It merely abrogates the previous rule that such knowledge was, of itself, a bar. Employees are not absolved from the duty, binding on all, to use ordinary care to avoid injury, and such knowledge, though no longer of itself a defense, is yet material in determining whether, with such knowledge, the employee exercised due care. *Welsh v. Ala. & V. R'y Co.*, 70 Miss. 20, explained.

"The servant of the lessee of a railroad cannot recover of the lessor for injury sustained in the use of defective machinery, although it be shown that it was leased in that condition. He must look for redress to his master, the lessee."

The learned judge, in explaining the *WELSH* case, said: "The case of *Welsh v. Ala. & Vick. R'y Co.*, 70 Miss. 20 (see preceding case in this volume of *AM. NEG. CAS.*), is not inconsistent with this view (as set out in the foregoing syllabus), as a careful reading of the opinion will show. That case shows that the Circuit Court had instructed peremptorily for the defendant because the plaintiff had used a defective appliance after he had notice of its condition. He testified that, although he had known of it, he had reason to believe, and did believe, that the defect had been remedied. It was in reference to the defense of contributory negligence consisting in mere knowledge of defects that the language of the opinion was employed, and correctly, but it was not intended to announce that employees are freed by the Constitution from the obligations of common prudence and caution to avoid injury applicable to all alike. The opinion should be read with reference to the case being dealt with, and it will be found correct as applied to it, but there is danger that the court may be supposed to have held what it did not intend to decide, and, because of this, and that the matter is presented in the case now before us, we have given expression to the foregoing views."

MINOR EMPLOYEES INJURED COUPLING CARS. — In *HATTER v. ILLINOIS CENTRAL R. R. CO.*, 69 Miss. 642 (*April Term, 1892*), brakeman, nineteen years old, injured by alleged defective coupling between the locomotive and box car of a freight train, judgment for defendant in the Circuit Court of the First District of Hinds county was *affirmed*, plaintiff having assumed the

risks. COOPER, J., said: "The complaint of the appellant was not that the coupler used by the defendant company was defective as one of its kind, but that it was of a kind more dangerous in its use than those of another sort. But it was proved by the defendant, and not controverted by the plaintiff, that the use of this coupler (one with chafing-iron attached) was not unusual when the plaintiff entered into its service; that there were several of its freight engines so equipped, which were intended to be used upon passenger trains as occasion might require. The plaintiff himself seems to have recognized the fact that in his employment as brakeman he would be required to couple cars to engines having these chafing-irons, for he informed himself touching the methods by which couplings with such engines could best be made. We find no room for doubt that the use of this appliance was one of the dangers incident to his employment, and voluntarily assumed by him. To hold the employer liable for the injury sustained would, as it appears to us, be to declare that railroads are responsible for injuries to their servants in all cases in which the safest appliances in use are not secured by them. We do not understand that counsel for appellant would push the rule contended for by them to this extent, and we know of no authority by which it could be done. The peremptory instruction for the defendant was correct upon the uncontroverted facts of this case. Judgment *affirmed*."

In **ILLINOIS CENTRAL R. R. CO. v. CATHEY**, Adm'r, 70 Miss. 332 (*October, 1892*), minor employee, a night switchman, while making up a freight train in defendant's yard, directed to make the coupling of a coal car, falling or knocked down and car running over leg and foot, resulting fatally, judgment for plaintiff for \$9,000, in the Circuit Court of Lafayette county, was *reversed*, the evidence failing to show any probable connection with the defendant's negligence and the injury suffered. Where it is shown that injury to employee was caused prior to the Constitution of 1890, the law then in force governs. By it the defendant *prima facie* was not liable to its employee for an injury suffered in the service for which he was employed. The gist of the action is negligence of the employer, by failure in duty to the employee, and that the injury resulted from this negligence. It is not enough that negligence of the employer and injury to the employee co-existed, but the injury must have been *caused by* the negligence; and the fact that injury to an employee occurred after the negligence is not sufficient to show the relation of cause and effect between them. Opinion by CAMPBELL, Ch. J.

BRAKEMAN KILLED COUPLING CARS — MILLER COUPLING — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY — VIOLATION OF RULES — EVIDENCE — PARENT AND CHILD — RIGHT OF ACTION — STATUTE. — In **WHITE v. LOUISVILLE, NEW ORLEANS & TEXAS R'Y CO.**, 72 Miss. 12 (*October Term, 1894*), action by plaintiff, as mother and sole surviving parent, to recover damages for the loss of support and maintenance, her son, a brakeman in defendant's employ, being killed while coupling cars, judgment on peremptory instruction given by the Circuit Court of Warren county, to find for defendant, was *reversed*. MAGRUDER & BRYSON, appeared for appellant (plaintiff below); MAYES & HARRIS, for appellee. The opinion was rendered by WHITFIELD, J., and the case and points decided are stated in the syllabus to the official report, as follows:

"Liability of a railroad company for injuries caused by defective machinery or appliances exists independently of section 193, Constitution 1890, enlarging the rights of employees, and rests on its common-law duty to furnish employees safe machinery and appliances. Failure in this regard is the negligence of the company, not of its employees.

"It is only where an employee of a railroad company is killed through the negligence of a fellow-servant that the action therefor must be brought by the personal representative, under section 193, Constitution 1890. Where the negligence is that of the company itself, as by failure to furnish safe appliances, the action for the death of a child is to be brought by the parent, under section 663, Code 1892. *Ill. Cent. R. R. Co. v. Hunter*, 70 Miss. 471 (16 Am. Neg. Cas. 366, *ante*), *distinguished*.

"The right of a parent, under section 663, Code 1892, to recover for the death of a child, depends on whether the child, had it survived, could have maintained an action for the injury. *Meyer v. King*, 72 Miss. 1.

"In an action against a railroad company for the death of a brakeman, crushed while coupling, where there is testimony that the cars were of different height and had different kinds of drawheads, so that they do not come squarely together, thus making the coupling difficult; that the bumpers were broken on one car, and that the spring for holding the (Miller) drawhead of the other in place had been removed, leaving it 'to play loose;' that these defects were not known to deceased or readily observable; that it was necessary to go between the cars to couple, and that deceased, while coupling in the usual way, was crushed by the cars, it was for the jury to say whether the appliances were suitable, and whether deceased was guilty of contributory negligence.

"In such case, failure of deceased to observe a rule of the com-

pany requiring the use of a stick in coupling, will not preclude recovery, if such failure was not the proximate cause of the injury, it being shown that, even with the stick, it was necessary, in this coupling, to go between the cars, and that its use would not have prevented the injury.

“Evidence of the habitual disregard of a rule of the company by its employees, with the knowledge and approval of the company, is competent as tending to show abandonment thereof. *Richmond & Dan. R. R. Co. v. Rush*, 71 Miss. 987, *distinguished*.”

In distinguishing the *RUSH* case the learned judge said: “It is insisted, earnestly, however, that the deceased violated the company’s rule in attempting to make this coupling without the coupling stick which had been furnished him, and *RICHMOND & DAN. R. R. Co. v. RUSH*, 71 Miss. 987, is invoked. On this point there is testimony by Westbrook that a ‘man cannot, by using the stick, keep from exposing his body between the cars; that by holding the stick by the handle and picking up the link with the notch on the other end of it, there would only be three or four inches between the switchman’s hand and the other bumper; that the stick is too short, and that brakemen, as a rule, pay no attention to the stick, but couple with their hands;’ by Rochelle that ‘you could not stand on the outside and couple the cars;’ by the conductor himself that you must go between the cars to make the coupling; and by Colder that in the thirteen experiments made at the trial — eight at the yard on a straight track and five where Gale was killed — the employee did not use a coupling stick, but his hands only, and that ‘it was plain that he could not have handled the coupling stick, and that the officers of the road and Superintendent Casey * * * stayed right by, and made no objection to the switchman using his hands.’

“In *RUSH*’s case the employee had the stick, and it was not shown that he could not properly have uncoupled with the stick, but chose to lay it down, and attempted to do with his hands what he might have done with the stick, though with difficulty. It was further shown in that case that there had been no violation of the rule to the knowledge of the company, except in occasional instances, and that employees violating the rule, or saying they could not couple with a stick, had been promptly discharged upon discovery of such violation. Plaintiff thus admitted that he might have pushed the pin out with the coupling stick, the case being one where the effort was to uncouple. The facts clearly differentiate the cases.” * * *

LIABILITY OF MASTER FOR TORT OF SERVANT —
SCOPE OF EMPLOYMENT — TEST OF LIABILITY. — In
NEW ORLEANS, JACKSON & GREAT NORTHERN R. R. CO. v.

HARRISON, 48 Miss. 112 (*April Term, 1873*), boy, fifteen years of age, run over by cars after uncoupling them under threat from one of defendant's servants, judgment for plaintiff for \$600, in the Circuit Court of Madison county, was *reversed*, the railway company not being liable for the torts of its employees committed outside the scope of their employment. The case is fully stated in the opinion by **TARBELL, J.**, and numerous authorities cited on the question of liability of master for torts of servants resulting in injury to third persons (1).

The syllabus to the **HARRISON** case states the case and points decided as follows:

" 1. A railway company is not liable for damages resulting from a wilful and malicious trespass committed upon a stranger to the company by its engineer or conductor, outside of and beyond the scope of his authority or line of duty.

" 2. A railway company is not liable for injuries inflicted, through the negligence of its servants, upon a stranger to the company while engaged in the voluntary service of uncoupling its cars, if by his negligence he contributed to the injury complained of.

" 3. **Harrison**, who was in no way connected with the railway company, was standing at the crossing in Canton, when the engineer or conductor of the train ordered him to go in and uncouple the cars. He refused at first, but in fear of some bodily harm from the railway employee, who had cursed and threatened to beat him if he refused, was forced to perform the service required. After he had uncoupled the cars the train commenced moving, the tender came against his shoulder and knocked him under the cars and the tender wheels ran over his left leg, injuring it so severely that he was compelled to suffer amputation. There was no brakeman on the train. He was not bound to obey the orders under which he acted and could have gotten away had he seen proper. He didn't know he could uncouple the train when he went in, but thought he could. The train was backing at the time. *Held*, that the company was not liable."

1. In **McCoy v. McKowen**, 26 Miss. 487, it is said: "It is immaterial whether or not the tortious act be committed while the agent is engaged in the rightful business of his employer, which he is attending to by his direction; for if he transcends his authority while so engaged, his acts do not bind his employer unless sanctioned

by him." The ruling in this case and the **HARRISON** case was based on the old doctrine of **McManus v. Crickett**, 1 East, 106, that the master is never liable for the wilful or malicious act of his servant, but in **Richberger v. American Express Co.**, 73 Miss. 161 (1895), these cases were overruled.

THE DOCTRINE IN THE HARRISON AND EARLIER CASES OVERRULED. — But in **RICHBERGER v. AMERICAN EXPRESS CO.**, 73 Miss. 161 (*October, 1895*), the doctrine of the HARRISON case (preceding paragraphs) was criticized and overruled, the opinion by WHITFIELD, J., treating the question at length, and citing numerous authorities. The rulings in the RICHBERGER case are stated in the syllabus to the official report as follows:

“ 1. Where one has complained of having been required to pay an overcharge on an express package, and the local agent who made the overcharge, on refunding the excess and taking his receipt therefor, immediately thereafter, while he yet remains in the express office, to which he had gone on business, ‘wilfully, wantonly, oppressively and wrongfully curses, abuses, insults and maltreats him,’ because he has demanded and had such excess refunded, the express company is liable in damages for the tort thus committed by its agent.

“ 2. The doctrine, once prevalent, that the master is never liable for the wilful or malicious acts of his servant, has been widely departed from in modern jurisprudence, and the true test of liability now rests upon the inquiry of whether or not the injurious act was done in the course of the master’s business. **WILLIAMS v. PLANTERS’ INS. CO.**, 57 Miss. 759, cited; and **MCCOY v. MCKOWEN**, 26 Miss. 487, and **NEW ORLEANS, J. & G. N. R. CO. v. HARRISON**, 48 Miss. 112, overruled in so far as they conflict herewith.

“ 3. The injurious act complained of was not, on the averments of the declaration, so separated by time and logical sequence from the refunding of the excess and taking of the receipt, which were the business of the master, as to relieve the master of liability, the whole transaction having consumed but a few moments, and all of its features constituting one continuous and unbroken occurrence, while the provoking cause of the tort was the lawful demand made for the excess.”

EMPLOYEE INJURED BY CAR ON SIDE TRACK — COUPLING CAR — CONTRIBUTORY NEGLIGENCE. — In **CAPITAL CITY OIL WORKS v. BLACK**, 70 Miss. 8 (*October, 1892*), judgment for plaintiff in the Circuit Court of the First District of Hinds county for \$350 was *reversed*. “Plaintiff was employed as a laborer to shovel cotton seed in defendant’s yard. While he was working there it became necessary to have it coupled to another car which was standing on a side track (1). The president of the defendant company was giving directions and told the laborers

1. *Employee struck by backing train.* — In **MISSISSIPPI COTTON OIL CO. v. ELLIS**, 72 Miss. 191 (*October Term, 1894*), judgment for plaintiff for \$2,500 in the Circuit Court of Lauderdale County was *affirmed*. The

that if any of them understood coupling to go ahead and couple the car. Plaintiff, who had had some experience in handling cars, responded. The president urged him to hurry up, and, at the same time directed another employee, a boy, to apply the brake to the car which was going down grade. Plaintiff supposed the speed of the car would be controlled and ran forward without looking back, but the brake was not applied, and, as he was making the coupling the moving car struck the car with force and his hand was caught and injured. Defendant asked for a peremptory instruction in its favor, which was refused, and it appealed. MILLER, SMITH & HIRSH, appeared for appellant; CALHOON & GREEN, for appellee. The opinion by CAMPBELL, Ch. J., is as follows:

"The peremptory instruction asked by the defendant should have been given. A clearer case for such an one is rarely presented. On his own testimony the plaintiff was not entitled to recover anything. His misfortune was the result of his own stupid carelessness. He knew all and saw all, or might have seen if he used his eyes, that was involved in his undertaking to couple the cars, and rightly charged his injury to an accident such as not unfrequently befalls those whose business it is to apply brakes. His own contemporary view of the occurrence, as indicated by his acts, suggests his proper understanding that he had no claim on the defendant for damages, and that his action for them was the result of after-thought, born of his discharge from the service of the defendant. The thought of holding a private individual responsible in damages in such case would not arise in any mind. The just rights of corporations, under the law, must be as zealously guarded and protected by the courts as those of natural persons. Reversed, and remanded for a new trial."

syllabus to the official report (opinion by WHITFIELD, J.) states the case as follows:

"In an action against an oil company by an employee, injured while painting its cars within an inclosed shed, by the backing of a train therein, the guard stationed at the entrance having testified that he gave warning of its approach, but plaintiff and others with him having testified that they did not hear it, it was proper to instruct that the warning must have been such as one of ordi-

nary hearing, at the distance where the plaintiff was, could have heard it.

"Where an oil company has a switch extending into its closed sheds, and keeps a guard at the entrance to signal in engines, one sent by it to paint detached tank cars within the shed may, while on them and in a position of peril, rely on the legal duty of the company to give him sufficient notice of danger from incoming cars, regardless of any custom of the company as to this. *R. R. Co. v. Bailey*, 40 Miss. 395."

CONROY v. THE VULCAN IRON WORKS (1).

Supreme Court, Missouri, January Term, 1876.

[Reported in 62 Mo. 35.]

DEFECTIVE COAL HOIST — EMPLOYEE INJURED BY COAL CAR — NOTICE OF DEFECT — PROMISE TO REPAIR — QUESTION FOR JURY. — Where plaintiff, an employee of defendant, alleged in his petition that while working in and about a coal hoist he was thrown under a coal car, owing to the defective construction of the hoist, the boards or timbers not being securely fastened, and the evidence showed that two days previous to the accident, he had pointed out the defects and the danger therefrom to defendant's superintendent, who promised to make the necessary repairs, it was *held* that plaintiff had a right to presume that the defect would be remedied and it was error to take the case from the jury, and judgment for defendant was reversed (2).

DANGEROUS MACHINERY — NOTICE — ASSUMPTION OF RISK — QUESTION FOR JURY. — Where the instrumentality which the servant is required to perform service with is so glaringly and palpably dangerous that a man of common prudence would not use it, the master will not be held responsible for damage resulting therefrom, as, in such

1. The judgment of nonsuit in the CONROY case (the case at bar) having been reversed, it was sent back to the Circuit Court, and, after a re-trial, was carried to the St. Louis Court of Appeals. See 6 Mo. App. 102. From that court it was taken by appeal to the Supreme Court, where the former rulings (in the case at bar) and also in the trial court and Court of Appeals were re-affirmed. Judgment for plaintiff was *affirmed*. See CONROY v. VULCAN IRON WORKS, 75 Mo. 651 (October Term, 1882).

2. See, also, the following cases arising out of injuries from defective appliances and machinery:

Defective chain — Agency — Contributory negligence — Defendant liable. — In MALONE v. MORTON, 84 Mo. 436 (October Term, 1884), judgment on verdict for plaintiff for \$150 in the Pettis Circuit Court, for injuries to plaintiff's arm sustained by the breaking of a chain while engaged for de-

fendant Morton in transferring heavy logs from one railroad car to another, was *affirmed*. Malone sued Morton before a justice of the peace for \$150 and recovered same; defendant appealed to the Pettis Circuit Court and plaintiff recovered full amount sued for, \$150. The evidence was that defendant was acting as agent for a firm, but nothing was said about the agency, and plaintiff knew nothing of it, until after the injury. *Held*, that the agency was no defense where plaintiff was not aware of the same until after cause of action accrued. *Held*, also, that plaintiff had a right to rely upon defendant's assurance that the chain was sufficient, and was not negligent in using same. Opinion by DE ARMOND, C.

Employee injured while unloading cars — Iron pipe falling and rolling against him — Incompetency of foreman — Defective appliance — Pleading and proof — Variance. — In ISCHER v. ST. LOUIS BRIDGE COMPANY,

a case, the servant would be guilty of recklessness in exposing himself to danger; but where the servant incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it may be reasonably supposed that it could be safely used by great caution or skill, a different rule prevails, and whether such care was used is for the jury to determine.

APPEAL by plaintiff from nonsuit in the St. Louis Circuit Court. The case is stated in the opinion. *Judgment reversed.*

J. C. MCGINNIS, with FINKELNBURG & RASSIEUR, for appellant.

CLINE, JAMISÓN & DAY, for respondent.

Wagner, J. — The court in this case gave an instruction that there was no evidence upon which the plaintiff could recover, whereupon he took a nonsuit, and there being a refusal to set the same aside, an appeal was taken to this court.

It was alleged in the petition that the plaintiff was in the employ of the defendant, in and about the coal hoist, and through the defective construction of the hoist he was thrown

95 Mo. 261 (April Term, 1888), the case is sufficiently stated in the syllabus to the official report as follows: "In an action by a servant against his employer for personal injuries, the petition charged that defendant's foreman was incompetent, and that by reason of said foreman's recklessness, carelessness and brutal disposition, plaintiff was compelled to take a position of unnecessary danger in unloading iron pipes from railroad cars; that the injury received by plaintiff was the direct result of the foreman's cursing, threatening and driving the men under him so that they could not work with safety. The evidence showed that the foreman was profane and prefaced his orders to his men with oaths, failed to show any threat to punish or discharge them, or that the place to which the foreman ordered the plaintiff was an improper one, or more hazardous than any other place necessary to be occupied. The evidence further seemed to show that the injury was the result

of a defective iron bar used in raising the pipes, and a failure to chock them to prevent their rolling. *Held*, that there was a fatal variance between the *allegata* and the *probata*, and the judgment for that reason reversed, and the cause remanded with permission to plaintiff to amend his petition. Judgment for plaintiff in the St. Louis City Circuit Court for \$5,000 was *reversed*. Opinion by NORTON, Ch. J.

Employee injured by machinery — Master liable — Safe appliances — Burden of proof — Limiting liability. — In BLANTON v. DOLD ET AL., 109 Mo. 64 (Division 1, October Term, 1891), where plaintiff, while in defendant's employ, was injured by his hand being caught in machinery in defendant's mill, judgment for plaintiff, in the Jackson Circuit Court, for \$5,000 was *affirmed*. CHASE & POWELL appeared for appellants (defendants below); JOHN W. BEEBE, for respondent. The opinion was delivered by BARCLAY, J., who said: "It

under a coal car and injured; that the injury resulted to him while he was in the discharge of his duty, and was caused directly by the fault, want of care and negligence of the defendant in not securely fastening down the boards or timbers placed within the track of the coal cars, upon which plaintiff had to stand in unhitching them.

The evidence submitted by the plaintiff showed that two days previous to the accident he had observed that the timbers were not secure, and had reported to the superintendent that there was danger in leaving them in that situation, and the officer told him that he would make the proper repairs, but he could not do everything at once.

Under the circumstances, we think, the action of the court in refusing to let the case go to the jury, was erroneous. A master is not responsible for injuries happening to his servant from the usual and ordinary risks incident to the employment in which he is engaged; for in all such cases the contract is presumed to be made with reference to such risks. Thus, in

is familiar law, and need here be expressed but briefly, that the master is not bound to supply the latest, or the best machinery or appliances for the work he undertakes; still less does he insure his employees safety. His obligation, in this relation, is to use such care as should characterize a person of common prudence, in the same position, that such machinery as is furnished be reasonably safe for the purpose to which it is intended to be devoted. The mere fact of an injury to plaintiff does not necessarily create a liability or warrant an inference of defendant's negligence. The burden of proof was on the plaintiff to establish, directly or by just inference, some want of care to which his injury might fairly and reasonably be traced." The court reviewed the evidence and held that the sudden starting of the machinery tended to show want of care in its condition, and also that such sudden and unusual starting was not one of the ordinary risks of plaintiff's employ-

ment. An express contract exempting the master from liability for negligence in the performance of his duties towards his servant is illegal, being contrary to public policy.

Fall of timber from hoisting machinery — Release — Fraud. — In *GIRARD v. ST. LOUIS CAR WHEEL COMPANY*, 123 Mo. 358 (In Banc, June, 1894), judgment for plaintiff in the St. Louis City Circuit Court was *affirmed*, the principal point being on the question of release. Plaintiff was in the employ of the defendant, and the petition charged negligence in respect of the operation of certain hoisting machinery, under the direction of defendant's superintendent, at its shops in St. Louis, and that, in consequence of that negligence, a heavy timber fell upon plaintiff, disabling him from labor, etc. The defendant set up, as a bar to the action, a written instrument signed by plaintiff and by one of defendant's officers, purporting to be a release, to which plaintiff, in reply, charged

Devitt v. Pacific R'y Co., 50 Mo. 302 (1), the plaintiff's son was a brakeman on a freight train, and was killed while he was at the brake on the top of a freight car, in passing through a bridge, the cross-timbers on the top of the bridge being so low as to strike his head. The accident occurred in the daytime, and it was shown that deceased had been in defendant's employ about three weeks; that he had passed this bridge every day during that time; that he had repeatedly been warned to look out for the bridge, and that when last seen, just before reaching the bridge, he was sitting upon his brake facing it. Upon these facts it was held that he was guilty of such negligence as to preclude a recovery; that he was apprised and warned of the danger, and that by continuing in the service, he took upon himself the risk.

Where the instrumentality which the servant is required to perform service with is so glaringly and palpably dangerous that a man of common prudence would not use it, the master could not be held responsible for the damage resulting there-

that same had been obtained from him by gross fraud and misrepresentation. The court (per BARCLAY, J.) discussed the question at length, citing numerous authorities. W. E. FIOSE and LEE & ELLIS, appeared for appellant; A. R. TAYLOR, for respondent. The decision is stated in the syllabus to the official report as follows:

"1. In an action for damages for personal injuries defendant, by answer, set up an alleged agreement in the nature of a release or discharge of the cause of action. To that plea, plaintiff replied that the agreement had been obtained by fraud, while he was unable (because of pain and suffering, caused by the injuries) to comprehend his act in signing it, and that he never assented to the agreement. *Held*, that the reply to the plea of a release was sufficient in an action at law, without resorting to equity to cancel that document. (GANTT, SHERWOOD and BURGESS, JJ., *dissenting*).

"2. Where a reply of fraud is made to a plea of release, and no point is interposed in the trial court of any deficiency in the reply on account of any omission to tender back the benefits received under the agreement for a release, and the record shows that those benefits were accounted for in the judgment, there is no prejudicial error in the omission to allege or prove an offer to return those benefits, even if such offer were otherwise necessary to avoid the release."

See, also, *GIRARD v. St. Louis Car Wheel Co.*, 46 Mo. 79 (March Term, 1891), where the judgment for plaintiff for \$1,500 was affirmed and certified to the Supreme Court. Judge Thompson reviewed the question of release at length, citing many authorities.

1. The *Devitt* case is reported with the Missouri railroad cases in this volume of *AM. NEG. CAS.*, *post*.

from. In such a case the servant would be guilty of heedlessly and recklessly exposing himself to danger, and he would have to abide the consequences. But where the servant incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonable to suppose or believe that it may be safely used by great caution or skill, a different rule should prevail.

In a case in the English Exchequer the plaintiff was employed by the defendant to oil dangerous machinery. At the time the plaintiff entered upon this service the machinery was fenced, but this fence became broken by accident. The plaintiff complained of the dangerous state of the machinery, and the defendant promised that the fencing should be restored. The plaintiff, without any fault on his part, was severely injured in consequence of the machinery remaining unfenced, and it was held that the defendant was liable for the injury. *Clarke v. Holmes*, 7 Hurlst. & N., 937, affirming *Holmes v. Clarke*, 6 Id. 349 (1).

Patterson v. P. & C. R'y Co., 76 Pa. St. 389, was an action against a railroad company for injuries to the plaintiff by their negligence, and on the trial he offered to prove that he was a conductor of freight trains of the defendant; that they had a siding on which coal cars were to be run out to empty coal on a platform, and it was his duty, as conductor, to run out on the siding the coal cars brought with his train; that by reason of the shortness of the curve at the siding, and its improper connection with the main road, it was dangerous to run the cars on the siding; that he had notified the superintendent and foreman of the railroad of such danger, and they promised to repair the road so as to avoid it, and requested the plaintiff to continue till the repair was made; that nothing was done towards the repair, and while the plaintiff was running his

1. In *CLARKE v. HOLMES*, 7 H. & N. 937, it appeared that plaintiff was employed by defendant to oil dangerous machinery. At the time plaintiff entered upon the service the machinery was fenced, but the fencing became broken by accident. The plaintiff complained of the dangerous state of the machinery, and defendant prom-

ised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced. The defendant was held liable for the injury. This affirms *Holmes v. Clarke*, 6 H. & N. 349.

train on the siding, using due care, the front car, by reason of the shortness of the curve, ran off the track, and the plaintiff, on the second car, was forced by the shock from the car, and was injured. The court below rejected this evidence; but its judgment was reversed, and it was held that it should have been received; the court declaring that the servant's primary duty was obedience, and if, in the discharge of his duties, he was damaged through the neglect of the master, the latter would be liable for the injury, and that if the master subjected his servant to dangers which he ought to provide against, he would be liable for any accident arising therefrom.

In an elementary work of great merit, the author lays down the doctrine that there can be no doubt that where a master has expressly promised to repair a defect, the servant can recover for an injury caused thereby, within such a period of time after the promise as it would be reasonable to allow for its performance, and for an injury suffered in any period which would not preclude all reasonable expectations that the promise might be kept. *Shearm. & Redf. Negl.*, § 96.

Where the defect is so glaring that with the utmost care and skill the danger is still imminent, so that none but a reckless man would incur it, then if the servant will engage in the hazardous undertaking, he must be considered as doing it at his peril. But if the defective machinery or appliances, though dangerous, are not of such a character that they may not be reasonably used by the exercise of skill and diligence, the servant does not assume the same risk. He is required to take and will be held responsible for the care incident to the situation in which he is placed, and whether he exercised that degree of caution is a fact for the determination of the jury. The timbers in the present case, though loose and not properly fastened, had been used and were still being used, and the plaintiff might have supposed that by using care they would be entirely safe. He had brought their doubtful character to the attention of his superior, and had received a promise that the necessary repairs should be made. He had a right to presume that his master would be mindful of his rights, and would take the proper steps to secure his safety.

The court, we think, erred in taking the case from the jury, and its judgment will be reversed and the cause remanded. All the other judges concurred, except VOIRES, J., who was absent.

MINOR EMPLOYEE INJURED BY MACHINERY — CLOTHING CAUGHT BY SET SCREW — DANGEROUS WORK — DUTY OF MASTER TO WARN EMPLOYEE — FOREMAN — FELLOW-SERVANT — VICE-PRINCIPAL — PLEADING AND PROOF. — In **DOWLING v. ALLEN & CO.**, 74 Mo. 13 (*October Term, 1881*), where plaintiff, a boy seventeen years of age, while employed in defendant's foundry, was directed by the foreman to assist a workman at a turntable in the foundry, and while obeying certain orders of the workman stepped across a revolving shaft, from which a set screw projected, which was close to the turntable, and the leg of his trousers was caught by the set screw and his leg was drawn under the shaft and so badly injured as to require amputation, judgment of the St. Louis Court of Appeals (6 Mo. App. 195), was *affirmed*, the questions of negligence of the parties being for the jury. (The trial court sustained a demurrer to the evidence and plaintiff took a nonsuit.) The rulings of the Supreme Court (per opinion rendered by HENRY, J.), are stated in the syllabus to the official report as follows:

"Where a servant, engaged in operating machinery, by reason of his youth and inexperience is not aware of the danger to which he is exposed, it is the duty of his master to warn him if he himself knows of it, and this notwithstanding the existence of that which renders the machinery dangerous is known to the servant. (Citing *Smith v. St. L. K. C. & N. R'y Co.*, 69 Mo. 39; *Porter v. Hann. & St. J. R. R. Co.*, 71 Mo. 66; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 15 Am. Neg. Cas. 506; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 558, 13 Am. Neg. Cas. 669.)

"A foreman in charge of a distinct piece of work in an extensive foundry, and having under him laborers bound to obey his orders, is, as to them, a vice-principal to their employer, and not their fellow-servant, and this although another may be general foreman of the entire establishment, with authority over him. (Citing *McGowan v. R. R. Co.*, 61 Mo. 528; *Marshall v. Schricker*, 63 Mo. 309.)

"The plaintiff was not confined by the pleadings in this case to proof that defendant's machinery was defective, but was entitled to prove, as a distinct act of negligence, the failure of defendant to warn him of the risk he ran in using it."

On a retrial of the DOWLING case plaintiff recovered judgment for \$10,000, which was *reversed* by the Supreme Court for erroneous instruction based on assumption of a material fact. The fellow-servant ruling on the former appeal was adhered to. See 88 Mo. 293 (*October Term, 1885*), reversing 14 Mo. App. 594.

A new trial was had in the St. Louis County Circuit Court and verdict and judgment rendered for plaintiff for \$12,000. Defendant ap-

pealed but the Supreme Court *affirmed* the judgment. "Where an inexperienced youth is employed to work about dangerous machinery of whose perils he is known by his employer to be ignorant, and while exercising ordinary care in executing the order of his superior is injured by some part of the machinery of whose danger no warning has been given him, and which is not obvious to a person of his age of ordinary intelligence and prudence, the master will be liable." *Reaffirming* Dowling v. Allen, 74 Mo. 13, and 88 Mo. 293. See DOWLING v. ALLEN, 102 Mo. 213 (*October Term, 1890*).

MINOR EMPLOYEE INJURED BY MACHINERY — KNOWLEDGE OF DANGER — MASTER NOT LIABLE. — In **NUGENT v. KAUFFMAN MILLING CO.**, 131 Mo. 241 (*October Term, 1895*), minor employee, twenty years of age, while working in defendant's mill, injured by his hands being caught in the rollers of a machine, judgment for plaintiff for \$4,000 in the St. Louis County Circuit Court was *reversed*. The Supreme Court reviewed the evidence and held that the work was not extra hazardous, nor was the plaintiff ignorant of the danger, but had knowledge of the same and the machine was in full view. It was not negligence, therefore, for the defendants to fail to tell plaintiff of the danger, he having worked about the machine for six months sweeping and cleaning up the floor and feeding the sweepings into the roller or crushing machine which caused the injury to him.

EMPLOYEE INJURED BY STEAM HAMMER — ASSUMPTION OF RISK — NEW TRIAL — PRACTICE. — In **MILLAR v. MADISON CAR COMPANY**, 130 Mo. 517 (*Division 2, November, 1895*), order granting plaintiff new trial after verdict for defendant in the St. Louis City Circuit Court was *reversed*, and remanded with instructions to the Circuit Court to render judgment on the verdict, the new trial having been improperly granted. The case is fully set out in the opinion of GANTT, J., who stated the facts as follows:

"The petition states that plaintiff, a draughtsman and pattern maker, was employed by the defendant as such in its pattern shop; that on December 24, 1891, he was ordered by his foreman, Miller, to go into defendant's blacksmith shop and obtain the measurement of a certain die needed for use in a steam hammer which was in the blacksmith shop, operated by steam and worked by a treadle; that there was then a pit or hole, three feet in width, three and one-half feet in depth, and six feet in length, in front of the hammer; that in obedience to the command of Miller he went to the foreman of the blacksmith shop, Little, and was negligently directed

by Little to the hammer containing the die, and was negligently permitted by him to take the required measurements of the die while it was in the hammer; that defendant had carelessly and negligently left the hammer with the steam turned on, and had neglected to block it, and had carelessly and negligently permitted the pit in front of it to remain uncovered; that the foreman of the blacksmith shop, Little, knew, or by the exercise of reasonable care might have known, that plaintiff could not safely take the measurements of the die in the hammer while in its then condition, and that this fact was not known to plaintiff; that by reason of certain defects in the hammer, known to the defendant, but not known to the plaintiff at that time, the hammer was apt, without any visible cause, to kick and begin working; that while plaintiff was taking the measurements of the die in the hammer under those circumstances it did kick and come down, catching and crushing plaintiff's hand so that its amputation was necessary. By reason solely of the negligence of the defendant as aforesaid, plaintiff has suffered injury to the extent of \$20,000, for which he prayed judgment.

"The answer denied that it was in obedience to any order from Miller that plaintiff went to Little; denied that Little directed him negligently, or otherwise, to go to the hammer containing the die; or that Little negligently, or otherwise, permitted him to take the measurements of the die while in the steam hammer; or that defendant was guilty of any negligence in leaving the hammer with the steam turned on without being blocked; or that the pit was entirely uncovered; admits that it was partially uncovered; denies that Little knew, or by the exercise of reasonable care might have known, that plaintiff could not take the measurements of the said steam hammer in its then condition; or that there were any defects in the hammer at that time; or that they were known to defendant; or that the hammer was apt, without visible cause, to kick or begin working; or that the hammer came down on account of any defect or without any visible cause; or that it kicked before coming down; avers that plaintiff was employed not only in the pattern shop, but in the blacksmith shop as well, and could have taken any measurements he needed to take while the steam hammer was as it was at the time of the accident without injury or danger to himself; denies all the negligence charged. The second count of the answer states plaintiff was guilty of negligence in placing his right hand on the die while he pressed his foot on the treadle, when he knew, or by the exercise of ordinary care might have known, that doing so would inflict the injuries which he sustained; and that he was injured by reason of his negligence. The reply was a denial of the new matter in the answer.

"The case was tried before a jury, which returned a verdict for

the defendant. Plaintiff filed a motion for a new trial in the usual form. The motion was sustained by the court by an order in the following words:

"Now at this day the court, having heard and having considered a motion for a new trial heretofore filed and submitted therein, orders that said motion be and the same is hereby sustained, for the reason that there was error prejudicial to the plaintiff in giving instructions numbers 5 and 6 in the form in which they were asked and given. These should have been modified or not given at all; and for the reason that instruction number 9 should not have been given." * * * Defendant appealed to the Supreme Court.

The rulings in the MILLAR case, *supra*, are stated in the syllabus to the official report as follows:

"1. An appellant from an order granting a new trial is required to show in the first instance error only as to the grounds therefor set out in the record of the trial court, the burden being on the respondent to show that the new trial should have been awarded on the other grounds set out in his motion.

"2. Where material, contradictory evidence has been given by a witness the court may properly instruct the jury that they may disregard, in whole or in part, the testimony of any witness whom they believe to have wilfully sworn falsely as to any fact mentioned in the instruction and bearing on the issues in the case.

"3. Plaintiff, an experienced workman, was employed by defendant in the pattern shop of its foundry and was sent, without objection on his part, to the blacksmith shop to measure a die on a steam hammer, and without informing himself as to the method of its operation, began working and was injured by the hammer falling. *Held*, that he having charged and attempted to prove that the injury was caused through defects in the hammer, and there being opposing evidence, an instruction as to the degree of care required of an employer in providing appliances for his workmen was not inapplicable, for the reason that while the machine was safe for the work for which it was intended it was not safe for the work plaintiff was directed to do.

"4. There being evidence that the pattern shop was run in connection with the blacksmith shop, and that employees in the former were frequently sent to the latter, it was proper to instruct as to the assumption by plaintiff of the ordinary risks incident to the measuring of the die.

"5. Where the trial court in granting a new trial recites the reasons therefor as required by Revised Statutes, 1889, section 2241, it will be presumed on appeal from such order that the court's action was founded alone on the grounds so stated."

EMPLOYEE STRUCK BY FLYING OBJECT FROM MACHINE — DEFECTIVE SET SCREW — PERSONAL INJURIES — PROXIMATE CAUSE — EXPERT. — In **SECKINGER v. PHILIBERT & JOHANNING MANUFACTURING CO.**, 129 Mo. 590 (*Division 2, June, 1895*), moulder in defendant's planing mill injured by being struck by a piece of lumber thrown from a circular rip-sawing machine, judgment for plaintiff in the St. Louis City Circuit Court for \$5,000 was *affirmed*. The case is set out at length in the opinion rendered by BURGESS, J., from which the following is taken:

"The facts out of which the litigation arose, as disclosed by the record, are about as follows: The accident occurred in July, 1891, while plaintiff was a laborer in the service of defendant. At that time there was a rip-sawing machine, immediately adjoining, and a few feet from, the machine operated by plaintiff, which was used by the various workmen in that part of the mill, including plaintiff, as occasion might require. Plaintiff had worked in the same position for about five months before the accident, and during that time frequently used the machine which it is claimed caused the injury. This machine had a table about six feet long by three to four wide. The saw worked near the center of the table, lengthwise, but somewhat nearer one side of the table than the other. It was operated by a pulley underneath, connected with a shaft below the floor, which supplied the motive power for propelling the saw. There was a sliding gauge on the saw table about eighteen inches long, used for regulating the width of strips of lumber when being cut, which was attached to the table by means of a bolt which worked in a slot, which gauge when in position was parallel with the saw.

"At the time the accident happened plaintiff was operating a moulding machine near the rip-saw, and Osburg, a fellow employee, was using the saw, when a stick of pine wood seven-eighths of an inch in thickness, one and one-eighth of an inch in width, and about eighteen inches in length, was thrown from the saw, which struck plaintiff on the upper part of the chest near and to the right of the breast bone, and about the second and third ribs. The skin was not broken.

"The evidence tended to show that one of the set screws in the gauge was loose and had been for some time, and when in this condition, as it was at the time of the accident, the saw would bind and throw the piece. The plaintiff testified that he examined the rip-saw five or ten minutes after the accident, and that the screw was loose and worn and the saw bound. A piece of wood can only be thrown from the saw when it binds, or when dropped upon it. None of the witnesses saw the piece of pine which struck plaintiff leave the machine, but the evidence tended to show that it would not have been thrown if the gauge had not bound.

own. As corporations can only act through agents and servants, it must necessarily follow that they are answerable for their acts, else they would be wholly irresponsible. The court clearly erred in withdrawing the case from the jury. It should have been submitted on an instruction similar to the one given in *Brothers v. Cartter*, *supra*, and if it was found that Withrow when he did the reckless and careless act was superintendent, and acting in the scope of his employment, then there could be no doubt of defendant's liability." Judgment reversed.

BURSTING OF GRINDSTONE — VIOLATION OF RULES — MASTER LIABLE. — In **HELFENSTEIN v. MEDART et al.**, 136 Mo. 595 (*October Term, 1896*), employee fatally injured by the bursting of a grindstone while operating same as a grinder in defendant's factory, judgment for plaintiff for \$4,500 in the St. Louis County Circuit Court was *affirmed*. The opinion was rendered by BURGESS, J., in Division 2, who set out the case at length, citing many authorities in support of the rulings, in which GANTT, P. J., concurred and SHERWOOD, J., dissented. This opinion was adopted *in banc*, in which BRACE, Ch. J., and BARCLAY and GANTT, JJ., concurred, and SHERWOOD, ROBINSON and MACFARLANE, JJ., dissented. It was held that "the fact that a servant, who was injured by the bursting of a grindstone while operating it, was at the time violating the rules of the master in changing his clothes before time for quitting work, will not prevent his recovery, it appearing that such conduct on his part in no wise contributed to the accident." The plaintiff did not assume risk of grindstone being run at excessive speed, where he was not aware of what might be excessive speed, having relied on foreman's instruction. Evidence as to custom of other persons using similar appliance to that causing injury to plaintiff, inadmissible, but not reversible error where such admission was harmless. A witness may testify as an expert, although knowledge of the particular matter may be derived from study rather than actual experience. Motion for rehearing in the HELFENSTEIN case overruled.

STATIONARY ENGINEER SCALDED BY ESCAPE OF STEAM FROM MACHINERY IN MILL — USE OF MACHINERY — ASSUMPTION OF RISK — ERRONEOUS INSTRUCTIONS. — In **GLOVER v. MEINRATH et al.**, 133 Mo. 292 (*March, 1896*), where plaintiff, a stationary engineer in defendant's employ, was scalded by the escape of steam from machinery in defendants' mill, judgment for plaintiff for \$2,000 in the Jackson Circuit Court was *reversed* for erroneous instructions. The opinion rendered by ROBINSON, J., states the case as follows:

"This action is for personal injuries received by plaintiff while in the employ of defendants as an engineer, based upon a petition charging that defendants had and used in their mill a certain machine constructed and used for the purpose of drying corn meal and other food products manufactured by them, intended to be used and operated as a steam drier, and that same should have been heated by steam from the boiler in said mill of defendants, but that defendants negligently, carelessly, and unskillfully used and operated said drier as a hot water machine, and caused the same to be heated by hot water and steam and not by steam alone; and that by changing, using, and operating said machine as a hot water and steam drier instead of heating and using said machine with steam alone as the same was constructed and intended to be used, made it a dangerous machine as defendants well knew; and that defendants negligently and carelessly failed and neglected to inform plaintiff of the manner in which said machine was at that time operated, and of the dangerous character thereof caused by changing the method of operating and using same, and that plaintiff was ignorant of the manner in which said machine was used, and of the change made in heating same as above named; and that on the night of June 2, 1892, while in the employ of defendants as an engineer, with the duty of superintending and operating the boilers and engines used in and about defendants' mill, and to repair the steam machinery used therein, he was directed by the miller in charge of and operating the milling machinery of said mill to repair the packing box around the shaft of said drier. That plaintiff supposing and believing that the drier was operated and conducted as a steam drier, as the same was constructed and intended to be used, resorted to the proper methods of cooling a steam drier, and in order to make the said repairs loosened the nuts of the bolts of said packing box, but that by reason of the change in the method of heating said machine as aforesaid, the drier being partially filled with hot water and steam, the said hot water and steam escaped with a violent pressure upon plaintiff, scalding and burning him to his damage, etc. That had said machine been used as the same was constructed and intended, and the same heated with steam, the said injury would and could not have occurred. The defendant set up by way of answer a general denial and a plea of contributory negligence on the part of plaintiff and his employees and fellow-servants.

"The testimony shows that plaintiff was scalded while attempting to repack a packing box in the steam drier, at that time being used by defendants in their mill and heated by means of hot water and steam instead of by steam alone as it was contemplated to be heated by its manufacturer. The testimony shows that the machine was not rendered in any wise more dangerous as a machine

while in use about the mill, but that as changed it was a perfect machine and did better the work for which it was purchased and intended to be used by defendants, than when heated alone by steam. The drier consisted of a cylinder composed of a number of steam pipes closed at one end, while the other ends are screwed into a round hollow chamber. This hollow chamber forms one end of the drier and has a hollow journal cast with it on which the cylinder revolves. It was while attempting to repack the packing box in which this journal was working that the plaintiff was scalded by the hot water issuing from the machines while he was unscrewing the nuts from the bolts that held the packing box in place.

“The change in the method of heating the machine was made by the day engineer at the mill by simply inserting a stop cock or valve in the pipe that conveyed the water of condensation that would gather in the machine by the steam cooling off, so as to enable him by turning this valve to check the flow of the condensed water in the drier and hold it in the machine instead of permitting its return to the water compartment of the boilers in the basement to be reheated and returned to the machines as steam. This was done in order to reduce the temperature of the drier, so that it would not burn or scorch the meal and other food products as they were run over the machine to rid them of whatever moisture there might be in them after the process of grinding. When the machine was heated by steam alone it would become too hot and would damage the meal and other products run over it, and to correct this evil the day engineer made the change indicated above in the method of heating the machine.

“Plaintiff was employed as night engineer at defendant’s mill and it was his duty to look after and repack this machine whenever it should begin to leak or need attention. It was part of his duties according to his own testimony; and of his own motion he began the work of repacking the packing box of this machine at the time he received his injury. Plaintiff testified further that when he began to repair the machine he thought it was a steam drier and that from all the connections made between the drier and the boiler he supposed that it was heated by steam; that he had never repaired the machine before, and that he had only worked for defendants three nights before he received his injuries; that neither the defendants nor their day engineer informed him of the change that had been made in the machine, and that as an engineer thoroughly acquainted with machinery he could see nothing to indicate that the machine was used differently from the way that it was contemplated to be used by its manufacturer; that when he noticed that the machine was dripping water, he immediately shut the steam off from the boilers, opened up the escape

from the machine to an open sewer, in order that the steam and water in the machine might blow or run out; that he then waited about half an hour out of caution before he began to unloosen the bolts in order to enable him to get to the packing box that he intended to repair, and that while at work unscrewing the bolts, the hot water from the machine issued out upon him and scalded him.

"Plaintiff further testified that if the machine had been heated by steam as he supposed it was, and as it was intended to be used by its manufacturer, that even though the relief or discharge pipe to the sewer were choked up (as it was afterwards found to be), still by waiting the length of time he did after turning off the steam as he did, he would not have been scalded as he was, for the reason, that in that time the steam left in the machine would have cooled off, and the steam in it condensed into but a quart or so of water, and the pressure in the machine would thus have been removed so that what little water there was left in it would not have issued out with such force as to have reached him in his work of unscrewing the nuts about the packing box. But that as the machine was permitted to remain full of hot water it would cool off more slowly and be sufficiently hot after the lapse of half an hour from the time the steam was cut off from it to scald one if it should issue out upon him.

"Plaintiff also testified that if the escape or discharge pipe to the sewer had been open so that the water or steam or whatever there was in the machine, could have escaped when he turned the escape valve from the machine to the discharge pipe, that the machine would have discharged itself of all steam or water within two or three minutes, and that in that event there would have been no danger to any one in working about the packing box of the machine; that he did not know that the discharge pipe to the sewer was closed up until after his injury, but supposed that it was open and waited as long as he did after turning the steam off, out of an abundance of caution. That he never had any reason to examine the discharge pipe to the sewer and never did so.

"Mr. Milks, the day engineer at defendant's mill, who was called as a witness for plaintiff, testified substantially as plaintiff as to the effect of heating the machine by hot water and steam, instead of by steam alone. That he employed plaintiff at defendant's request to take charge of the night shift at the mill as engineer. That he generally looked after the discharge pipe during the day shift to see that it was kept open. But that on the night of the accident it was closed up so that the steam and water from the drier could not escape into the sewer. That there was no way of telling whether the escape pipe was closed up or not, except by unscrewing it near where it connected with the machine, and lifting it up out of the sewer,

but that if the escape pipe was open, the machine would rid itself of all water or steam within a minute or so after the valve was turned and would then be perfectly safe to work with or about.

"As will be observed, the only real complaint made by plaintiff against the drier as used by defendant was, that it would not cool off as rapidly when heated by hot water and steam, as when heated by steam alone, and that not being informed of the change in the method of heating the machine, and thinking that it was heated by steam alone, as contemplated by its manufacturers, and as its connections with the boiler would indicate, so far as he observed, he went to work to repair it after waiting a sufficient time, after cutting off the steam from the boiler to the machine, to have guaranteed his perfect safety if it had been heated by steam alone, and that he was injured because the machine was in fact heated by hot water, that retained its heat longer than it would if heated by steam, and issued out upon him in its hot and scalding condition, when he attempted to unloosen the bolts to enable him to get to the packing box.

"Upon the issues and with the facts as above indicated, the court, on behalf of plaintiff, gave the following instructions numbered 3 and 5 against defendant's objection. Also on its own motion gave instruction numbered 1, and refused to give instruction numbered 2 asked by defendants:

"3. If the jury shall believe from the evidence that the plaintiff while in the employ of the defendants as engineer, and in the line of his duty in and about the business of defendants, received the injury complained of about the second day of June, 1892, and that said injury resulted from the use by defendants of the steam heater in a manner different and more dangerous than the one for which the same was constructed and intended to be used, and which might have been prevented by ordinary care and caution on the part of the defendants, that defendants knew of such increased danger, or might have known of it by the exercise of reasonable care and diligence, then you will find for the plaintiff, if you believe from the evidence that he was exercising ordinary care and prudence and did not know of the change in the use of said machinery and of the increased danger caused by such change."

"5. If the jury believe from the evidence that plaintiff by contract entered into the employ of defendants as an engineer to do such work as was required of him as an engineer in their factory, then the law presumes that in accepting such work he only assumed the ordinary risks or danger of such employment, when the steam drier in question was used in the manner contemplated by its manufacturer, and did not assume or contract with reference to any risk or danger arising or resulting from the change made in such use and method of heating the steam drier used by the defendants

unless he, plaintiff, knew of the change made in the method of using and heating the said drier, or might have known of it by the exercise of ordinary care."

"1. The jury are instructed that when the plaintiff entered into the employment of defendants as an engineer in their hominy mill, he undertook to furnish and possess all the necessary skill and experience required by such position, and also that he understood the nature, character, and method of operating the machinery about which he was to work, including the drier in question, when used in the manner contemplated by its manufacturer, and if you find from the evidence that he failed to have or possess such experience, skill, or ability as required to operate such machine when used in the manner above indicated, or to fully understand the nature, character, and working of the drier in question, when used in the manner above indicated, and by reason of the want of such skill, experience, ability, and knowledge of said drier, he was injured, then your verdict will be for the defendants."

"2. The jury are instructed that when plaintiff entered into the employment of defendants as an engineer in their hominy mill, that he undertook to furnish and possess all the necessary skill and experience required by such position, and also that he understood the nature, character and method of operating the machinery about which he was to work, including the drier in question, and if you find from the evidence that he failed to have or possess such experience, skill or ability as required to operate said machine, or fully understand the nature, character, and working of the drier in question, and by reason of the want or exercise of such skill, experience, ability, and knowledge of said drier, he was injured, then your verdict will be for the defendants."

"For the giving and refusing of which, defendants' chief assignment of error is made in this appeal.

"From these instructions it will be seen that the view of the trial court was that when the plaintiff entered into the employment of defendants as an engineer to take charge of the night shift at their mill, he did not assume or undertake to run all the ordinary risks and hazards of such position, including his own negligence or unskilfulness, and that of his fellow-servants in the same line of employment as well as all risks from the use of the machinery as used in the business about which he was engaged; but that plaintiff only assumed the risk of his employment, provided the drier used by defendants at their mill was used in the manner contemplated by its manufacturer; that he did not assume any risk or danger arising from the change made in said machine, and the method of heating same as used by defendants, unless he knew of the change or might have known of it by the exercise of ordinary care.

“ The real question for solution was not as to the way, or by what method that drier in controversy was to be heated in the contemplation of its manufacturer ; but, was it a machine that with reasonable care and caution could be used without danger by defendants at the place, and in the manner that it was used. Nor was it a question as to whether it might or might not have been operated by a method that was safer than as used by defendants. The defendants were not bound to provide the safest machinery in the market, nor were they required to resort to the safest methods for its operations. If the machine as used was such as was in ordinary use by persons in like business, and such as with ordinary care could be used without danger at the place, for the purpose, and by the method employed by defendants, the requirements of the law have been complied with by them, and they will not be held answerable for the injury, even though other machinery or that machine operated by a different method might have been much safer and less liable to inflict an injury to plaintiff.

“ The defendant was not bound to furnish the most approved or the best machinery for the work to be accomplished. His duty is only to use ordinary care that such as he does supply is reasonably safe, and suitable for the purposes to which it is put. There is more risk generally in the operation of a mill by steam than by water. There is also more risk in the process of converting grain to meal or flour, by the process of the fast revolving burr, than by the ancient use of the mortar, but no legal ground of negligence is chargeable or inferable by reason of the substitution of the fast revolving burr for the mortar, or for the substitution of the more dangerous power of steam for the gentle and regular flow of water power.

“ So the substitution of hot water for steam as a means of heating to the proper temperature the drier, used by defendants, would not be grounds alone for imputing to defendants negligence even if by so doing the machine was rendered more dangerous, nor would it relieve defendants of the additional risk incident to the change of method in the heating of the machine he saw before him when he entered the mill, unless the machine was so deceptively changed, and that plaintiff as an ordinary, competent, and prudent engineer could not by reasonable care on his part have observed the change, and that the machine from its general use and appearance and as connected with the boiler in the basement at the mill would indicate that it was operated in a manner different from the way that it was used on the occasion of the injury. The use as a foot mop at defendants' mill door of fabrics manufactured for the headwear of royalty would not increase or affect their liability for an injury to their engineer that might stumble over same in coming to or

going from the mill, provided the material as used and placed at the mill door was reasonably safe and suitable for the purposes to which it was put. The contemplation of the manufacturer, the sting to his pride in the desecration of the use of his handiwork, are matters of no concern to the triers of facts in cases of this character where negligence in the use or manner of use of the article is involved.

“ When the plaintiff entered the service as engineer at defendants’ mill he assumed to undertake the work he contracted to perform, and to take all the ordinary risks that were incident to that employment, among them the repairing of the drier at which he was injured. When he undertook the work, his engagement contemplated that he had the necessary skill and experience to perform that service properly; that he understood the manner of handling that particular machine he saw in use at the time he entered work at the mill (unless deceptively changed in the manner above designated), and not that he could handle the machine properly, if operated after the method contemplated by its builder. And an instruction that made the contemplated use of a machine by its manufacturer an issue in a case like this can never be otherwise than misleading and hurtful to the defendant.” *Judgment reversed.*

DURANT V. LEXINGTON COAL MINING COMPANY.

Supreme Court, Missouri, October Term, 1888.

[Reported in 97 Mo. 63.]

MINER INJURED BY LUMP OF COAL WHICH FELL FROM HOISTING CAGE — COAL MINE ACT — LIABILITY FOR FAILURE TO HAVE CAGES COVERED. — Where plaintiff, employed as a cager at bottom of shaft in defendant’s mine, while trying to get a loaded car on the down cage, was struck by a large lump of coal which fell from a car at the top of the shaft, the cage being uncovered, it was held that he came within the protection of the Coal Mine Act of 1881, which required hoisting cages to be covered, and defendant was liable for its violation of the statute in this respect (1).

1. *Miner falling down shaft — Contributory negligence — Death — Statute.* — In *SPIVA v. THE OSAGE COAL & MINING Co.*, 88 Mo. 68 (October Term, 1885), action under the Coal Mine Act, for damages by widow of deceased employee who was killed by falling down shaft in defendant’s coal mine, judgment of the Henry Circuit Court sustaining demurrer to plaintiff’s evidence was *affirmed*. The court held that the deceased voluntarily assumed the risk and that his injury was due to his own want of

KNOWLEDGE BY MINER OF UNCOVERED CAGE. — Knowledge only by plaintiff of defendant's failure to have the mine provided with the protections required by statute will not defeat the right of action.

EVIDENCE — ERRONEOUS ADMISSION — INSTRUCTION CURING SAME. — An error in the admission of evidence will be cured by an instruction which, in clear and express terms, withdraws it from the consideration of the jury.

care, and that recovery could not be had under the Coal Mines Act (Laws 1881, p. 165, Act of March 23, 1881). "The right of action accruing to the widow under the statute is such as would have existed in the husband's favor if death had not ensued, and none other, and as we hold the husband could not, under the evidence, have maintained the action if he had survived the accident, a recovery must be denied plaintiff upon the same ground." Opinion by RAY, J.

Employee injured by coal car in coal mine — Defendant liable. — In *HAMILTON v. THE RICH HILL COAL MINING CO.*, 108 Mo. 364 (October Term, 1891), where plaintiff, while working in defendant's mine, had his leg crushed by a coal car running over it, judgment for plaintiff for \$8,000 in the Bates Circuit Court, was *affirmed*. The opinion rendered by BLACK, J., states the facts as follows:

"The defendant owned and operated a spur railroad track, extending from the Missouri Pacific railroad west about one-fourth of a mile to a switch. From this point there were two tracks extending west on a curve and on an up grade some four or five hundred feet to defendant's coal shaft No. 6, and thence on to the west. There were no blocks between the rails of these two tracks, where they came together at the switch. The plaintiff was in the employ of the defendant from May 15, 1887, until September 28, following. Previous to this employment he had been a farmer and had no experience in mining or in handling cars, and this

fact was known and understood by defendant's representatives who employed him and under whom he worked. He was employed as a coal trimmer, that is to say, to level up the coal when dropped into the cars, move the cars from the chute when loaded, and move empty cars to the chute. He acted in this capacity as an assistant for a Mr. Cash up to three or four days before the accident. These duties did not require him to couple cars. Reavely was the superintendent of the mines, and in his absence the men at this shaft were under the direction of Thomas Graham, weighmaster, and John Graham, pit-boss. Three or four days before the accident John Graham directed Cash to go to the pit, leaving the handling of the cars in the hands of the plaintiff. He says John Graham told him to trim the cars and couple all that he could conveniently, and that this order was repeated on the morning of the day of the accident. He says he loaded one car and let it down the grade so that the rear end stood at or over the switch. He then loaded another car and let it down by applying the brake. Before reaching the car standing at the switch he got off, went forward to the other car, and as the approaching car came up he attempted to couple it to the standing car; that the heel of his shoe caught in the unblocked rails and threw him down, and the car ran over his leg, inflicting the injuries mentioned. Reavely and the two Grahams say they did not direct the plaintiff to couple the cars; that it

APPEAL from Lafayette Circuit Court. The case is stated in the opinion. *Judgment affirmed.*

WALLACE & CHILES, for appellant.

GRAVES & AULL, for respondent.

Black, J. — This is an action for personal damages sustained by the plaintiff while in the employ of the defendant, a corpo-

was the duty of the trainmen to perform this work. The trainmen were also in the employ of the defendant. There is much evidence to the effect that it is unsafe and dangerous to leave these converging rails unblocked, and there is evidence tending to show that in general they are not blocked at coal mines. There is also evidence to the effect that plaintiff, by reason of his inexperience, did not know that unblocked rails were dangerous. Indeed, there is evidence that he did not know that they were not blocked." * * *

The question of plaintiff's contributory negligence was for the jury; also, whether he was acting in the line of his duty at time of injury, the evidence being conflicting; and also whether defendant was negligent in failing to block the rails. The law of master and servant was also discussed by the learned judge.

Employee injured by stones rolling down mine slopes — Defendant liable. — In *DEWEESE v. THE MERAMEE IRON MINING Co.*, 128 Mo. 423 (Division 2, May, 1895), verdict and judgment for plaintiff for \$2,500, *affirmed*. The case is stated in 54 Mo. App. 476, in which report the syllabus states: "When persons at work in a mine are, owing to the condition of its slopes, in danger of injury from stones rolling down such slopes, and the owner of the mine knows of the danger, it is his duty to use reasonable care to prevent injury to his employees therefrom."

Cave-in of roof coal mine — Statute — Pleading and proof. — In *LES-*

LIE v. RICH HILL MINING Co., 110 Mo. 31 (In Banc, May, 1892), employee working in coal mine of defendant injured by roof of mine caving in on him, judgment for plaintiff for \$7,000 in the Bates Circuit Court was *reversed* for insufficiency of pleading and proof. Opinion by MACFARLANE, J. The case and rulings are stated in the syllabus to the report (paragraphs 3, 4 and 5) as follows:

"Where a statute makes it the duty of 'an owner, agent or operator' of any coal mine to keep a sufficient supply of timber when required to be used as props to protect its workmen, and gives a right of action to one injured by any wilful failure to comply with the above requirement, knowledge on the part of the owner that the props were necessary is essential to recovery by the injured person. [Mines and Mining Statute, March 23, 1881].

"Although plaintiff was in the service of one W. who was operating the mine under a contract with defendant, yet as the defendant was the owner of the mine, and under its agreement with W. the duty was expressly devolved on it of furnishing such timbers for propping, it was liable under the statute as owner.

"The petition which charged that the timber and props were required, and that defendant was notified of the fact and requested to furnish them but neglected and refused to do so, was insufficient without a specific charge that defendant was guilty of a wilful disregard of its duty."

ration engaged in mining coal. The action is founded upon the Act of March 23, 1881, Acts of 1881, p. 165. The Act, among other things, provides (§ 6): "The owner, agent or operator of every coal mine operated by shaft shall provide suitable means of signaling between the bottom and the top thereof; and shall also provide safe means of hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe, as far as possible, persons descending into and ascending out of said shaft." Section 8 provides: "The top of each and every shaft, and the entrance to each and every intermediate working vein, shall be securely fenced by gates properly covering and protecting such shaft and entrance thereto." Section 14 enacts: "For any injury to persons or property, occasioned by any wilful violation of the Act, or wilful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby."

The evidence shows, without any dispute, that defendant failed to cover its cages with iron or other material, that the top of the shaft had no gates or other protection, and the only means of communicating from the top to the bottom of the shaft was by the human voice. It is in these respects that the petition charges a wilful failure to comply with the statutes, and upon these issues the case went to the jury. The evidence also shows that the plaintiff was employed as cager at the bottom of the shaft, his duty being to put the pit cars on the cage, so that they could be hoisted to the surface. As one cage with its loaded car would go up, another one with an empty car would come down. The plaintiff was endeavoring to get a loaded car on the down cage, and the car being off its track, he stepped into the cage to pull it on. While he was doing this, a large lump of coal fell from the car which had reached the top of the shaft, and broke and fractured the bones of one leg. Had the cage been covered, it is quite clear that he would not have been injured.

Since the plaintiff was not going up or down the shaft, and did not go into the lower cage for that purpose, the defendant insists that, as to him, there was no violation of that clause of the statute which makes it the duty of defendant to "provide safe means of hoisting and lowering persons in a cage covered with boiler iron, so as to keep safe, as far as possible, persons descending into and ascending out of said shaft." If we stick

to the letter of this clause, the point must be sustained. But we think it may receive a construction broad enough to include the present case. When the meaning of the statute is clear, courts have no power to make qualifications or additions to cover seemingly omitted cases. It is, however, a familiar rule that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. This intention must, of course, be gathered from the statute itself, not from detached portions, but from the whole statute taken in its general scope and purpose. Now, the statute in question, in its many provisions, seeks to protect the health and safety of persons employed in and about mines, and whilst going in and out of them. This is its general scope and purpose, and to that end many detailed provisions and regulations are made. Among others, the cage must be furnished with guides to conduct it on slides, and with spring catches, and there must be a brake on every drum. These regulations are for the protection of persons while at work in the shaft as well as when going up and down. The statute does not contemplate two sets of cages, one with iron covers for persons to use in going up and down, and the other without covering to use in hoisting coal. The same cage is used for both purposes, and it must have the covering of iron. The employee, when at work in the cage, at the bottom of the shaft, is as much within the reason and intention of the statute as when going in and out of the mine, and, we conclude, is entitled to the protection of the covering.

The next contention of the appellant is that knowledge on the part of the plaintiff that the cage was not covered with iron, and that no contrivance had been provided for signaling from top to bottom of the shaft, and that the top of the shaft had no gates or other protection, should defeat the action. Such a declaration of law would in effect nullify the statute. Knowledge only by the plaintiff of the failure of defendant to have the mine provided with these protections will not defeat the action. It must be remembered that the plaintiff, to prevail, must show a wilful violation or failure to comply with the statutory regulations. Our statute seems to be the same as that of Illinois, and it has been held there that, though the injured person may not have been entirely free from fault, still if the jury found that the wilful conduct of defendant resulted in

injury, the verdict would be justified. *Litchfield Coal Co. v. Taylor*, 81 Ill. 590, 14 Am. Neg. Cas. 309*n*. But we do not say in this case that plaintiff could recover if guilty of negligence himself.

There is evidence in this case that plaintiff was out of his place when in the cage, and that he should have pushed the pit car into the cage. On the other hand, there is evidence that he had directions from the pit boss to pull the car in, and that he had been provided with hooks to do the work as he did, and that he was not negligent. Whether he was guilty of negligence contributing to the injury was submitted to the jury on various instructions favorable to defendant. A mass of lengthy instructions was given on both sides, and to which objections were made, but what has been said will dispose of such objections as we deem worthy of special notice.

During the trial some evidence was received, over the objections of the defendant, that the cages of defendant were, at the time of the trial, covered with iron and that a gate had been attached to one of the openings in the shaft. This evidence was in express terms excluded by an instruction given at the request of the plaintiff. The point of defendant's objection to this instruction seems to be that a party offering illegal evidence cannot have it excluded and thereby avoid a new trial or reversal, and that the party against whom it is offered can alone have it excluded. An error in the admission of evidence will be cured by an instruction which in clear and in express terms withdraws it from the consideration of the jury. *Griffith v. Hanks*, 91 Mo. 109; *Stephens v. R. R. Co.*, 96 Mo. 207. The court could of its own motion withdraw or exclude such evidence, and this being so, we do not see that it can make any difference at whose request the evidence is withdrawn or excluded.

We cannot follow out the other numerous objections to the introduction of evidence. Some of them are without a particle of merit; and there is nothing in the others to justify a reversal. The judgment is affirmed. The other judges concur, except BARCLAY, J., who concurs in the result.

CARPENTER WORKING IN ELEVATOR SHAFT
STRUCK BY DESCENDING ELEVATOR — INSTRUCTION
— HYPOTHETICAL CASE — COMPROMISE VERDICT —
ERRONEOUS INSTRUCTION. — In *DONOVAN v. GAY*, 97 Mo.
440 (October Term, 1888), appeal by plaintiff from judgment of

the St. Louis City Circuit Court, judgment was *reversed*, the opinion being rendered by BLACK, J., the facts and rulings being stated in the syllabus to the official report as follows:

"In an action for damages for injuries sustained by plaintiff while employed as a carpenter on defendant's building, by being struck [on the head] by the elevator while working on the elevator shaft, the elevator being operated by a boy under defendant's agent, and both the boy and the agent having been informed that the work could not be done while the elevator was in motion, the boy having been requested by plaintiff to stop the elevator that the work might be done, but failing to obey the request plaintiff was injured by the descending elevator while in a position necessary for the performance of his work, an instruction to the effect that if plaintiff knew the boy had failed to comply with his request, and put himself in a position of danger, his negligence would prevent his recovery, unless, after he was in such position, the operator either knew, or, by the exercise of reasonable care, might have known, of the danger in time to have avoided the injury, is erroneous, there being no evidence to show that plaintiff knew the boy intended to disobey his request. Such instruction presents a hypothetical case not made by the evidence and wrongfully imposes upon plaintiff the whole duty of avoiding the collision.

"The duty to stop the elevator arose from the known fact that plaintiff was about to perform work which could not be done with safety while the elevator was in operation, and it made no difference that the boy was not under plaintiff's orders.

"It was the duty of the defendant to use such care and caution in the performance of the work as a reasonably prudent person would have used under like circumstances, and whether or not he used such care was a question for the jury to determine under the facts of the case.

"Where the instructions given for the defendant are such as to force the jury to a compromise verdict for the plaintiff, which is, for all practical purposes, a verdict for the defendant, it should be set aside upon the complaint of the plaintiff." [The jury assessed plaintiff's damages at one dollar although it was shown that he had paid \$200 for medical services.]

EMPLOYEE STRUCK BY ELEVATOR — PLEADING. — In **TROTH v. NORCROSS**, 111 Mo. 630 (*Division 2, October, 1892*), employee of defendants engaged in constructing a building, struck on head and shoulders by an elevator, judgment of Jackson Circuit Court sustaining demurrer to plaintiff's evidence was *affirmed*. The petition failed to aver that defendants had any authority or control over the elevator. "Negligence can be founded only on the neglect of some duty." Opinion by GANTT, P. J.

EMPLOYEE KILLED BY FALLING DOWN ELEVATOR CHUTE — DAMAGES — INSTRUCTION — HARMLESS ERROR. — In **McGOWAN v. THE ST. LOUIS ORE & STEEL COMPANY**, 109 Mo. 518 (*October Term, 1891*), statutory action by plaintiffs in the Circuit Court of the City of St. Louis to recover damages for the death of their father by falling down an elevator chute on defendant's premises, where he was employed, judgment for plaintiffs for \$5,000 was *affirmed*. Hitchcock, Madill & Finkelnburg, appeared for appellant (defendant below); Laughlin, Kern & Tansey, for respondents. The principal question in the case related to the question of damages, which was very fully discussed by the justices. The court was divided on the question as to reversible error in instructions, GANTT, J., who delivered the opinion, being in favor of reversal of judgment, in which SHERWOOD, Ch. J., and McFARLANE, J., concurred, and BRACE, BARCLAY and THOMAS, JJ., being in favor of affirmance, short opinions being rendered by BRACE, BLACK and THOMAS, JJ. The case was heard *in banc*, and the judgment was *affirmed*. It was held that an instruction that the jury "will assess the damages in such sum as they believe will compensate the plaintiffs for the pecuniary injury sustained by them in the death of deceased not in excess of the sum of \$5,000," was erroneous in not furnishing a sufficiently definite rule for the measure of damages, but that such error was harmless where the verdict was only for \$5,000, and the plaintiffs were four minor children, and clearly entitled to recover the aggregate sum returned in the verdict. The plaintiffs claimed damages under Rev. St. 1879, section 2122.

MINOR EMPLOYEE KILLED IN ELEVATOR — ASSUMPTION OF RISK. — In **O'BRIEN v. WESTERN STEEL CO.**, 100 Mo. 182 (*October Term, 1889*), minor employee killed in elevator, nonsuit in the St. Louis City Circuit Court was *affirmed*, the case being stated in the syllabus to the official report (opinion by BRACE, J.), as follows:

"A petition charging death from a negligent defect in the plan of the construction of an elevator, on which deceased was riding when injured, is not supported by proof of death resulting from negligence in its operation.

"An employee of defendant familiar with the construction of its elevator, used in its business only for transporting material, and who rides thereon under an implied license for his own pleasure and convenience, can only require of defendant the exercise of ordinary care in its operation.

"The employee in such case accepts whatever risk is incident to the construction and operation of the elevator."

HOLLORAN v. UNION IRON AND FOUNDRY COMPANY.

Supreme Court, Missouri, October Term, 1895.

[Reported in 133 Mo. 470.]

EMPLOYEE MOVING DERRICK ON FIRST FLOOR OF BUILDING — FALLING INTO CELLAR — OBVIOUS DANGER — ASSUMPTION OF RISK. — The general rule is well settled that if one who is fully capable of selecting and contracting for himself voluntarily enters into an employment with full notice of the risks thereof, he is held to assume the risks of injury ordinarily incident to such employment.

But this rule does not obtain where the risk is known to the master or, by the exercise of ordinary care, should be known to him and is not known by the servant; nor is the rule applicable if the servant incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or when it is reasonable to suppose that it may be safely used with great care or skill. Mere knowledge on his part will not defeat the servant's right of recovery if injured under such circumstances.

The rule as to assumption of risk *applied*, where an employee who had been engaged in adjusting iron work in the construction of buildings for two years and was well acquainted with the duties of his employment and the *modus operandi*, was injured by falling from the iron girders of the first floor of a building in construction into the cellar below while he was engaged in moving an upright derrick on loose planks on said floor, the dangers of the work being open and obvious.

APPEAL from the St. Louis City Circuit Court. The case is stated in the opinion. *Judgment affirmed.*

L. FRANK OTTOFY and JOHN P. LEAHY, for appellant.

POLLARD & WERNER, for respondent.

Gantt, P. J. — This is an action for personal injuries sustained by the plaintiff in falling from the first floor of the De Menil building in St. Louis into the cellar thereof during its construction.

Plaintiff was a laborer for the Union Iron & Foundry Company, which had the contract for the ironwork in said building, and had been employed for two years by said company in the general work of receiving, moving and putting up ironwork in buildings in the course of construction. On the day he received his injuries, plaintiff was engaged, in conjunction with several other laborers, in moving an upright derrick on loose planks laid for that purpose across the uncovered iron

girders of the first floor of said De Menil building. The first story had no floor as yet, the iron columns and cross-beams only having been put in place and fastened. The derrick was provided with small wheels or rollers.

On this occasion a run or track was laid consisting of planks laid side by side and extended end to end across the girders, on which the derrick was to be moved. The derrick was pushed along on these planks by plaintiff, and was pulled and guided by Droney, the foreman of the gang, on the front, or the end in the direction they were moving it. This work had proceeded safely up to a certain point when it was observed by the foreman, who was engaged with the other men in this work, that the derrick was running to one side, and he thereupon called to plaintiff, who was standing on a plank immediately behind the derrick, prying it from behind by means of a crowbar, to "cut it in." This he attempted to do by stepping to one side, allowing one foot to rest on the plank on which he had been standing, and bracing the other against one of the iron girders running alongside the plank, and inserting his crowbar under the derrick from the side. Whilst in this position his foot, braced against the girder, slipped, and he fell into the cellar below, receiving the injuries complained of.

Testimony was introduced to the effect that plaintiff and the other men engaged with him had complained some time before this to the foreman that they were not provided with enough planks for this work. No two agree as to just what was said to, or by, the foreman. The only witnesses introduced (aside from the physician) were plaintiff, Lehman, a fellow-laborer, and Droney, the foreman of the gang. As to these complaints the testimony of these witnesses is as follows, viz.:

Plaintiff testified: "Before moving the derrick in the morning I told Droney I couldn't do with these four planks; he said, go ahead, he would get more right away; told him I would sooner quit than work on such a job; he said he would get more right away, and to go on."

Lehman testified: "Holloran said to Droney, 'We ought to have more planks there;' heard Droney say, 'We can't get any more, we have to get along with them;' heard no conversation next morning; I also objected; that is all I heard objected. Droney said: 'We have got all he could get and must get along with them.' Said nothing about getting more; sent me

out to get in some columns; came back; told him it was getting dangerous here. I says: 'We ain't got no more planks loose now.' He says: 'Well, I can't help it; we have got to try to get along with it.' " On cross-examination he says that he "meant that I needed more planks to roll in columns."

Droney, the foreman, testified: "Don't know whether Holloran said anything in particular about there not being sufficient planks; the whole gang of them said we ought to have more; I told them we would try to get some more, but we would try to get along with that, for it was all we had; didn't try to get more that day." On cross-examination he says: "Holloran was present. I said, you take your party and roll in some of these columns; I was working at stake with another man at the end; they came over and said, we haven't got enough of plank; I said, we will get along to-day; they, the whole crowd, said they ought to have more plank to run in the columns on. They were not moving derrick at that time; that was about an hour after. The planks asked for were for rolling in columns and the eight boards were intended for derrick."

As to the relation of the witness Droney to the plaintiff and the other men engaged with him in the work at hand, the testimony introduced shows simply that he acted for the defendant as a foreman in directing these men what to do and when to do it. He engaged in the work with them. It nowhere appears that he had any power to provide materials or appliances of any kind, or any right to employ or discharge men.

Upon the foregoing facts the Circuit Court sustained a demurrer to the evidence and plaintiff appeals. The question for determination upon this record is whether upon the evidence as it stood the Circuit Court correctly ruled that the case should be withdrawn from the jury by a peremptory instruction that the plaintiff was not entitled to recover.

The general rule is well settled, and is evidenced by many decisions, not only of this court, but of the courts of last resort in England and of the various States of the Union, that if one who is fully capable of selecting and contracting for himself voluntarily enters into an employment with full notice of the risks thereof, he is held to assume the risks of injury ordinarily incident to such employment.

This general rule does not obtain where the risk is known to

the master, or by the exercise of ordinary care should be known to him, and is not known by the servant, and it has been often ruled in this State that this general rule is not applicable if the servant incurs the risk of machinery which, though dangerous, is not so much so as to threaten immediate injury, or when it is reasonable to suppose that it may be safely used with great care or skill. Mere knowledge on his part will not defeat his recovery, if injured under the circumstances last mentioned. *Conroy v. Vulcan Iron Works*, 62 Mo. 35, 16 Am. Neg. Cas. 377, *ante*; *Huhn v. R. R. Co.*, 92 Mo. 440; *Hamilton v. Rich Hill Mining Co.*, 108 Mo. 364, 16 Am. Neg. Cas. 398, *ante*; *O'Mellia v. R. R. Co.*, 115 Mo. 205.

Is the present case one for the application of the general rule? Did the plaintiff knowingly assume the risk of falling into the cellar?

According to all the evidence, he had been employed in adjusting ironwork in the construction of buildings for two years. He was well acquainted with the duties required of him and the *modus operandi*. It is not claimed that it was foreign to his employment to require him to assist in rolling the derrick from one portion of the unfinished building to another, nor that it was unusual to move it upon planks laid as on the occasion when he fell. He was a man of mature years; he was not a minor or a raw and inexperienced man employed in a work which was strange to him. He knew and fully appreciated the usual risks of his employment, and with this knowledge, and with the risks open and obvious to him and, for that matter, to every one working about the building at that period in its construction, he undertook to assist in moving the derrick. He knew the floor had not yet been laid, and the only way of moving the derrick or columns was by the temporary use of the loose planks provided for that purpose. The danger was that he might fall between the uncovered iron girders or rafters. It was perfectly apparent that a careless step would precipitate him into the cellar below.

As already said, up to a certain point the work had proceeded safely when the derrick appeared to be running too much to one side, whereupon Droney, the foreman of the gang with which plaintiff was at work, and who was at the other end of the frame pulling the derrick as plaintiff was pushing, called to him to "cut it in," and plaintiff to do this stepped to one side

of the derrick, keeping one foot on the planks and bracing his other foot against one of the iron girders which ran alongside of the planks, and inserted his crowbar under the derrick from the side, and just then, he says, "Droney straightened it up, just as I went to cut it." "He pulled it back, when I fell." His foot slipped off of the iron girder, which was four inches by four inches, and he fell into the cellar and was hurt.

The appliances to move the derrick were perfectly simple and were as well understood by the plaintiff as the defendant. Plaintiff knew the relative position of the plank and girder upon which he stood and knew better than anybody else whether he could handle himself safely in his position. The girders and planks were entirely sound; the only danger was he might slip and fall, and he voluntarily incurred that risk. The manner of handling himself was under his own control.

In the course of the erection of a new building it is almost impossible to keep it in an absolutely safe condition at every moment of the work. The skeleton has to be erected before the covering, the ironwork before the brick and frame. Certain risks are ordinarily incident to the state of things found in the unfinished condition of every building in course of construction. But the mechanics and laborers employed and paid to build it are presumed to understand their duties and the risks usually attendant upon them, and knowing beforehand the methods in use, they assume the risks usually incident to the discharge of their duties. The master has never been held for such injuries to his servants. If he were, he would be the insurer or guarantor of his servant's or employee's safety. No one would dare to undertake a work requiring the employment of mechanics and laborers to assist him if such a rule should prevail.

Plaintiff's fall was not caused by any breaking of the planks, or by any defect in the derrick or crowbar. His sole complaint is that there were not enough planks, and yet his own witnesses testify he was told that the work must be done with those.

When the relation of the mechanics and laborers to this building they were constructing, at that stage, is considered, it can, we think, be safely assumed, as it was by the Circuit Court, that plaintiff was not employed in a dangerous place. While it might be dangerous for children, or persons wholly unaccustomed to such work, it in no sense fell within the line

of places denominated "extra hazardous." To denominate this as a dangerous place and hold the master liable for such an accident is to place upon him a burden which the law up to this time has not imposed. It was the defendant's duty to furnish his servants with tools, appliances and instrumentalities reasonably safe for the purpose for which they were used, but it was not required to use the most modern or improved tools or appliances, and it is perfectly apparent that plaintiff's fall was not occasioned by the insufficiency in the number of planks or any defect in the crowbar, or the derrick, but was the result simply of a miscalculation on his part as to his position and his accidental slip from the girder, and the defendant is not liable for the consequences.

This brings us to the contention of plaintiff's counsel that this case falls within the exception to the general rule, that, notwithstanding the defect or risk is brought to the knowledge of the employee, yet if he reports it to his employer and the master promises to repair the defect or remove the danger, the servant can recover for an injury caused thereby, within such a period as it would be reasonable to allow the master for its performance, and for any injury suffered in any period which would not preclude all reasonable expectations that the promise might be kept. This qualification of the general rule is now firmly engrafted in the law of this State. *Conroy v. Vulcan Iron Works*, 62 Mo. 35, 16 Am. Neg. Cas. 377, *ante*; *Keegan v. Kavanaugh*, 62 Mo. 230; *Flynn v. R. R. Co.*, 78 Mo. 195; *Stephens v. R. R. Co.*, 96 Mo. 207 (1). And is likewise the accepted rule in England. *Holmes v. Clarke*, 6 Hurl. & N., 349, 7 Id. 937 (2).

Waiving all discussion of the authority of Droney to bind defendant by a promise of additional planks, as testified by plaintiff alone and denied by his own witnesses, does plaintiff bring himself within the exception and qualification of the rule last mentioned? We think most clearly not, because plaintiff himself testified and reiterated it over and over that he did not think he was in a dangerous position when he put one of his feet on the girder and the other on the plank. Whatever need there might have been for more planks to

1. The cases cited are reported with the Missouri Railroad cases in this volume of AM. NEG. CAS., *post*.

2. See note of *Clarke v. Holmes*, on page 381, *ante*.

expedite the work of rolling in the columns, or whatever danger he anticipated from a want of planks in some other way, his own evidence confronts him, in which he three times asseverates that he didn't think himself in any danger at the time his foot slipped. As he apprehended no risk from placing himself in this attitude it is self-evident he had not sought or received any assurance that this unanticipated risk should be obviated, and as he had no promise covering this risk, it necessarily follows that he was not induced to remain in the service and expose himself to danger by the promise of Droney or any one else to remedy it, so far as the real cause of his injury is concerned.

The learned counsel for appellant, in their brief, suggest various theories upon which a recovery might be predicated, but it is sufficient to say they are not alleged in the petition and hence are not here for consideration.

The trial court was justified in reaching the conclusion that there was no substantial evidence of negligence on the part of defendant, and it followed, as a matter of law, that no recovery could be had, and he therefore properly sustained the demurrer to the evidence, and his judgment is affirmed. BURGESS and SHERWOOD, JJ., concurred.

DANGEROUS PREMISES — EMPLOYEE FALLING FROM PLATFORM — DEFECTIVE CONSTRUCTION — ABSENCE OF GUARD RAIL — SUFFICIENCY OF COMPLAINT — PLEADING AND PRACTICE. — In **YOUNG v. SHICKLE, HARRISON & HOWARD IRON CO.**, 103 Mo. 324 (October Term, 1890), judgment of nonsuit in the St. Louis City Circuit Court, on the ground that the petition was insufficient to sustain action, was *reversed*. The Supreme Court (per BLACK, J.,) said:

“The plaintiff states in his petition that he was at work on a platform over which was suspended a wire cable; that a mechanical appliance known as a traveler worked along and over the wire rope; that the movements of the traveler were regulated by means of a signal given by a person standing on the platform and pulling a rope; that the sounding of a signal was an intimation of danger and to be careful; that the stations for the signal ropes were a great distance apart; that the platform had insufficient guard rails around it; that on the day of the injury the platform had been allowed to become so blocked with material and *debris* as to allow only a narrow passageway for persons to pass over and along the same; that

it became necessary for another employee of defendant engaged in a different department of work to use one of the signal ropes to sound an alarm; that said employee, in passing along the narrow passageway to reach the signal rope, "accidentally ran against and struck forcibly the plaintiff and knocked him under the guard rails and off the platform to the ground below," breaking his shoulder, etc.; "that the defendant was careless and negligent in the construction of said platform in not providing it with sufficient guard rails; that said platform was not suitable to carry on the work in which plaintiff was engaged by reason of the fact that defendant had negligently allowed a large quantity of material of various kinds to be piled thereon; that the signal stations, above mentioned, were too far apart, necessitating a quick and hurried movement on the part of the operative, whose duty it was to look after the signals, in order to reach the ropes in time to sound the alarm. Wherefore, and by reason of the negligence of defendant as aforesaid, plaintiff has been damaged in the sum of \$5,000, for which amount, with costs, he asks judgment."

The court reviewed the petition, and, in reversing the judgment, ruled as follows (as per syllabus to the official report):

"1. There is a material difference in questioning the sufficiency of a petition by demurrer and by objecting at the trial to the introduction of any evidence.

"2. Though a petition is informal and the cause of action is defectively stated, still, if it states sufficient facts to show a cause of action, the objection made at the trial to the introduction of any evidence should be overruled.

"3. A petition in an action by a servant against his employer for injuries resulting from negligence in furnishing defective appliances *held* good against the objection made at the trial to the introduction of any evidence.

"4. The fact that the servant had equal means with his employer of knowing the defect in the machinery is a matter of defense and need not be stated in the petition.

"5. Contributory negligence is a matter of defense, and plaintiff in an action for injuries arising from negligence need not allege he was without fault.

"6. A servant may recover for injuries caused by the joint negligence of the master and a fellow-servant."

EMPLOYEE INJURED BY FALL OF IRON COLUMN — FOREMAN — VICE-PRINCIPAL — INDEPENDENT CONTRACTOR — SAFE MACHINERY AND PLACE TO WORK — ASSUMPTION OF RISK — QUESTION OF PRACTICE. — In **HERDLER v. BUCK'S STOVE & RANGE CO.**, 136 Mo. 3

(*October Term, 1896*), judgment of St. Louis City Circuit Court awarding defendant new trial, after verdict for plaintiff for \$3,500, *was reversed* and cause remanded with directions to enter judgment for plaintiff on the verdict. A. R. TAYLOR, appeared for appellant; C. P. & J. D. JOHNSON, for respondent. The opinion rendered by GANTT, P. J., stated the case as follows:

“ This is an action brought by the plaintiff against the defendant to recover damages for personal injuries received on January 26, 1893, by the fall of an iron column, against which plaintiff had placed a ladder, and on which he was standing under the direction of one of defendant's superintendents who had charge of and controlled plaintiff in the work he was doing for defendant. Plaintiff had been employed on the day preceding his employment by defendant's foreman Inanen to work as a carpenter in the erection of a building which defendant was constructing at 3500 North Second street, St. Louis. The Union Iron and Foundry Company had been employed by defendant as an independent and separate contractor to put up the ironwork of its building, including in which were certain upright iron posts or pillars on which a part of the woodwork was to rest for support. The particular work at which plaintiff was engaged when hurt was the adjusting of the wooden beams upon the top of these upright iron posts, which had already been placed in position by the foundry company. These iron pillars or posts had been stationed at the proper distances and stood upright upon their bases and were held in place by braces attached and fastened by the iron workers. These braces consisted of two planks about sixteen feet long, spliced together so as to make a length of about twenty-eight feet and were fastened to a collar or wooden box around the iron columns near the top of the column and extended to within twelve or fourteen feet from the base or foot of the posts, being fastened at that end to a stub or stake driven in the ground about three inches deep. The planks used in making the braces were an inch thick, six inches wide, and sixteen feet long, — spliced as already stated. The stake was about two inches thick by four inches wide and the long brace was nailed to the stub or stake by a nail or two, — ten or twelve-penny wire nails. The plaintiff had not seen these posts erected and had worked in the building only the preceding half day before he was hurt on the morning of January 26, 1893. The attention of the foreman had been called by the carpenters, notably by August Lauth, prior to plaintiff's injury, to the fact that these posts were insecurely braced. Lauth testified: “ I saw some columns raising and I went to Innon (Inanen) and told him the braces were too weak to hold these columns and that an accident would happen and he answered me ‘ I will see about it. ’ ” Other carpenters testified similarly.

The evidence tended to prove that Ignon or Inanen, the foreman in charge of the work, directed Hërdler, the plaintiff, to go up on a ladder placed against one of these iron posts and bring the girder to its place on top of the post. Obeying this order he placed the ladder against the post and had ascended it and reached out for the wooden beam when the column gave way and fell and in the fall plaintiff's right ankle was crushed, the bones being broken. On cross-examination he stated he had never done such work before. "They had a derrick there to raise the beams. They would raise one end on a column and then swing the other round to rest upon another column." He had gone up the ladder resting against these columns four times the first day he worked. He fell on the first one he ascended on the morning he was hurt. He had never worked on a building in which they put up such columns as these. He did not see the foundrymen putting up the posts. He did not notice how the columns were braced before going up the ladder." * * *

The rulings of the learned judge are set out in the syllabus to the official report as follows:

"1. The action of the trial court in setting aside a verdict and awarding a new trial on the ground of the admission of improper evidence is erroneous where no exceptions were saved by the losing party to the admission of any evidence on the trial. (Citing *Millar v. Madison Car Co.*, 130 Mo. 142; *Bradley v. Reppell*, 133 Mo. 545.)

"2. The fact that during the trial defendant's counsel and the court became involved in a spirited controversy in which, however, nothing improper or prejudicial to defendant's rights was said by the court, and in which neither plaintiff nor his counsel took part, cannot afford ground for setting aside a verdict returned for plaintiff.

"3. It is the duty of the master to furnish his servant a reasonably safe place within which to work and to see that the appliances he is to use are in a reasonably safe condition. (Citing *Paterson v. Wallace*, 1 Macq. Sc. App. 751.)

"4. A servant does not assume those risks which result from latent defects in machinery or appliances which are unknown to him but which are known to the master, or which by the exercise of ordinary care on the part of the master could be known to him.

"5. The duty of seeing that the place and appliances are such that the servant can perform his duties with reasonable safety is a personal one which the master cannot delegate to an independent contractor or other person and thereby escape liability on his part. (Citing *Burnes v. R. R. Co.*, 129 Mo. 56.)

"6. The fact that the servant's work is done in the presence of,

and under the immediate direction of, the master's foreman, is equivalent to an assurance that the servant may safely proceed with it; he is not bound in such case to search for danger, but may rely for his safety on the judgment of the foreman. *Sullivan v. R. R. Co.*, 107 Mo. 66, *followed*."

DEFECTIVE APPLIANCE TO CRANE — FALL OF BAR OF IRON ON EMPLOYEE. — In **NICHOLDS v. CRYSTAL PLATE GLASS CO.**, 126 Mo. 55 (*In Banc*, December, 1894), judgment for plaintiff was *affirmed* on remittitur being filed by the plaintiff. The fourth paragraph of the syllabus to the report states the case as follows: "Plaintiff, a foreman of defendant's blacksmith shop, was furnished by the foreman of defendant's machine shop, in compliance with the direction of the master mechanic, with a crane to which was attached an endless chain through which one end of heavy bars was placed while being hammered on an anvil. While plaintiff was holding a heavy bar in place on the anvil a defective link in the chain broke and the bar fell and injured him. *Held*, it appearing that the chain was defective, and that the defect could have been discovered on an examination by a competent person, and it appearing further that no such examination was ever made, and that it was not plaintiff's duty to inspect the chain, defendant was liable." Whether plaintiff was negligent in attempting to handle the iron by the use of the crane and in standing close to the shaft when it fell, was for the jury to determine. Verdict for \$8,666 excessive; on remittitur of \$3,666, the Supreme Court ordered judgment should be affirmed for \$5,000. (*Burdick v. Mo. Pac. R'y Co.*, 123 Mo. 221, *affirmed*.) Opinion rendered by BLACK, P. J., in Division 1, *approved*. BARCLAY, GANTT and SHERWOOD, JJ., dissented on the ruling as to damages and remittitur.

FALL OF CROSS-BEAM — EMPLOYEE INJURED — CONTRIBUTORY NEGLIGENCE. — In **LUCEY v. THE HANNIBAL OIL COMPANY**, 129 Mo. 32 (*Division 2*, June, 1895), employee struck on head and arm by fall of crossbeam, judgment for defendant in the Hannibal Court of Common Pleas, was *affirmed*, on the ground of assumption of risk and contributory negligence. Opinion by BURGESS, J., all the judges concurring. The syllabus to the report states the case as follows:

"An employee who knew the dangerous condition of the crossbeams in a building where he was required to work, and who himself assisted in propping such beams in a defective and insecure manner, and who, with this knowledge, continued to work in the same place, notwithstanding there was no promise by defendant

to make the beams at some future time more secure, will be held to have assumed the risk of injury from such defect.

“An employee at work rolling barrels of oil from a building known by him to be dangerous, in consequence of the defective condition of the beams overhead and the props he has himself placed under them, and who rolls the barrels under the defective beam when he might have avoided this risk by moving out of his way other barrels of oil and empty barrels, is guilty of contributory negligence.”

FEMALE EMPLOYEE INJURED BY FALL OF BUILDING — EVIDENCE — EXPERT — EXTRAORDINARY STORM — PRESUMPTION — BURDEN OF PROOF — NEW TRIAL — PRACTICE. — In **TURNER v. HAAR**, 114 Mo. 335 (*Division 1, February, 1893*), female employee injured by fall of building occupied by defendants as manufacturers of clothing, judgment for plaintiff in the Jackson Circuit Court was *reversed* for errors in admission of certain evidence, etc. BEEBE & WATSON, appeared for appellants (defendants below); SHERRY & HUGHES, for respondent (plaintiff below). The opinion was rendered by MACFARLANE, J., who stated the facts as follows:

“The suit is to recover damages for personal injuries received by plaintiff, by reason of the fall of a building in which she was employed by defendants to work; caused, as alleged, by its defective construction and improper use.

“The petition charged that defendants were lessees and occupants of a four-story brick building in Kansas City, in the second, third and fourth stories of which they were carrying on the business of manufacturers of overalls and pants; that on the eleventh of May, 1886, plaintiff was, and for a long time prior thereto had been, with others employed by defendants in the third story of said building in making these articles. “That the several floors of said building were insufficiently sustained and constructed; that the said building and the various parts thereof were weak, insecure, and insufficient for the business then and there carried on therein by defendants, or to sustain said building; that the joists supporting the floors of the third and fourth stories of said building were weakened and rendered more insecure, unsafe and unfit for use and occupation by defendants, as aforesaid, by placing on the fourth floor of said building a steam-engine of the weight of three tons, and by operating the same in the manufacture of overalls and pants; all of which matters and things, on the day and year last aforesaid, were, and for a long time prior thereto had been, known to defendants and unknown to plaintiff. That on said day, while engaged in her work in the third story of said building, and being ignorant

of any danger, the whole of said building, together with the machinery therein, fell, by which plaintiff was injured," etc.

"It appears from the evidence that defendants were lessees of the building, which was made of brick with a stone foundation, and was four stories high. They moved into the building in September, 1885. The boiler and engine were removed from the fourth story of the former place of business and put in the third story of this building about March, 1886. The engine was used to run twenty to twenty-five sewing machines. During the prevalence of a storm, on the eleventh of May, the roof was blown from the building, the walls and floors fell and plaintiff was carried down with the building by which she was injured.

"The evidence of plaintiff tended to prove that the building was twenty-five feet wide and one hundred and six feet long, from north to south, and fronted south. Another brick building composed the east wall, to which this one was bound by strap-iron anchors every ten or sixteen joists on each floor. On the third floor at the north end there was a crack or opening between the walls of the two buildings large enough for plaintiff to see through, and into which she could put her hand. This opening extended from the bottom to top of building. There was an elevator-way cut up through the joists from the bottom to the top. A stairway was built inside the building on the west side to the third story and on the east side from the third to the fourth story. In the third floor was placed a steam boiler and engine and eighty feet of line shafting along the west side of the building and attached to the floor by means of iron brackets for the purpose of running the sewing machines; the whole machinery weighing about twelve hundred pounds.

"The defense was a denial of negligence, and that the building was destroyed by a violent and unprecedented storm. A. B. Cross, a witness for plaintiff, who had lived in Kansas City for thirty years testified that he never remembered seeing a worse storm. It came from the northwest, 'blew down some of the strong buildings here in town, and blew a span out of the river bridge.' Indeed, the evidence leaves no doubt of the extraordinary and unprecedented character of the storm. Defendant's evidence tended to prove that the building was well constructed with good material, was well secured to the adjoining buildings, and that the machinery did no injury to it." * * *

On the question of admission of certain testimony offered by plaintiff as expert evidence, the court said:

"An expert is defined to be 'one who is skilled in any particular art, trade or profession, being possessed of peculiar knowledge concerning the same. Strictly speaking, an "expert" in any science,

art or trade is one who by practice or observation has become experienced therein.' Rogers on Expert Testimony, p. 2.

"Architects and builders are well known as persons engaged as a business in planning, constructing, remodeling and adapting to particular uses buildings and other structures, and, if their experience and observation are sufficient, they may be regarded as being especially skilled in that business and qualified *prima facie* to testify as experts. These witnesses were shown to have been engaged in the business a number of years and are presumed to have acquired special knowledge of the business. Their knowledge, skill and experience were not tested further by cross-examination, and we think they were *prima facie* qualified to give their opinions on any question in respect to the construction, strength and sufficiency of the building which may have been a proper subject for opinion evidence.

"The opinion asked of these expert witnesses as to what produced the crack between the walls would have been proper enough in an issue involving the effect upon the wall a sinking of the foundation would have produced, but in the issue here the condition of the walls and the sufficiency or insufficiency of the foundation were facts susceptible of direct proof, and it was improper to get before the jury, as proof that the wall was defective or the foundation had given way, an opinion that the separation of the walls may have resulted from these facts and conditions.

"It is a well-settled principal of law that, before a witness will be allowed to give his opinion as an expert upon the state of facts, a knowledge of which he derives from other witnesses, he must be put in possession of all the facts as ascertained or supposed on the question about which the inquiry is made. An opinion given upon a partial statement of the facts would be of no value. Rogers on Expert Testimony, p. 70; Senn v. R. R. Co., 108 Mo. 142." * * *

The other points decided are stated in the syllabus to the official report as follows:

"It is the duty of the master to provide his servant a safe place in which to work, but he is not required to provide against storms, extraordinary and unprecedented in their character in the locality in question, but only such as could reasonably have been anticipated.

"The mere falling of a building from its own weight and inherent weakness or from the effect of ordinary storms raises a fair presumption of its insufficiency and unfitness for use. But, where plaintiff's evidence to prove the destruction of the building also discloses the fact that it was destroyed during the prevalence of an unprecedented storm of sufficient violence to tear away a span of a bridge across the river and demolish a number of other build-

ings in the locality, the destruction of the building in question must be primarily attributed to the storm rather than to defects in the building and the use of machinery in it. The *prima facie* case made by the falling of the house is in such case rebutted and the burden still left upon plaintiff to show the insufficiency and unfitness of the building for the uses to which it was applied.

"Where evidence offered by plaintiff is erroneously held by the trial court to make a *prima facie* case without requiring further proof, the Supreme Court will remand the cause for a new trial, as the error was one at law as to what was necessary to be proved by plaintiff, and the evidence offered may not have shown the strength of her case."

FALL OF WALL OF BUILDING — CARPENTER KILLED — SUPERINTENDING ARCHITECT — MISFEASANCE AND NONFEASANCE — AGENT — AMENDED PETITION — STATUTE OF LIMITATIONS — PRACTICE. — In **LOTT-MAN v. BARNETT**, 62 Mo. 159 (*January Term, 1876*), judgment for plaintiff for \$5,000 in the St. Louis Circuit Court was *affirmed*, her husband, a carpenter, having been killed by the fall of a wall of a building in course of construction (1). The opinion was rendered by NAPTON, J., and the questions decided are stated in the syllabus to the official report as follows:

"One having the general charge and superintendence of the construction of a building was held to be responsible for the killing of a workman caused by the falling of a wall which resulted from the giving way of supports on which it rested, under the working of a jackscrew, although the appliance was put to work under the immediate direction of another person employed by the owner of the building, and while the architect was absent, where it appeared that the manager of the jackscrew was employed under the advice of the architect, and subject to his direction, and that he knew and approved of the method adopted for effecting the raising. Whether the wall fell because the plan for raising it was a bad one, or because the supports were inadequate, in either case the disaster was attributable to positive misfeasance for negligence in a work

1. In **HORNER, ADM'R, v. NICHOLSON**, 56 Mo. 220 (*March Term, 1874*), employee fatally injured by fall of floor and wall in building being constructed by defendant, judgment for plaintiff was *affirmed*.

In **NORTON v. ITTNER ET AL.**, 56 Mo. 351 (*March Term, 1874*), plaintiff's intestate, a hod carrier in defendant's

employ, killed while crossing a gangway, constructed by defendants or their agents, from third story of one house to third story of another, defective plank giving way, judgment of nonsuit in the St. Louis Circuit Court was *reversed*, the question of negligence being for the jury.

which the architect undertook, but in which he failed to exhibit the care and skill which the law imposed upon him. For such negligence he was responsible not merely to his employer, but to those injured in consequence, and the question whether, and in what respect, he was guilty of negligence, was one for the jury under appropriate instructions. The doctrine that agents are not responsible to third persons for mere non-feasance, has no application to such a case. (Citing *Harriman v. Stowe*, 57 Mo. 93.)

"In such suit, where the original petition joined the architect and the owner as defendants, charging them with carelessness and negligence in the construction of the building, and the suit was subsequently dismissed as to the owners, and an amended petition was filed alleging that the remaining defendant (the architect), had the entire superintendence and control of the building, and that the disaster was caused by his carelessness as such architect, in the construction of the building, it was held that the amendment did not change plaintiff's cause of action so as to affect the running of the statute of limitations. (Citing *Buel v. Transfer Co.*, 45 Mo. 562, and *Thompson v. Mosely*, 29 Mo. 477.)

"In civil actions at law the Supreme Court will not consider questions of conflicting evidence.

"Amendments are allowed expressly to save a cause from the statute of limitations, and courts have been liberal in allowing them when the cause of action is not totally different." (Citing *Mad-dock v. Hammet*, 7 Term Rep. 55.)

EMPLOYEE INJURED BY FALLING OBJECT — ASSUMPTION OF RISK. — In **STEFFEN v. MAYER et al.**, 96 Mo. 420 (*October Term, 1888*), judgment for plaintiff in the St. Louis Circuit Court was *reversed*, on the ground of assumption of risk. The syllabus to the report (opinion by BLACK, J.) states the case as follows: "The plaintiff was a laborer at defendant's foundry and was directed by the defendant and his superintendent to unload from a wagon, a mill brought to the foundry for repair. The driver of the team left the horses without unhitching the traces or blocking the wheels, and while plaintiff and his co-laborers were unloading the mill, it fell on plaintiff's foot by reason of the horses taking fright at a passing railroad train. *Held*, that the danger was one which was incident to plaintiff's employment, and should have been guarded against by him, and that, therefore, he was not entitled to recover."

NIGHT WATCHMAN FALLING THROUGH HATCHWAY IN FACTORY — CONTRIBUTORY NEGLIGENCE. — In **GLEESON v. THE EXCELSIOR MANUFACTURING COMPANY**, 94 Mo. 201 (*October Term, 1887*), appeal from judgment for plaintiff in the St. Charles Circuit Court, in action by plaintiff for damages for death of her husband, a night watchman in defendant's employ, judgment for plaintiff was *reversed*, the case being stated in the syllabus to the official report as follows:

"1. Plaintiff cannot recover for the death of her husband, occasioned by falling through a hatchway in defendant's manufactory, when it was a part of his contractual obligation to close such hatchway when left open, and when, at the time of the accident, it was well lighted by gas jets burning near it, and he had a lighted lantern in his hand. He was guilty of such contributory negligence as to preclude a recovery.

"2. Where the negligence of the injured party is the proximate cause of the injury, there can be no recovery. And, if the deceased, knowing that the hatchways were unguarded, voluntarily entered into the employment of defendant and continued in it, agreeing, as a part of his undertaking, to close the hatchways when left open, he took upon himself all the risks incident to the employment."

BOETTGER v. SCHERPE AND KOKEN ARCHITECTURAL IRON COMPANY.

Supreme Court, Missouri, October Term, 1896.

[Reported in 136 Mo. 531.]

SCAFFOLD BREAKING AND EMPLOYEE FALLING GREAT DISTANCE AND KILLED. — In an action by a widow for the death of her husband, a common laborer in the employ of defendant, who was working upon a scaffold around a tower of a high building, about 125 feet from the ground, and by reason of the scaffold being defectively constructed it broke and the plaintiff's intestate was precipitated to the ground and killed, it was *held* that defendant was liable and judgment for plaintiff for \$4,500 was affirmed (1).

MORTALITY TABLES — EVIDENCE. — In such action there was no error in admitting in evidence the "American Experience Table," to show the expectancy of deceased's life, the same being a standard table recognized by R. S. 1879, § 5968 and R. S. 1889, § 5841.

1. A former trial of the **BOETTGER** case resulted in a verdict and judgment for plaintiff for \$3,000, but was reversed, on appeal, for erroneous instruction as to duty of deceased to examine the lumber for the scaffold. See 124 Mo. 87 (*April Term, 1894*).

SUPERINTENDENT — EXPERT. — Neither was it error for the court to refuse to permit defendant's superintendent to give his opinion as to whether deceased was competent to select lumber for the scaffold, that being for the jury to determine.

COMMON LABORER — DEFINITION. — Nor was it error to refuse to define the term "common laborer," the meaning being obvious to the jury.

APPEAL from St. Louis County Circuit Court. The case is stated in the opinion. *Judgment affirmed.*

POLLARD & WERNER, for appellant.

L. FRANK OTTOFY, for respondent.

Brace, P. J. — This is an action for damages by a widow for the death of her husband, who lost his life while in the employment of the defendant, in which she recovered judgment below for \$4,500, and the defendant appeals.

The errors complained of are: The refusal of the court to instruct the jury to return a verdict for defendant; admitting in evidence the mortality table contained in Revised Statutes, 1879; the refusal of the court to permit defendant's superintendent to give his opinion as to whether the deceased was competent to select the number for the scaffold in question; and the refusal of the court to define the term "common laborer."

1. This is the second appeal in this case. The decision on the former appeal is reported in 124 Mo. 87. The case was re-tried on the same pleadings as before, consequently the issues were precisely the same as before. The instructions for the plaintiff, after eliminating therefrom the error for which the judgment was reversed on the former trial, were the same as given before, and defendant's theory of the case was presented in very favorable terms in other instructions asked by it. On pages 96-101 of the opinion on the former appeal will be found a full and fair statement of the salient facts of the case as they appeared from the evidence on the former trial (1).

1. The facts stated in the opinion on the former appeal in the **BOETTGER** case, 124 Mo. 87, are as follows:

"The facts disclosed by the evidence are that the deceased was a strong, healthy man, aged forty-three years, who, at the time of his death, had been in the employ of the de-

fendant five or six years as an outside laborer in their iron business. The first two years he received \$1.50, then \$1.75 and at last \$2 per day. His family consisted of himself, wife and eight children, the oldest seventeen years and the youngest thirteen months old. On April 19, 1892, the

On the re-trial, in addition to the witnesses who testified before, one other was introduced by the plaintiff and four by the defendant. We have been furnished with printed copies of the evidence, in full, as detailed by all the witnesses, and, after giving it a very careful reading and comparing it with the evidence on the former trial, we find the additional testimony simply cumulative in character, not changing, in any material aspect, the complexion which the case bore when it was here before. The first point made in the brief of counsel for appellant on the former trial was "that there is no evidence to support the verdict." The point was maturely considered then and ruled against the appellant. It has been so considered again in the light of all the evidence as it appears in the present record, and we reach the same conclusion. The court committed no error in refusing to instruct the jury to return a verdict for the defendant.

2. The court committed no error in admitting the "American Experience Table" in evidence to show the expectancy of deceased's life. This is a standard table which has been long recognized in this and other States, both by statute and by the courts. R. S. 1879, § 5968; R. S. 1889, § 5841; Abb., Trial Ev., p. 724, n. 4. It detracts nothing from the value of this evidence that other tables are also so recognized.

defendant company were erecting the ironwork of a porch or balcony about 125 feet from the ground around the top of a high tower for the Anheuser-Busch Brewing Company. In order to do the work, it became necessary to construct a scaffold at that height for the workmen, outside of five iron brackets inserted in the wall of the tower and extending out about three feet therefrom, upon which to perform their labors. This scaffold was constructed by rigging a hanger at the end of each of the five brackets, and extending two by six inch scantling six feet long from the wall outward, resting about midway and edgewise in the hanger, on which boards were laid, making the required platform outside the brackets, the weight of the boards outside the hanger and brackets holding the scantling in

place by pressing the other ends against a beam at the wall under which they rested. Upon this scaffold, deceased, John Wells, and John Lakas were at work laying down the last of the boards upon the scantling, when about a quarter to six in the evening, the middle scantling broke, just outside the hanger, and the deceased was thereby precipitated to the ground and instantly killed.

"The scantling broke at a place where there was a knot or cross-grain in it, running diagonally through the piece from the top to the bottom, and this was the cause of the breaking.

"The deceased, John Lakas and Henry O'Hara had been detailed from the defendant's force of laborers to construct this scaffold under the direction of John Wells as fore-

3. The court committed no error in refusing to permit defendant's superintendent to give his opinion as to whether deceased was competent to select the lumber for the scaffold in question. That was the very issue the jury were called upon to try upon the facts in evidence, in the case. He was permitted to testify to all the facts within his knowledge, touching the question of deceased's experience in respect to the subject of inquiry, but it would have been improper to have permitted him to go further and give his own opinion upon those facts. This was the province of the jury. These facts did not call for the opinion of an expert, but for a verdict. *Gutridge v. R. R. Co.*, 94 Mo. 468.

4. Nor did the court commit error in refusing to define the term "common laborer," the meaning of which was just as obvious to the jury as to the court. The judgment is affirmed. All concur.

STONE MASON FALLING FROM SWINGING SCAFFOLD — DEFECTIVE CONSTRUCTION — SUPERINTENDENT — FELLOW-SERVANT — DAMAGES — ERRONEOUS INSTRUCTION. — In **WHALEN v. THE CENTENARY CHURCH OF THE CITY OF ST. LOUIS**, 62 Mo. 326 (*January Term*,

man. They had been working at it all day, the deceased sawing the lumber therefor into pieces of the required length on the roof of the tower, and passing them out to his fellow-workmen, Lakas and O'Hara, by whom they were put in place. Their work was thus arranged for them by the foreman. The scaffold was being constructed from such lumber as could be found in and around the building, gathered by the deceased, under the directions of the foreman, who told him to pick out good timber. There was evidence tending to prove that O'Hara put in place the piece that broke, that the foreman was present when he was handling it. O'Hara testified that right at the break there was a piece in the wood that looked like cross-grained; 'from outside appearance the lumber looked first rate; when I

put it in, it looked like pretty fair lumber.' The evidence tended to show that the deceased was not a worker in wood, nor a mechanic of any kind; that while he had assisted in erecting many scaffolds, under the directions of a foreman, he had assisted in erecting none like this; that ordinarily the scaffold used by the defendant's workmen consisted of trestles with boards laid on them, prepared and fitted out of lumber selected by the company's carpenter, and carried by the workmen from place to place as needed. The evidence further tended to prove that the defect in the scantling was easily discoverable by one accustomed to work in wood, and its unfitness for the purpose could have readily been detected by a mechanic in that kind of work." * * *

1876), stone mason injured by falling from swinging scaffold, judgment for plaintiff in the St. Louis Circuit Court was *reversed* for erroneous instruction, permitting punitive damages. Opinion by NAPTON, J. The case is stated in the syllabus to the official report as follows:

“A superintendent, placed in charge of work, is not a fellow-servant with the employees, but the agent of the master and a vice-principal, and not within the rule as to the non-liability of the master for negligence of a co-employee. And where, by the defectiveness or ill-construction of a scaffold built by the superintendent or under his directions and necessary for the work in which he was engaged, an employee receives a fall and injuries, and the superintendent is guilty of negligence in preparing the scaffold, and if the servant exercised proper care, the master will be liable.

“Where the master employs incompetent servants or defective machinery, the risks arising from either of these circumstances are not implied by the contract of the servant.

“To provide a safe place where the servant can work is an obvious duty of the employer.

“A master is bound to exercise proper care in the materials and machinery given to a servant to work upon, or with, and if this duty is neglected, he is liable for resulting injuries.

“An instruction awarding vindictive damages, without evidence to warrant it, is improper.”

EMPLOYEE KILLED BY FALLING FROM BRIDGE SCAFFOLDING — NEGLIGENCE OF FELLOW-SERVANT. — In **RYAN v. McCULLY**, 123 Mo. 636 (*Division 1, July, 1894*), judgment of nonsuit in the St. Louis City Circuit Court was *affirmed*, in action by the widow of one of the defendant's employees, who while working upon a scaffolding for an iron bridge which defendant was building, standing upon a wooden beam for the purpose, lost his balance, by reason of a beam which was being hoisted striking against the one he was on, fell to the ground and was killed. Opinion by BARCLAY, J. The second and third paragraphs of the syllabus to the official report are as follows:

“2. A laborer employed in building a bridge, and an engineer operating the hoisting machinery for its construction, are fellow-servants, where both belong to the same working force, under the orders of the same foreman. The master is not liable for an injury to the laborer from the negligence of the engineer.

“3. The master's order to lower a beam, during the process of constructing a bridge, does not render him liable for the act of a servant (charged with the execution of the order) in lowering the beam so carelessly as to inflict injury on a fellow-servant.”

EMPLOYEE FALLING FROM SCAFFOLD — INSUFFICIENCY OF COMPLAINT. — In **WRIGHT v. COOPER**, 127 Mo. 377 (*Division 1, March, 1895*), the case is sufficiently stated in the syllabus to the official report as follows: "An action by an employee for injuries resulting from a fall from a scaffold, claimed to have been caused by defendant's having removed some of the boards therefrom during the day without plaintiff's knowledge, is not sustained where plaintiff testifies that he did not notice any change in the platform, although he worked there all day, and the only evidence in support of plaintiff's charge was defendant's admission that he was having the scaffold torn down without informing plaintiff, it not appearing that the removal was not at some other place than that at which plaintiff fell." Judgment of St. Louis County Circuit Court, sustaining demurrer to evidence, *affirmed*. Opinion by BRACE, P. J.

CARPENTER FALLING FROM STAGING — ASSUMPTION OF RISK. — In **FUGLER v. BOTHE**, 117 Mo. 475 (*Division 1, October 1893*), the syllabus to the report (per opinion by BIGGS, J.), states the case as follows: "Deceased, an experienced carpenter, had been working for three weeks in the side boarding of air shafts. He had finished three of them, standing on a plank on the inside of a shaft for that purpose. While sheathing the fourth he lost his balance, fell off the plank down the shaft and received injuries which caused his death. *Held*, that the danger being obvious and continuous, the deceased assumed the risk and the master was not liable." The case was certified from the St. Louis Court of Appeals upon a division of opinion in that court. The opinion of BIGGS, J. (in which THOMPSON, J., concurred), in which judgment for plaintiff for \$1,300 in the Circuit Court was *affirmed*, is set out in 117 Mo. 475. The dissenting opinion of ROMBAUER, J., holding that the decision is contrary to the decisions of the Supreme Court in *Aldridge v. Midland Blast Furnace Co.*, 78 Mo. 558; *Devitt v. Pac. R. R. Co.*, 50 Mo. 302, and other cases, was approved as properly declaring the law, and the judgment was reversed and remanded.

See also, report of the Fugler case, in 43 Mo. App. 44.

LABORER FALLING INTO RIVER FROM BRIDGE AND DROWNED — BRIDGE APPLIANCES — FELLOW-SERVANT. — In **LEE v. THE DETROIT BRIDGE AND IRON WORKS**, 62 Mo. 565 (*May Term, 1876*), nonsuit in the Buchanan Circuit Court was *affirmed*, the fellow-servant rule being applied (1). Plaintiff's intestate was a day laborer in defendant's employ, and

1. The relations of the person injured and the person causing the injury in the case at bar (the *LEE* case) were said to be much the same as in the case of *MARSHALL v. SCHRICKER ET AL.*, 63 Mo. 308 (Oc-

at time of accident was adjusting a lock frame in bridge work. NAPTON, J., in rendering the opinion said: "It appears from the testimony, that the accident occurred in putting in a frame into the caisson. This frame had been built on the bank of the river, and moved on a dolly to the point where it was suspended, directly over the caisson, by a block and tackle to let it down to its proper place in the caisson. The ropes around the frame embraced the plank, on which it rested, and the dolly, on which it had been moved, and were so unskilfully adjusted, that, when the foreman ordered the men to jump on it, press it down, it inclined to one side, and five of the men on it were precipitated into the water, and one of them, Lee, was drowned. The machinery was all right; there was no defect in the ropes or pulley, or any other appliances used; but the dolly was improperly left under the plank on which the frame rested. The work was under the immediate care of one Shepley, who with another foreman, named Taylor, was putting on the frame. Both of these foreman were under the supervision of Patton, assistant superintendent, and Robinson, general superintendent. Patton and Robinson were both present when the accident occurred. It does not appear, however, that Robinson interfered in any way, except to call attention to Lee when he fell through. One witness states, that Patton called on the men to jump on the frame, and Shepley first jumped on and called on others to do so, and Shepley and four others fell into the water from the frame. There is one witness who gives it as his opinion, that Shepley was incompetent for the place of foreman of bridge carpenters; but there was no proof showing, or tending to show, that defendant was guilty of negligence in his employment, or retained him in their employment after being appraised of his incompetency." * * *

tober Term, 1876), an action for the killing of one of plaintiff's horses by alleged negligent blasting caused by incompetency of defendant's foreman, plaintiff being in the employ of defendants at the time of the injury. Plaintiff had a verdict and judgment in the Johnson Circuit Court, but, on appeal by defendants, the Supreme Court *reversed* the judgment. Opinion by HOUGH, J. Plaintiff was employed by defendants to haul, with his own team, earth, stone and other materials from certain excavations then being made by them as contractors. He, with other employees, was under the direction of Clifford,

who had charge of blasting operations and acted as defendant's foreman. He was directed by Clifford to remove his team until a blast was exploded. When the discharge took place a large stone was hurled in the direction of plaintiff's team and struck and killed one of the horses. The fellow-servant rule was applied, it being held that the foreman was not a vice-principal but a fellow-servant, being engaged in the same work with plaintiff and not charged with any executive duties or control over him to constitute him (the foreman) the agent of defendant. Citing several authorities on the fellow-servant rule.

BROTHERS V. CARTTER ET AL.

Supreme Court, Missouri, St. Louis, March Term, 1873.

[Reported in 52 Mo. 372.]

- "1. NEGLIGENCE OF CO-SERVANTS — FELLOW-SERVANT RULE — The master is not liable for injuries received by a servant caused by the negligence of a co-servant, unless the latter is not possessed of the ordinary skill and capacity for the business intrusted to him, and unless his employment is attributable to the want of ordinary care on the part of the master.
- "2. DELEGATION OF MASTER'S AUTHORITY — LIABILITY FOR NEGLIGENCE. — When a master delegates to a superintendent the power to employ and discharge servants and to provide and remove material, which duties adhere to him as master, he thereby makes himself liable for any injuries sustained by his servants, caused by the lack of care or negligence of such superintendent."

So *held* in an action for damages for injuries sustained by plaintiff, an employee, while at work upon a railroad bridge which was being constructed by defendants, one of the spans falling, owing to alleged defective bracings, etc., and precipitating plaintiff a distance of many feet upon rock beneath the bridge.

APPEAL from St. Louis Circuit Court. The case is stated in the opinion. *Judgment affirmed.*

LACKLAND, MARTIN & LACKLAND, and DRYDEN & DRYDEN, for appellants.

STEWART & WIETING, for respondent.

Wagner, J. — This was an action for damages received by the plaintiff while in the employ of defendants in the construction of a bridge across the Aux Vasse river, in the county of Callaway, Missouri, for the Fulton and Jefferson branch of the Louisiana & Missouri Railroad. The material averment in the petition is, that while plaintiff was at work on the bridge, one span fell, and plaintiff was precipitated a distance of seventy-three feet upon the rock and debris beneath, and was thereby seriously injured.

The cause of the falling of this span of the bridge is alleged to have been the insufficiency in amount and quality of the bracings and falsework used in the construction of the span, that defendants failed to furnish proper and sufficient material for the erection of said structure, and because of the removal by defendants of supports and bracings, which had been fur-

nished for this purpose, to make the structure safe and secure during its construction; and that defendants well knew of the insecure condition of the structure and of the deficiency and insufficiency of the materials furnished for the same, and of the dangerous condition of the structure, and that in consequence of defendants' negligence and recklessness in and about the premises, plaintiff was injured, etc.

The plaintiff gave evidence strongly tending to prove his averments.

It appears that the defendants did not personally have charge of the work, and what they knew of its character and condition was from being about it occasionally during its progress.

They did not attend personally to the purchase and collection of materials, or to directing the construction. The former duties were committed to the superintendent, Graham, and the latter to the foreman, Logan,

The jury rendered a verdict for the plaintiff, and as there was ample evidence to support it, of course this court will not interfere, unless they were misled by wrong instructions.

The instructions given for both parties taken together fairly presented the law, and the second instruction given for the plaintiff is the only one that is seriously complained of here. That instruction is as follows: "If the jury find from the evidence that one John Graham was the superintendent for defendants of the work on the bridge in question, and as such had entire control and charge thereof, with power to employ and discharge hands, and to provide and remove material, and that said Graham was the representative of defendants in the construction of said bridge, and that plaintiff was subject to his orders and directions, then the jury are instructed that said Graham was not a fellow-servant with the plaintiff, and that his acts and conduct in connection with said bridge were and are the acts and conduct of defendants so far as this case is concerned."

The other instructions essentially lay down the law as it was declared by this court in the case of *Gibson v. Pacific R. Co.*, 46 Mo. 163, that where injuries to a servant were owing to improper or defective machinery or appliances used in the prosecution of the work — the condition of which by reasonable and ordinary care and prudence the master might know

—and not to the lack of care and prudence in the servant, the master would be liable. That the legal implication was, that the employer would adopt suitable instruments and means with which to carry on his business, and if he failed to do so he was guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he would be responsible (1).

In that case we also held, affirming the cases of *McDermott v. Pacific R. Co.*, 30 Mo. 115, and *Rohback v. Pacific R. Co.*, 43 Mo. 187, that where injuries to servants or workmen happen, through the negligence, misfeasance or misconduct of a fellow-servant, no action therefor can be maintained against the master, unless the fellow-servant is not possessed of the ordinary skill and capacity in the business intrusted to him, and unless his employment is attributable to the want of ordinary care on the part of the master.

The question then is, if Graham was defendants' superintendent and had entire control of the work, with power to employ or discharge hands and to provide and remove material, whether he was a fellow-servant within the meaning of the term. If a workman or servant is to work in conjunction with others, he must know that the carelessness of one of his fellow-servants may be productive of injury to himself, and he must know that neither care nor diligence by the master can prevent the want of due care and caution on the part of his fellow-servants. The servant, on entering upon the employment, is supposed to know and assume this risk. But does he risk the carelessness and negligence of those placed over him, in the selection of suitable materials, machinery and the appliances incident to the employment? He acts in subordination. His simple duty is obedience. He has no means or opportunity of knowing whether the articles furnished are safe, and has to rely on the judgment of his superiors.

If the master in person superintends the work, then there is no controversy or dispute as to where the responsibility belongs.

If the master deposes the superintending control of the work, with the power to employ and discharge hands and purchase and remove materials, to an agent, then the master acts

1. The cases cited in the opinion in *Missouri Railroad cases* in this volume of *AM. NEG. CAS.*, *post*. the case at bar are reported with the

through the agent and the agent becomes the master. The duties are the duties of the master, and he cannot evade the responsibilities which are incident and cling to them by their delegation to another. When the master appoints some other person to perform these duties, then the appointee represents the master, and though in their performance he may be and is a servant to the master, yet in those respects he is not a co-servant, a co-laborer, a co-employee, in the common acceptation of those terms. He is an agent and stands instead of the principal, and is not a fellow-servant within the meaning of the rule as applied to laborers and workmen. His acts are the acts of a master and superior, and the servants are bound to use whatever materials, machinery, apparatus or appliances he may see fit to provide for them. This question was carefully considered in the case of *Harper v. Ind. & St. Louis R. Co.*, 47 Mo. 567, and decided in accordance with the doctrines above mentioned. In any view which I am able to take of the subject, I think that the instruction was right, and that the judgment should be affirmed.

The other judges concurred, except SHERWOOD, J., who was absent.

CAVE-IN ACCIDENTS — EMPLOYEES INJURED. — In **KEEGAN v. KAVANAUGH**, 62 Mo. 230 (*January Term, 1876*), "where a hodcarrier engaged at work in an excavation, having manifested some reluctance to descend, was ordered by his employer to go down, and the earth caved in upon and killed him, it was held that the order was an implied assurance that there was no danger; that the laborer properly relied on the superior information of the master, and that the latter was liable; and that in such a case the question of negligence was for the jury, judgment for plaintiff in the St. Louis Circuit Court was *affirmed*. Opinion by NAPTON, J.

In **ALDRIDGE'S ADM'R v. THE MIDLAND BLAST FURNACE CO.**, 78 Mo. 559 (*October Term, 1883*), judgment for \$500 for plaintiff in the Phelps Circuit Court was *reversed*, for erroneous instruction omitting point as to the danger of the work being obvious to the injured employee. Plaintiff's intestate, according to the petition, while at work by defendant's direction in the Millsap bank at the foot of an embankment, or wall of earth, four feet back from the face of which was a crevice partially separating the embankment from the body of the surrounding earth, the embankment fell upon and injured him, by reason of defendant's failure

to secure it by the use of shores or props ; that plaintiff was ignorant of the crevice and defendant was not. Opinion by HENRY, J.

In **SHORTELL v. CITY OF ST. JOSEPH**, 104 Mo. 114 (*Division 1, April Term, 1891*), laborer injured while engaged in repairing a sewer, judgment for defendant in the Buchanan Circuit Court was *affirmed*. The city engineer had charge of the work, and while it was dangerous, it was shown that the employee had knowledge thereof.

LABORER IN FOUNDRY INJURED BY HEAVY WHEEL BEING ROLLED AGAINST HIM — SUFFICIENCY OF PETITION. — In **CUMMINGS v. COLLINS**, 61 Mo. 520 (*January Term, 1876*), it was held that sufficient facts were stated to show a cause of action where "the petition alleged that the plaintiff was employed as a common laborer by the defendants, who were proprietors of a certain iron foundry, in the City of St. Louis; that on the 31st day of March, 1873, the defendants ordered the plaintiff to assist three other men in rolling a large iron wheel, weighing many hundred pounds, from one place to another in said foundry; that said order was improper, as said wheel was too large to be rolled by four men; that the service thus required of plaintiff was out of the line of his employment and exposed him to dangers not contemplated by his contract; that he had never received nor executed such an order before; that plaintiff protested against undertaking said work, but said order having been repeated, he undertook its execution; that the designated line of passage for said wheel was obstructed with various heavy articles; that there was a concealed hole in the floor of said foundry along the line where said wheel was ordered to be rolled, the existence of which was unknown to plaintiff, but was known, or should have been known, to the defendants; and, in the execution of said order said wheel was necessarily rolled over said hole, and fell into the same and against and upon the plaintiff, breaking his leg and inflicting other injuries of a permanent character. The petition further formally alleged that the injury to plaintiff was caused by defendant's fault and negligence in ordering plaintiff to roll a wheel, which was too large to be rolled by hand; in failing to provide sufficient number of men to assist plaintiff in rolling said wheel; in requiring plaintiff to perform a service out of the line of his employment; in requiring said wheel to be rolled along a passageway too narrow to enable the men rolling it, to control it; in failing to cause the obstructions in the line of passage of said wheel to be removed; and in permitting said hole to remain in the floor of said foundry." Opinion by HOUGH, J. Judgment for defendant *reversed*.

LINEMAN KILLED BY FALL OF TELEGRAPH POLE ON ANOTHER COMPANY'S PREMISES — CONTRIBUTORY NEGLIGENCE. — In **MATTHEWS v. THE ST. LOUIS GRAIN ELEVATOR COMPANY**, 59 Mo. 474 (*March Term, 1875*), lineman killed by fall of telegraph pole, judgment was rendered for defendant, the syllabus to the official report stating the case as follows: "An elevator company had its office connected with the main lines of a telegraph company, by means of wires supported by a pole placed in the ground to a depth of four or five feet in the elevator lot. But the earth had afterward been graded down, leaving the pole standing not deeper than a foot in the soil. At the request of the elevator company, a telegraph employee was sent to remove the pole, and while detaching it from the wires, it fell, and he was killed. It appeared that the pole was originally placed in position under the supervision of deceased; that the grading down of the ground was apparent to the observation of anyone; that deceased had been in the habit of visiting the office frequently, and that the elevator company did not in any way employ deceased or control his actions. *Held*, that neither in making the change of grade, nor in failing to notify the telegraph company or the deceased thereof, was the defendant guilty of such negligence as to render it liable in damages for the death; but, *semble*, that deceased was guilty of contributory negligence in attempting, under the circumstances, to climb the pole and remove the wire. Such a case is not to be confused with a suit against a common carrier — where the law requires the utmost diligence in the company." See also former appeal, 50 Mo. 149.

DOMESTIC SERVANT INJURED — ASSUMPTION OF RISK — SCOPE OF EMPLOYMENT — WIFE OF EMPLOYER DIRECTING SERVANT TO PERFORM WORK WHICH CAUSED INJURY — RESPONDEAT SUPERIOR — HUSBAND AND WIFE — PRINCIPAL AND AGENT — WIFE NOT LIABLE. — In **STEINHAUSER v. SPRAUL**, 127 Mo. 541 (*Division 2, October Term, 1894*), appeal from verdict and judgment for plaintiff (Steinhauser), for \$3,000, in the St. Charles Circuit Court (plaintiff being injured while employed as a domestic servant), judgment was *reversed*, the case and points being set out in the syllabus to the official report, as follows:

"1. A domestic servant who was directed by the wife of her employer to get pigeons from a loft and used a ladder made for the purpose which, though sound, was not adapted in length to the height of the loft, cannot recover for injuries received from a fall while attempting to enter the loft, it appearing that she had several times before used the ladder with safety and knew as much

about its use for the purpose as did her employer. (BRACE, Ch. J., GANTT and BURGESS, JJ., *dissenting*.)

"2. The servant in such case assumed the risks of executing the order which was a duty within the range of her employment as a domestic servant. *Ib*.

"3. A servant who, by negligence in the discharge of his duties, injures a third person, is not personally liable to such third person. In such case, the maxim *respondeat superior* obtains, the principal is liable for the injury and the agent is then liable to the principal for the damages, which the latter may have sustained. (Per SHERWOOD, J., ROBINSON, J., *concurring*.)

"4. The agent, however, is personally liable to third persons for misfeasances and positive wrongs not done in the course of his employment. *Ib*.

"5. Where a wife ordered a domestic servant in her husband's employment, to procure pigeons from a loft, and a servant, in obeying the order, used a ladder furnished for the purpose by the husband which was longer than the height of the loft, and was injured in consequence, the wife was acting as the husband's agent in giving the order and is not liable in damages for the injury. *Ib*.

"6. In cases where the risk of injury in the use of tools is small, the requirement of the master to use ordinary care in furnishing implements is discharged by furnishing primitive and inefficient instruments. *Ib*."

The leading opinion in the STEINHAUSER case, *supra*, was delivered by SHERWOOD, J., who, in the opening paragraph, said: "The theory on which this cause was tried in the court below was that defendant was the wife and agent of her then husband, Erwin Spraul, and as such gave the command which it is claimed indirectly resulted in the litigated injury. The whole case turns on the point whether, in giving such order, defendant was guilty of a mere omission of duty or negligence, while acting within the scope of her implied authority derived from her husband, or whether she was guilty of an actionable *misfeasance*. The learned judge discussed the point at length, citing numerous authorities in support of his rulings, which latter are set out in the foregoing syllabus. BROADHEAD & HEZEL and H. A. HAUSSLER, appeared for appellant (defendant below); J. HUGO GRIMM, for respondent.

The opinion delivered *in banc*, in the Steinhauser case, *supra*, is as follows: "*Per curiam*. The judgment herein is reversed and the petition dismissed, as directed in the foregoing opinion of SHERWOOD, J., in Division No. 2, ROBINSON, J., concurring with SHERWOOD, J., in the opinion, MACFARLANE, J., in the third paragraph, BARCLAY, J., specially concurring; BRACE, Ch. J., GANTT and BURGESS, JJ., *dissenting*."

See also former appeal in *STEINHAUSER v. SPRAUL*, 114 Mo. 551 (*Division 2, March 1893*), where judgment of nonsuit and order refusing new trial was *reversed* for error in refusing to permit plaintiff to testify that in using the ladder, she was acting under defendant's orders as her servant, and that defendant knew that plaintiff in order to obey such orders would be compelled to use a ladder which defendant knew was unsafe. Opinion by BURGESS, J. On rehearing, it was held that: "An action may be maintained by a servant against his master's wife as fellow-servant for injuries received in using, at the wife's direction, a ladder known to the wife to be unsafe." Citing *Rogers v. Overton*, 87 Ind. 410, 14 Am. Neg. Cas. 460n; *Hinds v. Harbou*, 58 Ind. 121, 14 Am. Neg. Cas. 459; *Hinds v. Overacker*, 66 Ind. 547, 14 Am. Neg. Cas. 460; *Griffiths v. Wolfram*, 22 Minn. 185, 16 Am. Neg. Cas. 219, *ante*; *Harriman v. Stowe*, 57 Mo. 93.

In *HARRIMAN ET AL. v. STOWE*, 57 Mo. 93 (referred to in the preceding paragraph), where plaintiff, a married woman, brought action, in conjunction with her husband, against defendant for injuries sustained by her in falling through a trapdoor or hatchway, judgment for plaintiff in the Jackson Circuit Court was *affirmed*. Opinion by WAGNER, J. The defense set up that the house where the hatchway was built was the property of defendant's wife, and that defendant was acting as her agent. "The principle is well settled that where an agent is employed to perform or superintend work, the principal is responsible to third persons for injuries caused by the neglect or nonfeasance of the agent in doing his work. And this principle obtains, though the agent exceeds his powers or disobeys his instructions, provided he does the act in the course of his employment. In a case of positive misfeasance, and not mere omission of duty, on the part of an agent or employee, he will be directly liable to a third party for injuries resulting therefrom." In the *Harriman* case, it was held that the action would lie not only against the principal, but the agent also.

MOUND CITY PAINT AND COLOR COMPANY v. CONLON.

Supreme Court, Missouri, April Term, 1887.

[Reported in 92 Mo. 221.]

RELATION OF MASTER AND SERVANT — TORT OF SERVANT. —

The relation of master and servant only exists where the person sought to be charged as master for the act of the servant either employed or controlled the servant, or had the right of control over him at the time

the injury sued for happened, or expressly or tacitly assented to the rendition of the particular service by him. He must at the time have had the right to direct the action of the servant and to accept or reject its rendition by him. Wood, Master and Servant, § 306; Cooley on Torts, 533.

LIABILITY OF MASTER—SCOPE OF EMPLOYMENT.—The fact that the servant disobeys the instructions of the master does not relieve the latter from liability. Garretzen v. Duenckel, 50 Mo. 104 (1).

INSTRUCTIONS MISLEADING—PLEADING.—Instructions which present issues not fairly raised by the pleadings and evidence are calculated to mislead the jury and should be refused.

APPEAL from St. Louis Court of Appeals. (See 15 Mo. App. 601.) The case is stated in the opinion. *Judgment affirmed.*

MADILL & RALSTON, for appellant (Conlon).

W. C. MARSHALL, and PHILLIPS & STEWART, for respondent.

I. In GARRETZEN v. DUENCKEL, 50 Mo. 104 (March Term, 1872), where defendant's servant was showing a customer a rifle and, in obedience to request of the customer the servant loaded the rifle and the same was discharged and shot plaintiff, who was sitting at a window in a house on the opposite side of the street, where defendant's gun and ammunition store was situated, judgment for plaintiff was *affirmed*. The opinion was rendered by WAGNER, J., who stated the rule of law in such cases as follows:

"The universally recognized rule is that a principal is civilly liable for the neglect, fraud or other wrongful act of his agent in the course of his employment, though the principal did not authorize the specific act; but the liability is only for acts committed in the course of the agent's employment. A master is not responsible for any act or omission of his servants which is not connected with the business in which they serve him, though in general he is responsible for the manner in which they execute his orders, and for their negligence in selecting

means by which the orders are to be carried out. In determining whether a particular act is done in the course of a servant's employment it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act was done while the servant was at liberty from his service and pursuing his own ends exclusively, there can be no question that the master is not responsible, even though the injuries complained of could not have been committed without the facilities afforded by the servant's relations to his master."

See, also, the following cases on the rule as to liability of master for tort of servant:

In SIEGRIST v. ARNOT, 86 Mo. 200 (April Term, 1885), action for damages for injury to Mrs. Siegrist, who was thrown from a carriage belonging to defendant, a livery stable keeper, it appeared that defendant gratuitously furnished carriages and drivers to carry to and from a hall, some ladies and gentlemen who were taking part in a benefit performance for charity, and that this agreement was made with the managers of the enter-

Black, J. — The plaintiff, a corporation, brought this suit to recover damages done to its goods by the falling of the south wall of the brick building known as No. 704, on Second street, in St. Louis. The wall, it is alleged, fell by reason of the negligence of defendant, who had been employed by the owner of the property to underpin it. Mr. Snyder was the contractor for the erection of a new house on property south of and adjoining the wall, and he had employed Mr. Archibald to excavate the cellar, which had been done to the depth of nine feet, three or four feet below the wall to 704; but Archibald had left next to the wall a retaining bank of earth as a support until the wall should be made safe. The third instruction and a part of the fourth, given at the request of defendant, proceed upon the hypothesis that at the time the building fell, Archibald was not acting under his employment with the defendant, but in the execution of his contract with Snyder for

tainment. After the performance Mrs. Siegrist (who was not a performer in the entertainment) was invited to get into a carriage by one of the managers. The horses took fright and Mrs. Siegrist was thrown from the carriage. Defendant had judgment in the Circuit Court, which was reversed by the St. Louis Court of Appeals, and defendant appealed. The Supreme Court (per HENRY, Ch. J.) reversed the Court of Appeals and *affirmed* the judgment for defendant in the Circuit Court. All concurred, except BLACK, J., who dissented. One who gets into the carriage of another without his consent or knowledge, and is injured by the careless driving of the latter, who was ignorant of the presence of the former in his carriage, cannot recover for the injury."

See, also, *SIEGRIST v. ARNOT*, 10 Mo. App. 197.

In *REILLY ET AL. v. HANNIBAL & ST. JOSEPH R. R. Co.*, 94 Mo. 600 (October Term, 1887), appeal by defendant from judgment for plaintiffs for \$5,000 in the Monroe Circuit Court, in action for

negligent killing of plaintiff's infant son, a child of sixteen months, who was run over by a switch engine, judgment for plaintiffs was *affirmed*. As to the scope of employment the first paragraph of the syllabus to the official report states the point as follows: "In an action by parents against a railroad company for negligently killing their minor child with a switch engine, while carrying certain of the company's employees from the roundhouse to their meals, where the defense is that such use of the engine was not in the business of the company and was without its knowledge and consent, evidence that the engine had been so used in an open and notorious manner from six weeks to three months, with the knowledge of the yardmaster, and that the superintendent had frequently seen it so used, and was in a position to know all about it, is sufficient to justify the court in submitting to the jury whether such use was known to the company and acquiesced in by it, and whether when so used the engine was engaged in the business of the company." The law on the point is stated

the excavation of the basement of the new building. Another part of the fourth and the fifth are based upon the theory that if Archibald was not to begin the work of underpinning the wall until defendant had shored up the building, and that the building fell before the shoring had been done, then Archibald was not the servant of the defendant, and defendant was not liable for Archibald's acts.

It was urged that there was no evidence which warranted the giving of these instructions, containing the proposition before stated, and that they were designed to mislead the jury. Mr. Archibald, in substance, testified: "I agreed with Conlon at least four days before the wall fell to take charge of the excavating and walling, that is the underpinning, at four dollars a day and commissions on each day's outlay; he told me to let him know when he could get the braces in the cellar, and I went to see him on three different days, but could not find

in the seventh paragraph of the syllabus: "The master cannot be held responsible for the negligent act of his servant, unless done in and about the business of the master, or unless the act in the doing of which the negligence occurs is sanctioned or authorized by him."

In *STRINGER v. MISSOURI PACIFIC R'y Co.*, 96 Mo. 299 (October Term, 1888), where a laborer in the employ of another while riding on defendant's switch engine on the invitation of defendant's brakeman had his leg injured by the engine jumping the track, judgment for plaintiff in the St. Louis City Circuit Court was *reversed*, the evidence failing to show that the brakeman was either acting within the scope of his employment or was authorized to invite plaintiff to ride on the engine. The trial court erred in overruling defendant's demurrer to the evidence. Opinion by NORTON, Ch. J. Citing and following *Snyder v. Hann. & St. J. R. Co.*, 60 Mo. 413, 419 (12 Am. Neg. Cas. 225n), the court said: "The mere fact that a tortious act is committed by a servant *while* he is actually en-

gaged in the performance of the service he has been employed to render cannot make the master liable. Something more is required. It must not only be done while so employed, but it must pertain to the particular duties of that employment."

In *WHITEHEAD v. ST. LOUIS IRON MOUNTAIN & SOUTHERN R'y Co.*, 99 Mo. 263 (October Term, 1899), where plaintiff, a boy fourteen years of age, traveled with a brakeman in the caboose, by consent of the conductor, was injured in a collision while he was asleep in the caboose, his arm and leg being broken, judgment for plaintiff for \$5,000 in the Washington Circuit Court was *affirmed*. The defendant was liable for the act of the conductor in permitting the plaintiff to ride in the caboose although against the rules, such act being within the scope of the conductor's employment. As the train was passing over the top of the hill the caboose and other cars parted from the train. Another train coming down the hill ran into the caboose. Opinion by BLACK, J. See, also, 22 Mo. App. 60.

him; he came to the cellar on the morning of the day the wall fell and told me to commence digging on Second street, to dig square down, but not to undermine, and he would go home and his men would be there with shores in an hour; said he thought the building was pretty safe; I told him Mr. Snyder was anxious, and I felt anxious myself about the wall; said he would have his men there immediately and put up the shores; my men commenced at the end of the cross wall on Second street and took the width of that out so that we could get to the depth we had to go, and then drift under the wall, according to Conlon's instructions; at four o'clock when I left, my man had gone straight down and had not got to the bottom of where we had to go; had not got to the bottom of the excavation I had to make for Snyder; when I came back the building was down; had lime and sand on the ground ready and had made arrangements with the mason on the other wall for the stone."

Mr. Conlon testified: "Saw Archibald three or four days before the wall fell, but did not make any arrangement with him then. The next time I saw him (Archibald) was the morning of the day the building fell. I then made arrangements with him to take the dirt from under the wall and do the underpinning for four dollars a day for his own services and a commission on the men he would employ."

Q. "*What did you say to him about it when it was to be commenced?*" A. "*As soon as we would have the shoring done.*"

Q. "*What did you tell him on the subject?*" A. "*I told him not to take a pound of dirt out from under the wall until he had shored it up; he said he thought it was perfectly safe; said I, that may be, but it will be still safer when we get the braces up, and I don't want you to touch a pound of dirt till that is done.*"

"I told him I would order the poles right away, and I supposed they would be done in an hour or two. My foreman was present at this conversation, which was about half-past seven or a quarter to eight o'clock in the morning. I instructed my foreman about bracing up and not allowing any dirt to be taken from under the wall till he had his shores put up, before I left. I had nothing to do with the bank of dirt. All I had to do was to take the dirt from under the wall and do the underpinning."

Carney, who was Conlon's foreman, states that he went to

the cellar in the morning and stayed there until four o'clock in the afternoon; that he was preparing for the braces; that Conlon directed him to see that no dirt was dug from the wall; that he saw the laborer and told him to quit, but the latter said that he (Carney) was not his boss.

David Breslin, the laborer, who dug out the hole at the corner, speaks of it as a trench, but says he does not know what it was for. It may be stated here that what the stone masons said to him was incompetent evidence and should have been excluded.

Besides the foregoing evidence, it appears that masons under Snyder were at work on the end wall of the new house, on Second street, had extended that wall up to within six or eight feet of the wall of 704; and there is evidence tending to show that the trench or hole dug on the day the wall fell was in a continuation of that wall. This circumstance, and the fact that Archibald's contract with Snyder required him to remove all the earth to a depth of nine feet, are urged as proof that Archibald was then at work in the execution of his contract with Snyder. But the proof is undisputed that Snyder had forbidden the removal of the bank of earth, and that in other respects the cellar had been excavated for ten days. It was no part of Archibald's contract to dig the trenches for the footcourses of the walls to the new house. The wall to 704 could not be underpinned without throwing the bank of retaining earth back in short sections, and it was this at which the laborer under Archibald was engaged, no braces having yet been put up when the wall fell. We do not see any evidence tending to show that Archibald was at the time the wall fell performing his contract with Snyder, but it all tends to show that he was then working for Conlon. It may be that Archibald was bound to remove the earth from the cellar after the wall was underpinned in virtue of his contract with Snyder, but be that as it may, the evidence is all to the effect that, by the direction of Snyder and the agreement of Archibald, the work of excavating the cellar had ceased for the wall of 704 to be made safe.

Saying nothing about the evidence of Archibald, which directly contradicts that of Conlon, still the evidence of Mr. Conlon shows that he and his foreman and Archibald were all in the cellar when the latter was employed to work by the

day; and Archibald then had lime and sand on the ground to go on with the work. They all expected the shores to be on hand in one or two hours, and the foreman was charged with the duty of preventing the removal of any earth until the shores were up. The contract was a present engagement, and the very most that can be said of the evidence is, that it tends to show that Archibald disobeyed the directions of his employer by commencing work before the shores were up. In Wood on Master and Servant, section 306, it is said: "The relation of master and servant only exists where the person sought to be charged as master either employed or controlled the servant, or had the right of control over him at the time when the injury happened, or expressly, or tacitly assented to the rendition of the particular service by him. He must, at the time, have had the right to direct the action of the servant and to accept or reject its rendition by him." To the same effect is Cooley on Torts, 533. The fact that the servant disobeys the instructions of the master does not relieve the latter from liability. Garretzen v. Duenckel, 50 Mo. 104. There can be no doubt, from the evidence of Conlon himself, that Archibald was under his control and that of his foreman during the time the digging was done on the day the wall fell, and while they were waiting for the shores.

Instructions 3, 4 and 5, therefore, present issues not fairly raised by the evidence, *i. e.*, that Archibald was, at the time the wall fell, engaged in the execution of his contract with Snyder, and that there was an arrangement or contract between defendant and Archibald, whereby the latter was not to commence work until defendant had shored up the wall; the instructions, as prepared, could but mislead the jury and should have been refused.

The judgment of the Court of Appeals, reversing that of the Circuit Court, is *affirmed*. All concur.

GIBSON v. PACIFIC RAILROAD COMPANY.

Supreme Court, Missouri, March Term, 1887.

[Reported in 46 Mo. 163.]

FELLOW-SERVANT — INCOMPETENCY. — A servant injured by the negligence, misfeasance and misconduct of his fellow-servant can maintain no action against the master for such injury unless such fellow-servant is not possessed of ordinary skill and capacity in the business intrusted to him, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master. *McDermott v. Pacific R. Co.*, 30 Mo. 115; *Rohback v. Pacific R. Co.*, 43 Mo. 187.

ASSUMPTION OF RISK. — A servant assumes the risks naturally incident to his employment, including injuries from negligence of fellow-servants, where the master has exercised due care in the selection of the latter.

BRAKEMAN INJURED — DEFECTIVE COUPLING APPARATUS — MASTER LIABLE. — Where a servant is injured by reason of improper and defective machinery and appliances used in his work, the use of which he could not foresee, the master is liable, the legal implication being that the latter will adopt suitable instruments and means for the servant to work with.

So *held*, in action for injuries sustained by a brakeman in defendant's employ, caused by alleged defective coupling apparatus.

APPEAL from St. Louis Circuit Court. The case is stated in the opinion. *Judgment affirmed.*

—— **WHITTELSEY**, for appellant.

TERRY & TERRY and **STEWART & WIETING**, for respondent.

Wagner J. — This was an action for damages brought by the respondent, an employee of the appellant, a railroad company, against the company, on account of injuries received through the negligence and carelessness of the company in using upon its road defective and dangerous machinery. The respondent was a brakeman on the road, and, as such it was his duty to assist in coupling cars to form a train, and the case shows that he was a careful and prudent man. While acting under orders of the conductor, the train was backing on a switch to take on an additional car, and, while engaged in inserting the link in the drawhead, the cars came so closely together that in withdrawing his hand it was caught between the deadwoods or buffers, and smashed so that he lost three fingers. There was evidence going to show that the officers of the road, and the master mechanic who had charge of the

road and repair shops, were skilful and competent men, but it most clearly appears that the coupling apparatus, as used on the cars which the respondent was coupling, was dangerous and defective, and that the company was engaged in altering the cars in which a like defect existed, to make them conform to a better standard and consist with greater safety. Judgment was given for the respondent in the court below, and the case is appealed here.

The objections are to the action of the Circuit Court in giving and refusing instructions. For the respondent the court gave two instructions. The first was as follows: "If the jury find from the evidence in this case that the apparatus used for coupling the cars by which the plaintiff was injured, or either of them, from its make and construction, was unsafe, and the defendant knew thereof, or might have known thereof by the exercise of reasonable care and diligence, they are instructed that the defendant is liable to plaintiff for any injuries he has received in consequence of such defect in the make and construction of such apparatus, after it was known or ought to have been known by defendant, if they further believe that plaintiff was exercising ordinary care and prudence at the time he received the injury, and did not know of the defect in said apparatus, and that the same was not due to the carelessness of any fellow-servant of the plaintiff." The second instruction related to the measure of damages, and no point is made upon it in this court.

The appellant asked five instructions, three of which were given and two refused. The following were given:

"1. Although the car by which the plaintiff was injured was defective by having too short a spring, yet if the directors and superintendent of said railroad were ignorant of the defect of said car, and used due care and diligence in procuring its cars, and selecting careful and competent servants to construct and procure said cars, then the defendant is not liable.

"2. If the Pacific Railroad selected competent and skilful subordinates and servants to supervise, inspect, regulate, and control its freight cars while running on its road, and used due care in constructing and procuring said cars, then the plaintiff, being a servant employed on said road, cannot recover in this action.

"3. The plaintiff, as a servant in the employment of de-

fendant, assumed all the risks belonging to the employment he undertook; if, therefore, the plaintiff was injured by and through the negligence of another fellow-servant or person employed on said road, then the plaintiff cannot recover."

The following are the instructions of the appellant refused:

"4. If the Pacific Railroad, the defendant in this cause, selected competent and skilful subordinates and servants to supervise, inspect, regulate, and control its freight cars while running on the road, and if any defect in the car by which the injury happened was unknown to the board of directors representing the company, then the plaintiff cannot recover.

"5. The plaintiff, as a servant in the employ of the defendant, assumed all the risks belonging to the employment he undertook; if, therefore, the plaintiff was injured by and through the negligence of another fellow-servant in the employ of defendant, by means of the negligence of such fellow-servant in sending out or using a car with a spring in the drawhead defective by being too short, and if such defect was unknown to the board of directors of defendant, then the plaintiff cannot recover in this action."

The principles of law which must govern in this case are not to be confounded with the rule which has so often been announced and adjudged, that a servant of a corporation who has been injured by the negligence, misfeasance, and misconduct of his fellow-servant can maintain no action against the master for such injury unless the servant by whose negligence or misconduct the injury was occasioned is not possessed of ordinary skill and capacity in the business intrusted to him, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master. *McDermott v. Pacific R. R. Co.*, 30 Mo. 115; *Rohback v. Pacific R. R. Co.*, 43 Mo. 187 (1).

A workman or servant, on entering upon any employment, is supposed to know and to assume the risk naturally incident

1. In *McDERMOTT v. PACIFIC R. R. Co.*, 30 Mo. 115 (1860), action by a brakeman for injuries sustained by the car on which he was at work being precipitated into the river while running over a bridge or trestle, defective bridge being alleged and also negligent running of train, judgment

for plaintiff in the St. Louis Court of Common Pleas was *reversed*, the syllabus to the official report (opinion by NAPTON, J.) stating the case as follows:

"A servant, who is injured by the negligence or misconduct of his fellow-servant, can maintain no action

thereto; if he is to work in conjunction with others, he must know that the carelessness or negligence of one of his fellow-servants may be productive of injury to himself; and besides this, what is more material, as affecting his right to look to his employer for damages for such injuries, he knows or ought to know that no amount of care or diligence by his master or employer can by any possibility prevent the want of due care and caution in his fellow-servants, although they may have been reasonably fit for the service in which they are engaged.

It is neither unjust nor unreasonable that consequences which the servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work. The use of those they could not foresee. The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business. These

against the master for such injury, unless the servant, by whose negligence the injury is occasioned, is not possessed of ordinary skill and capacity in the business entrusted to them, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master.

"A servant of a railway company could not recover against the company for an injury caused by the falling of a bridge, unless such injury was caused by incompetent servants or agents of the company whose employment might be traced to the negligence of the company, or to a defect in the bridge attributable to the fault of the company."

In *ROHBACK v. PACIFIC R. R. Co.*, 43 Mo. 187 (1869), trackhand run over by train and legs injured, negligent running of train being alleged, judgment of First District Court reversing judgment for plaintiff in Cole

County Circuit Court was *affirmed*, the syllabus to the official report (opinion by WAGNER, J.) stating the rulings as follows:

"A servant of a railroad corporation who is injured by the negligence or misconduct of his fellow-servant can maintain no action against the master for such injury, unless the servant by whose negligence or misconduct the injury is occasioned is not possessed of ordinary skill and capacity in the business intrusted to him, and the employment of such incompetent servant is attributable to the want of ordinary care on the part of the master.

"Servants and employees of a railroad corporation are not to be included in the designation 'any person,' according to the true meaning of the Act concerning railroad companies. Gen. Stat. 1865, p. 342, ch. 63, § 38."

he can provide and maintain by the use of suitable care and foresight, and if he fails to do so he is guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he ought to be responsible. *Snow v. Housatonic R. R. Co.*, 8 Allen, 441, 15 Am. Neg. Cas. 417, per Bigelow, Ch. J.; *Cayzer v. Taylor*, 10 Gray, 274, 15 Am. Neg. Cas. 500; *Seaver v. Boston & Maine R. R.*, 14 Gray, 466, 15 Am. Neg. Cas. 421*n*. Any other rule would be productive of the greatest injustice and wrong. The servant has no control over the matter. He acts in subordination. He relies wholly on the judgment of the master, that suitable machinery and the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe. His attention is exclusively due to the peculiar duties incident to his branch of the employment. He assumes the risk, more or less hazardous, of the service in which he is engaged; but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and which might be prevented by ordinary care and precaution on the part of his employer.

In England, where the principle has been so firmly established, ever since the decision in *Priestley v. Fowler*, 3 M. & W. 1, that a servant cannot recover of his employer for the negligence or carelessness of a fellow-servant, the courts have universally held that the master will be liable for ordinary neglect in the use of defective machinery or apparatus from whence injury results. Upon this ground the English, the Scotch, and the American law all concur. In *Patterson v. Wallace*, 1 Macq. 748, Lord Cranworth says: "I believe by the law of England, just as by the law of Scotland, in the actual state of the case with which we have to deal here, a master employing servants upon any work, particularly a dangerous work, is bound to take care that he does not induce them to work under the notion that they are working with good and sufficient tackle, whilst he is employing improper tackle, and, being guilty of negligence, his negligence occasions loss to them." The same view of the law was taken by Lord Brougham in that case.

The case of *Marshall v. Stewart*, 33 Eng. L. & Eq. 1, was

an appeal heard in the House of Lords, from a judgment of the Court of Sessions in Scotland, in an action by the representatives of a miner killed by injuries arising from the shaft of the pit being in an unsafe state, owing to the negligence of the defendant, his employer. The law of Scotland was, throughout the case, treated as the same with the law of England. The servant, in that case, was killed while leaving his master's employment without proper cause. "A master," says Lord Cranworth, "by the law of England and by the law of Scotland, is liable for accidents occasioned by his neglect to those whom he employs." I quite adopt the argument of the Solicitor-General, "that he is duly responsible while the servant is engaged in his employment; but then we must take a great latitude in the construction of what is being engaged in his employment," and he further adds that the liability of the master continues "whatever he does in the course of his employment, according to the fair interpretation of the words *eundo, morando redeundo*; for that the master is responsible, and it does not in my opinion make the slightest difference that the workmen had, according to the finding of the jury, no lawful excuse for going out, no lawful excuse for leaving their work." "The master," remarks Lord Brougham in the same case, "who led them down is bound to bring them up, even if they come on their own business and not on his; he is answerable for the state of his tackle by which the lamentable accident was occasioned."

In *Bryden v. Stewart*, 2 Macq. 30, the Lord Chancellor, among other things, said: "The law of both countries (England and Scotland) makes a master liable for accidents occasioned by his neglect toward his servants."

In the case of *Dixon v. Rankin*, 14 Court of Sess. Cas. 420, the Lord Justice Clerk held that "the master of men in dangerous occupations is bound to provide for their safety. This obligation extends to furnishing good and sufficient apparatus, and keeping the same in good condition; and the more rude and cheap the machinery and the more liable on that account to cause injury, the greater obligation to make up for its defects by the attention necessary to prevent such an injury."

In *Roberts v. Smith et al.*, 2 Hurl. & Nor. 213, the injury arose from a rotten and defective scaffold, over which the

plaintiff, a bricklayer, was compelled to pass in the course of his employment; and in consequence of its rottenness, it broke, and the plaintiff fell to the ground. The case decides the liability of the defendant if the injury arose from his negligence, he knowing the condition of the scaffold, and the servant being ignorant thereof.

In *Williams v. Clough*, 3 Hurl. & Nor. 259, it was alleged in the declaration that the defendant was possessed of a granary and ladder leading up to it; that the ladder was wholly unfit and unsafe for use; that the plaintiff was a servant for hire of the defendant; that the defendant, knowing the premises, wrongfully and deceitfully ordered the plaintiff to carry corn up the ladder into his granary; that the plaintiff, believing the ladder to be fit for use, and not knowing to the contrary, did carry corn up the ladder to the granary, and, by reason of the ladder being unsafe, the plaintiff fell from it and was injured. It was held, on demurrer, that the declaration was sufficient. The American authorities are equally decisive (1).

In *Mad River & Erie R. R. Co. v. Barber*, 5 Ohio St. 541, the court says: "If the defects which caused the injury were actually unknown to the company or the conductor, and were not discoverable by due and ordinary care and inspection, and yet were such as resulted from a neglect of reasonable and ordinary care and diligence on the part of the company, either in procuring or continuing to use cars and machinery beyond the time when they could be safely used, the company will be liable." In the same court, in *McGatrick v. Wason*, 4 Ohio St. 566, the general rule is declared to be that an employer who provides overseers and controls the operation of machinery must see that it is suitable; and if a defect, unknown to a workman, injures him, which ordinary care could have prevented, the employer is liable for the injury.

So, in *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 565, the court says: "The master is liable to his servant for any injury happening to him from the misconduct or personal negligence of the master, and this negligence may consist in the employment of unfit and incompetent servants and agents,

1. The English cases cited are sufficiently stated in the opinion in the case at bar, the facts of which are frequently set out in notes in vols. 13, 14, 15 and 16, AM. NEG. CAS.

or in furnishing for the work to be done, or for the use of the servants, machinery or other implements and facilities improper and unsafe for the purposes to which they are to be applied."

In *Keegan v. Western R. R. Co.*, 4 Seld. 175, a railroad company which continued a defective and dangerous locomotive was held liable to its servant engaged in running such machine, for an injury sustained by him (without negligence on his part) in consequence of such defects.

In *Fifield v. Northern R. R.*, 42 N. H. 225, the plaintiff, a brakeman in the employ of the defendant corporation, being injured without fault on his part, by their negligence in permitting the road to be blocked up with snow and ice, and their car to be out of repair, was held entitled to maintain an action to recover compensation for the damages by him so sustained.

Under the instruction given for the respondent in this case, the jury must have found that he was exercising ordinary care and prudence at the time he received the injury; that he did not know of the defect in the apparatus used in the coupling of the cars, and that the injury was not due to the carelessness of any fellow-servant. The three instructions given for the appellant were as favorable as could have been asked. The argument is now pressed that the last two instructions, numbered four and five respectively, which were refused, should have been given, because there was no evidence that notice of the defect was brought directly home to the knowledge of the directors of the company, and that, for the same reason, the respondent's instruction, which declared that the company was liable if they knew or might have known, by the exercise of reasonable care and diligence, that the apparatus was unsafe and dangerous, should have been refused.

The difference lies in what amount of care and diligence the master is bound to exercise in supervising and examining the machinery that he furnishes for the use of his servants. The testimony in the case tends strongly to show that the condition of the drawhead was not due to use or negligent repairing, but to improper and defective construction. The company fully recognized the defect, and were altering and improving the cars thus constructed.

But the instruction given for the respondent is well supported by authority and is founded in reason. If, by reason-

able and ordinary care and prudence, the master may know of a defect in the machinery he operates, it is his duty to be advised, and not needlessly expose his servants or employees to hazard, peril, or mutilation. The servant has no means of ascertaining the facts, the master has, and therefore he should exercise that care which devolves on a prudent man in like circumstances.

In *Hayden v. Smithville Manuf. Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669, it was held that a servant might maintain an action against his master, for an injury caused by defective machinery, when the employer knew or ought to have known of the defect, and the servant did not know it and had not equal means of knowledge.

In *Noyes v. Smith*, 28 Vt. 59, the declaration averred that the plaintiff was hired by the defendants to have the charge of and conduct and run an engine, and that, by virtue of said employment, it became the duty of the defendants to furnish an engine that was well constructed and safe, etc., but that they carelessly and wrongfully furnished an insufficient engine; that the insufficiency was unknown to the plaintiff, and, "but for want of all proper care and diligence, would have been known to the defendants;" and that, while the plaintiff was in the careful and prudent use of said engine, it exploded on account of said insufficiency, and injured the plaintiff, etc. Held, on demurrer, that the declaration disclosed a sufficient cause of action.

To the same effect is *Ryan v. Fowler*, 24 N. Y. 410, where it was decided that the master was responsible to his servant for injuries received by the latter from defects in the building in which the services were rendered, which the master knew or ought to have known.

Upon a full view of the record, I have been unable to discover any error. I think that the law was properly declared, and that a fair trial was had. I, therefore, advise an affirmance.

Judgment affirmed. The other judges concur.

DEVITT v. PACIFIC RAILROAD COMPANY.

Supreme Court, Missouri, July Term, 1872.

[Reported in 50 Mo. 302.]

BRAKEMAN, A MINOR, KILLED BY COMING IN CONTACT WITH BRIDGE. — In an action to recover damages for the death of plaintiff's minor son, a brakeman on defendant's freight train, who was killed while on top of freight car by coming in contact with a low railroad bridge, it was held reversible error to refuse defendant's requests for instructions relating to contributory negligence and assumption of risk.

CONTRIBUTORY NEGLIGENCE — ADDITIONAL INSTRUCTION. —

Where an instruction relating to contributory negligence was general in its terms, and the other party, in order to prevent misconception, asks to have the law applied to the facts, as he claims them to be, by an additional appropriate instruction, it should be given.

LIABILITY OF MASTER FOR NEGLECT OF DUTY — ASSUMPTION OF RISK BY SERVANT. —

Where the principal has been guilty of fault or negligence, either in providing suitable machinery, or in the selection or employment of agents or servants, and injury arises in consequence, he must respond in damages; but this liability is modified when the servant himself, well knowing the default of his principal, as in providing defective or unsuitable machinery, voluntarily enters upon the employment, as by so doing he assumes the risk.

APPEAL by defendant from judgment for plaintiff in the Kansas City Court of Common Pleas. The case is stated in the opinion. *Judgment reversed.*

J. N. LITTON, for appellant.

W. E. SHEFFIELD, for respondent.

Bliss, J. — The plaintiff recovered damages below, under the third section of the Damage Act, for the death of her minor son while in defendant's employ (1). The facts are undisputed. The plaintiff's son was a brakeman on a freight train, and was killed while at his brake upon the top of a freight car, in passing through Post Oak bridge, the cross-timbers on the top of the bridge being so low as to strike his head.

1. The third section of the Damage Act is as follows: "Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured. "The fourth section declares what parties may sue, and the amount of damages to be recovered."

The accident occurred in the daytime, and it was shown that deceased had been in defendant's employ about three weeks; that he had passed this bridge every day during that time; that he had been repeatedly warned to look out for this and other bridges; that when last seen, just before reaching the bridge, he was sitting upon his brake, facing it. The following instructions, asked by defendant and refused, raise the only legal questions necessary to be considered:

"If the jury believe from the evidence that the deceased, James Devitt, while in the employment of his duty as brakeman, passed over the bridge in question (Post Oak bridge) daily for the space of two or three weeks, and that he knew the danger of coming in contact with the top of said bridge, and that his attention had been called to the danger of injury from the lowness of the bridges on his route, and that with this knowledge he sat upon the top of the brake on the freight car, and while so sitting there was, in passing, struck by the top thereof and killed, then the jury are instructed that this was contributory negligence on the part of deceased, and that plaintiff cannot recover."

"If the deceased knew of the exposure to danger in serving as brakeman for defendant upon a train having to pass bridges insufficiently high to permit him to pass under them, while standing at full height on the top of a car, and with such knowledge consented to and did continue in the service of the defendant as such brakeman, and was thereafter killed by coming in contact with the top of one of said bridges, then the plaintiff cannot recover from the defendant for any negligence in the construction of the bridge."

Both these instructions should have been given. Upon the facts supposed in one, the deceased was killed in consequence of his own negligence, which not only contributed to, but was the immediate cause of, his death; and upon the hypothesis embraced in the other, the deceased voluntarily encountered the danger, took upon himself the risk of the low bridge, well knowing its height; and even though it was wrongfully built at that height, and would charge the defendant under other circumstances, the plaintiff cannot recover (1).

1. In *RAINS v. ST. LOUIS IRON MOUNTAIN & SOUTHERN R'Y Co.*, 71 Mo. 164 (October Term, 1879), minor employee, a brakeman, killed while on top of freight car while it was passing under a railroad bridge, his head coming in contact with the bridge, judgment for plaintiff in the

1. Upon the facts first supposed, it would almost seem that the deceased committed suicide; at least that he was trying the extremely hazardous experiment of sitting upon the brake, which was a high one, and which elevated him higher than he would have been upon his feet, to see whether he could stoop sufficiently to clear the timber. It would be difficult to imagine a clearer case of contributory negligence, and if one guilty of it could recover, or his friends for him, if the experiment proved fatal, we must necessarily ignore the legal consequences of such negligence. Upon this point counsel claim that the jury had already been properly instructed, and that the instruction refused was superfluous. It is true that the jury had been told that if they believed that said Devitt was killed by reason of the negligence of defendant in building the bridge, "without negligence on his part contributing thereto," they should find for plaintiff. This proviso in regard to contributory negligence was general in its terms, and might not be understood by the jury. We all know that jurors, where, as in Missouri, verbal explanation by the court is forbidden, are liable to be deceived as to the law, even when correctly stated. Instructions are apt to assume too much of an abstract character; and if the other party, in order to prevent

Bolinger Circuit Court was *reversed* for failure to give certain instructions. The court (per HOUGH, J.) said:

"Instructions numbered 6 and 11, asked by the defendant, should have been given. They are as follows: 6. 'If the deceased knew of the exposure to danger in serving as brakeman for the defendant upon a train having to pass a footbridge insufficiently high to permit him to pass under it while standing at full height on the top of a box car, and with such knowledge consented to and did continue in the service of defendant as such brakeman, and was thereafter killed by coming in contact with said footbridge, then the plaintiff cannot recover from the defendant for any negligence in the construction of said footbridge.'

"11. 'If the deceased, while in the discharge of his duty as brakeman,

passed under the footbridge in question frequently for the space of two or three weeks, and knew the danger of coming in contact with the top of said footbridge, and his attention had been called to the danger of injury from the lowness of the footbridge, and with this knowledge he stood or walked erect on the top of the box car and while so standing or walking erect there, was in passing, struck by the footbridge and killed, then the jury are instructed that this was contributory negligence on the part of the deceased and that plaintiff cannot recover.' These instructions are precisely like two instructions which received the approval of this court in *Devitt v. Pacific R. Co.*, 50 Mo. 302, the facts in which case very closely resemble the controlling facts in the case at bar."

misconception, ask to have the law applied to the facts, as he claims them to be, by an additional appropriate instruction, it should be given. The jury might not know what was contributory negligence, and therefore the defendant had a right to have the matter explained, and to require that they be told that certain facts which the evidence tended to establish constituted such negligence.

2. Upon the other point the law is settled. An employee or servant cannot recover for injuries received from the negligence of other servants when the principal is not at fault. But if the principal has been guilty of fault or negligence, either in providing suitable machinery, or in the selection or employment of agents or servants, and injury arise in consequence, he must respond in damages. This liability is, however, modified when the servant himself, well knowing the default of his principal, as in providing defective or unsuitable machinery, voluntarily enters upon the employment. By so doing he assumes the risk, and hence cannot charge it to his employer. *Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 566; *Buzzell v. Laconia Mfg. Co.*, 43 Me. 113, 15 Am. Neg. Cas. 256; *Thayer v. St. L. & T. H. R. Co.*, 22 Ind. 26, 14 Am. Neg. Cas. 554ⁿ; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669; *Mad River, etc., R. Co. v. Barber*, 5 Ohio St. 541. Much of the work of the country is done without the employment of the best machinery or the most competent men, and it would be disastrous if those prosecuting it were held to insure the safety of all who enter their service. If persons are induced to engage, in ignorance of such neglect, and are injured in consequence, they should be entitled to compensation; but if advised of it, they assume its risk. They contract with reference to things as they are known to be, and no contract is violated and no wrong is done if they suffer from a neglect whose risk they assumed. *Volenti non fit injuria*.

The other judges concurring, the judgment will be *reversed* and the cause remanded.

DALE v. ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY COMPANY.

Supreme Court, Missouri, October Term, 1876.

[Reported in 63 Mo. 455.]

MINOR EMPLOYEE, A FIREMAN, INJURED BY OVERTURNING OF LOCOMOTIVE—DEFECTIVE TRACK—KNOWLEDGE OF DEFECT—ASSUMPTION OF RISK—QUESTION FOR JURY.—

Where plaintiff, a minor employee, a fireman in defendant's employ, was injured by the overturning of the locomotive caused by alleged defective railroad track, and it appeared that he had observed the rough part of the track, the rails being short; that he made no particular inspection of the track nor any report of the same, but it did not appear that he knew of the particular defect which caused the locomotive to be overturned: *Held*, that he had a right to rely on defendant's proper discharge of its duty to inspect the track, that his continuance in service was not an assumption of the risk of a defective track, and that the question of negligence was properly submitted to the jury (1).

1. See, also, the following cases relating to injuries to minor employees:

Falling from train—Exposure to cold—Death.—In *MOSS v. PACIFIC R. R. Co.*, 49 Mo. 167 (January Term, 1872), minor employee on defendant's freight train fatally injured by exposure to the cold, after falling from train, judgment for defendant was *affirmed*. Opinion by BLISS, J. The second count alleged incompetency of servants running the train, and the third the accident and carelessness of employees. The allegation that the railroad company allowed its employees to neglect their duties, without specifying how or wherein such occurred, was not sufficient to charge the company with liability. An allegation charging failure to employ skillful servants but not alleging want of care in selection of servants, was bad on demurrer.

Brakeman thrown from car and run over.—In *PORTER v. HANNIBAL & ST. JOSEPH R. R. Co.*, 60 Mo. 160 (May Term, 1875), minor employee,

nineteen years of age, employed as brakeman by defendant, injured by being thrown from car and run over, his leg being crushed, defective switch side track being alleged, judgment was *reversed* because the petition alleged the minority of plaintiff and appointment of next friend, and the allegations being denied in the answer, no proof was offered on the subject.

A subsequent appeal in the *PORTER* case discussed the case at length and the law of master and servant. See *PORTER v. HANNIBAL & ST. JOSEPH R. R. Co.*, 71 Mo. 66 (October Term, 1879), where the facts of the case are stated in the official report (opinion by HENRY, J.) as follows: "A brakeman, while engaged in coupling cars at night, stepped into a hole under a tie, by which his foot was caught and he was thrown under the moving car which passed over his legs, causing serious and permanent injuries. The defect in the road was not patent, but required inspection to

APPEAL from the St. Louis Circuit Court. The case is stated in the opinion. *Judgment affirmed.*

BLODGETT & WOODSON, for appellant.

LEVERETT BELL, for respondent.

Napton, J. — This action was brought by a fireman of an engine on the St. Louis, K. C. & N. R. Co., to recover damages for an injury to him by reason of the failure of the defendant to provide a safe railroad track upon which to run the engine and train. The defense was that the plaintiff knew the condition of the track upon which he worked, and continued to work on it, knowing its condition, and, therefore, the damage was the result of his own negligence. Upon the conclusion of the plaintiff's evidence at the trial, the defendant asked an instruction in the nature of a demurrer to the evidence, which was refused; and the court instructed the jury

discover it, and he had never worked on this portion of the track before. His attention had been called to the generally unsafe and dangerous condition of the track, but not to the specific defect causing his injuries. He was ignorant of its existence, and the attention of the servants of the railroad company, whose duty it was to attend to the track, had more than once been called to its dangerous condition, but they had taken no steps to repair it." * * * Judgment for plaintiff for \$10,000 in the Clinton Circuit Court *affirmed*. There have been three trials of the Porter case, and three verdicts for plaintiff, the first for \$10,000, the second for \$12,000 and the third for \$10,000.

Boy injured assisting brakeman — Passenger — Scope of employment. — The ruling in the PORTER case, 60 Mo. 160 (see preceding paragraph) as to failure of proof of appointment of plaintiff as guardian, was followed in *SHERMAN v. HANNIBAL & ST. JOSEPH R. R. Co.*, 72 Mo. 62 (April Term, 1880), an action for injuries sustained by plaintiff, a boy about fourteen years old, who was injured while assisting a brakeman. The petition alleged the

minority of plaintiff and the appointment of Ellen Sherman as guardian, but there was no evidence as to such appointment and judgment for plaintiff in the Livingston Circuit Court was *reversed*. Opinion by HUGH, J. The facts are stated in the opinion as follows: "The plaintiff introduced evidence tending to prove that the plaintiff got on a freight train of defendant at Chillicothe, about October 6, 1875, without the knowledge or consent of his parents; that he rode on said car some ten miles when he was discovered, being still in Livingston county, by a brakeman on said train, when he was told by the brakeman if he wanted to ride he must help brake, and placed him at a brake and instructed him in the signals when to brake and signal the engineer; and when he got to Cameron he was told if he wanted to ride to St. Joe he must help coal up; that the said brakeman permitted him to ride on said train, and not in the caboose car attached to the train for the purpose of carrying passengers, till the train arrived at Cameron, a point of forty miles west of Chillicothe; that at Cameron the plaintiff,

that, "if the jury find from the evidence in this case that plaintiff received the injuries complained of by reason of the unsafe condition of defendant's railroad track, and the defendant knew of the condition of its railroad track, or might have known thereof by the exercise of reasonable care and diligence, they are instructed that defendant is liable to plaintiff for any injuries he has received in consequence of the condition of the track after it was known, or ought to have been known by defendant, if they further believe that plaintiff was exercising ordinary care and prudence at the time he received the injuries, and did not know of the unsafe condition of said railroad track, and that the same was not due to the carelessness of any fellow-servant of the plaintiff."

The cases of *Gibson v. Pac. R. Co.*, 46 Mo. 167, 16 Am. Neg. Cas. 442, *ante*; *Devitt v. Mo. Pa. R. Co.*, 50 Mo. 305,

who was thirteen years and ten months old, and a bright, capable boy of his age, was directed by said brakeman to assist in coaling up the engine, which he did; that when it was coaled up, the brakeman told the boy to get on top of a certain freight car if he wanted to ride to St. Joseph, which he did; and while riding on top of said train, and about one mile from St. Joseph, and in Buchanan county, the brakeman by signs, directed the plaintiff to adjust some boards on a car, which boards were falling off; that while plaintiff was in the act of so adjusting said boards, one of them striking on and against a post hit and threw plaintiff off the train, which was then in rapid motion, and broke his leg, seriously injuring him for life; that the conductor of said train knew plaintiff was on the train at Cameron and afterward to the time of the accident, but never spoke to him or gave him any directions in any way." * * *

Among the rulings are the following as set out in the syllabus to the official report:

"It seems that a person riding on a freight train on which passengers

are allowed to be carried, is to be regarded as a passenger, although he may have boarded the train without the knowledge or permission of the conductor and paid no fare, if the conductor, after becoming aware of his presence, permits him to remain.

"It is well settled that to make the master liable for the tortious act of his servant the act causing injury must have been in the line of the servant's duty and within the scope of his employment. Upon this principle, where the conductor had exclusive control of a railroad train and of all persons on it, but a brakeman, nevertheless, without the knowledge of the conductor, assumed to direct a boy on the train to perform a certain service, and in the attempt to comply with the order the boy was injured: *Held*, that the railroad company was not liable.

"The youth of a person injured on a railroad train may excuse him from concurring negligence, but it cannot supply the place of negligence on the part of the company, or extend the liability of the company for tortious act of its servant.

"If a passenger on a freight train

16 Am. Neg. Cas. 451, *ante*; *Cummings v. Collins*, 61 Mo. 522, 16 Am. Neg. Cas. 432, *ante*, are sufficient to explain the views of this court in regard to the points of law assumed in this instruction, and any extended review of the matter here is deemed unnecessary. It is obvious that the instruction which is copied almost literally from the opinion in *Gibson v. Pac. R. Co.*, 46 Mo. 167, 16 Am. Neg. Cas. 442, *ante*, would not have been prejudicial to the defendant.

The main point, however, of objection here, is that the court on the conclusion of plaintiff's evidence, did not so instruct the jury as to require a nonsuit, and this is based upon the assumption that the evidence showed that the plaintiff had been for two years and upwards in the employment of the defendant, and four months previous to the accident, had been passing twice a day over the section of the road where the acci-

is injured while simply riding on a freight car by reason of an accident to the train, the company will be liable if the rule prohibiting passengers from riding elsewhere than in the caboose is not conspicuously posted as required by law; but it is otherwise if the injury is the result of an attempt on his part to perform an unauthorized service for the company."

Brakeman killed in collision.—In *PARSONS v. MISSOURI PACIFIC R'y Co.*, 94 Mo. 286 (October Term, 1887), minor employee, eighteen years old, a brakeman, killed in collision, judgment for plaintiff for \$5,000 in the Cooper Circuit Court was *reversed*, on the ground of excessive damages. The deceased was employed on a train hauling rock from a quarry; some of the cars broke away and collided with stationary cars on the track; the car on which deceased was standing broke in the middle, throwing him forward and the rock upon him, instantly killing him; the timbers of the car being decayed, etc.

Sectionhand assistant thrown from car.—In *REAGAN v. ST. LOUIS, KEOKUK & NORTHWESTERN R'y Co.*, 93

Mo. 348 (October Term, 1887), boy, seventeen years old, employed by defendant to carry water for a section gang and to take charge of tools, injured by being thrown from platform of car, leg and arm being broken, some cars being shoved against standing train, judgment for defendant was *reversed*. The syllabus to the report (opinion by BLACK, J.) is as follows:

"One who employs servants in a complex and dangerous business ought to prescribe rules sufficient for its orderly and safe management, and his failure to do so is a personal neglect, for the consequences of which he will be liable to his servants.

"It is feasible and proper for a railroad company to have some rules and regulations for the government of its employees in making flying switches, and in the shunting and kicking of cars, for the warning of persons liable to be injured; and a petition which bases a charge of negligence upon the company's failure to do so states a cause of action.

"Whether the railroad company was, in this case, guilty of negligence, in failing to prescribe suitable rules, was a question for the jury."

dent happened, and therefore had ample opportunities of knowing the defects in the roadbed.

It is observed in the work of Shearm. & Redf. on Negligence, in regard to this rule concerning an assumption of risk by a servant who knows the insecurity of the machinery he is employed to work on, that the rule is only applicable to such defects as the servant ought reasonably to have foreseen might endanger his safety, and the mere continuance of a servant in his work is not in all cases conclusive evidence of his having waived objections to defects in the materials or machinery intrusted to him. Shearm. & Redf., Neg., §§ 95, 96. The servant has a right to presume on the master's compliance with the obligations implied by the contract between them, and the real question in reference to a particular case is, whether the servant has had equal opportunities with his employer to observe the defects in the machinery or materials, and having such opportunities, intends to waive any obligation to them. The proof in the present case was, that the plaintiff was a fireman, and in passing over the section of road on which the accident ultimately occurred, had observed that it was a rough part of the track, that the rails were short, and inferred that it was a bad track from the bumping of the cars in passing over it. No particular inspection of the track was ever made by him nor any report of its supposed deficiencies. It was not his business. Nor does it appear that he was aware of the particular defect which resulted in overturning the locomotive. The defendant, of course, had in its employment persons whose business it was to examine the track and see to its repairs, and it was their neglect if it was not kept in proper condition. It would be a harsh conclusion to say that the plaintiff, who was merely a fireman, would be required to abandon his employment upon a merely speculative apprehension that the defendant had not seen and would not see that the road over which their locomotive and cars passed was properly and safely constructed. The immediate cause of the accident was a defective joint of the rails, of which he could have known nothing as a fireman passing over the road, and which the defendant might have known by the exercise of proper diligence.

This was, however, a matter for the jury. There was, obviously, no ground to authorize the court to infer from the evidence that the plaintiff was consenting to the risk of a

defective track. He was aware that it was rough from the jolting of the cars when they passed over it, but he had no opportunity of inspecting it, particularly, which the defendant had, and therefore confided in the defendant's exercise of its appropriate duties.

The verdict in this case on the first trial was set aside on account of the damages being, in the opinion of the court, excessive. A second verdict was for the same amount which the court refused to set aside, and any interference by this court would be an usurpation of the province of the jury. *Goetz v. Ambs*, 27 Mo. 34.

Judgment affirmed. The other judges concurred, except Judge Wagner, who was absent.

DEFECTIVE HANDHOLD ON FOREIGN CAR — BRAKEMAN INJURED — RELEASE. — In **MATEER v. MISSOURI PACIFIC R'Y CO.**, 105 Mo. 320 (*In Banc, April Term, 1891*), brakeman assisting in switching a train of cars belonging to a transportation company which was being handled by defendant over its road, injured while attempting to get on top of car, as his duties required, the handhold of the ladder on the car breaking causing plaintiff to fall to the ground and his foot being run over by the train, judgment for plaintiff for \$3,000 in the St. Louis County Circuit Court was *reversed* for erroneous instructions, etc. The principal question in the case turned on the validity of a release signed by the plaintiff. The point was fully discussed by GANTT, P. J., who cited several authorities and the ruling is stated in the syllabus to the official report as follows:

"1. An employee of a railroad who, having the opportunity and ability, neglects to read all of a receipt releasing the company from any and all claims, on account of and arising from injuries received by him while in the service of the company, and signs the same, will not afterwards be heard to say that he did not read it.

"2. An instruction in an action for the injuries is improper which permits the jury to disregard the release, if the company's claim agent obtained it 'by trick or artifice;' it should confine the jury to the fraud shown by the evidence.

"3. An instruction should not be given submitting to the jury the question of fraud in obtaining a release where there is no evidence to support it.

"4. The law favors the compromise and settlement of disputed claims.

"5. One who receives a personal injury cannot split his cause of action into several parts."

In the *MATEER* case, *supra*, the learned court and counsel cited

several authorities on the question of release, among them being *Jarrett v. Morton*, 44 Mo. 275; *Hurl v. Handlin*, 43 Mo. 171; *Estes v. Reynolds*, 75 Mo. 563; *Blair v. R. R. Co.*, 89 Mo. 392; *Mastin v. Grimes*, 88 Mo. 490; *Burnett v. Crandall*, 73 Mo. 22; *Snider v. Express Co.*, 63 Mo. 376; *Brown v. Fagan*, 71 Mo. 563.

THE MISSOURI DAMAGE ACT CONSTRUED — ACTION FOR DEATH OF BRAKEMAN. — In **CONNOR v. CHICAGO, ROCK ISLAND & PACIFIC R. R. CO.**, 59 Mo. 285 (*February Term, 1875*), brakeman on car of gravel train thrown from car and killed by reason of train colliding with cow on track, precipitating several of the cars down an embankment, judgment for plaintiff was *reversed*. The action was brought under the statute known as the Damage Act, and the construction of the statute is exhaustively treated in the opinion rendered by NAPTON, J. The rulings are fully set out in the syllabus to the official report as follows:

“1. Under a proper construction of section 2 of the Damage Act (Wagn. Stat. 519-520), the representatives of an employee who is killed by a railroad accident, cannot recover against the company, where the accident was caused by the negligence of a co-employee, unless such co-employee was not possessed of ordinary skill and capacity, and his employment, or retention after notice of his incompetency, is attributable to the want of ordinary care on the part of the road.

“2. The design of section 2 of the Damage Act, was simply to extend the liability for damages, theretofore attached in favor of the party injured, to his representatives where death ensues, and not to create any new liabilities in that event. The words “person” and “passenger,” in the first and second clauses of that section, were used indiscriminately and at random. *Schultz v. Pacific R. Co.*, 36 Mo. 18, *criticised* (1).

1. In criticising the SCHULTZ case [which construed the Damage Act of 1855] the learned judge (NAPTON, J.) said: “It is clear that the case (the Connor case) was tried on a construction of the second section of the Act concerning damages, given by this court in the case of *Schultz v. Pacific R. Co.*, 36 Mo. 13. As the construction given to this second section of the Damage Act in *Schultz v. Pac. R. Co.*, *supra*, has never been before this court since the decision of that case, so far as I am aware, and as my convictions are very well settled that the critical analysis of that section by

the learned judge who delivered the opinion of the court in that case, and the conclusion to which he arrived on such examination, are totally at variance with the true intent and meaning of the Act, it is proper to explain my reasons for these convictions. In doing so, I speak for myself only and with the highest respect for the abilities and learning of the judges who have expressed a different opinion.” The learned judge then construes the Damage Act in accordance with the rulings set out in the syllabus to the report.

" 3. Courts should carry out the intent of an act, although to effect this a literal interpretation must be rejected.

PER CURIAM. — " 4. A railroad company will be liable for killing an employee, notwithstanding the fact that deceased was conducting and managing the train at the time of his death, where the company was guilty of negligence in employing an unskilled engineer, or in allowing such engineer to turn over the engine to a fireman who was not qualified to manage it, and the damage resulted from the conduct of the engineer or fireman.

" 5. The majority of the court adhered to the doctrine of *Schultz v. Pac. R. Co.*, 36 Mo. 18, that under section 2 of the Damage Act, the representatives of an employee killed by a railroad train can recover against the road, where the death was caused by the negligence of fellow-servants, without regard to the question whether the company exercised proper care and prudence in selecting and retaining such fellow-servants. The word "person," in clause I of that section, includes employees (1).

Per HOUGH, J. — VORIES, WAGNER and SHERWOOD, JJ., not concurring.

" 6. The second section of the Damage Act was not intended to change the common law rule, that the master is not liable for the death of a servant caused by the negligence of a fellow-servant, when the master himself has been guilty of no negligence, or want of care, in the selection, or retention in his service, of the servant causing such death. The same common law defenses may be made by the master, in a suit brought against him under said section, by the representative of any servant dying from injuries received as therein specified, which might have been made by such master,

1. In *SCHULTZ v. PACIFIC R. R. Co.*, 36 Mo. 13 (1865), the case criticised in the *CONNOR* case (the case at bar), the construction of the Damage Act is as follows:

"Under the second section of the 'Act for the better security of life and property' (R. C. 1855, p. 647), the representatives of a servant can maintain an action against the master, if the death be occasioned by the negligence, unskillfulness or criminal intent of a fellow-servant. The burden of proof is upon the plaintiff to show negligence in such cases.

"So held in action for death of plaintiff's intestate, a day laborer in defendant's employ, who while riding

on a wood train was killed by the train colliding with one of defendant's locomotives." Judgment of nonsuit reversed.

Among other cases cited in the several opinions rendered in the *CONNOR* case (the case at bar) were: *McDermott v. Pacific R. Co.*, 30 Mo. 115; *Gibson v. Pacific R. Co.*, 46 Mo. 163; *Rohback v. Pacific R. Co.*, 43 Mo. 192; *Harper v. Ind. & St. L. R. Co.*, 47 Mo. 567; *Moss v. Pacific R. Co.*, 49 Mo. 167; *Devitt v. Pacific R. Co.*, 50 Mo. 302; *Brothers v. Cartter*, 52 Mo. 372; *Brownell v. Pacific R. Co.*, 47 Mo. 242, which cases are reported with the Missouri cases in this volume of AM. NEG. CAS.

in a suit brought by the injured servant himself, if death had not ensued. The words "any person" in the first clause of second section includes employees, but not such employees as are fellow-servants of those causing the death. Section 38 of the Railroad Corporation Law, Wagn. Stat. 310, and *Rohback v. Pacific R. Co.*, 43 Mo. 187, referred to (1).

"The third section of the Damage Act applies to employees of carriers as well as to other persons."

The section of the Damage Act (Wagner Stat. 519-520), referred to in the *CONNOR* case, *supra*, is as follows:

"Sec. 2. Whenever any person shall die from an injury resulting from or occasioned by the negligence, unskilfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting, or managing any locomotive, or train of cars, or of any master, pilot, engineer, agent or employee, whilst running, conducting, or managing any steamboat, or any of the machinery thereof, or of any driver of any stage coach or other public conveyance, whilst in charge of the same as a driver, and when any passenger shall die from any injury resulting from, or occasioned by any defect or insufficiency in any railroad or any part thereof, or in any locomotive or car, or in any steamboat or the machinery

1. The Railroad Corporation Law and the *Rohback* case are referred to in the opinion by *HOUGH, J.*, as follows:

"The thirty-eighth section of the General Corporation Law, applicable to railroad companies in this State, makes it incumbent on all railroad companies to have a bell placed on each locomotive engine, to be rung at a distance of at least eight rods from the place where the railroad shall cross any traveled public road or street, and kept ringing until it shall have crossed such road or street, or to sound a steam whistle, except in cities. The last clause of the section is as follows: 'And said corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect.'

"The words 'any person' in this clause were held, in the case of *Rohback v. Pac. R. Co.*, 43 Mo. 187, not to include fellow-servants. In that case the court say: 'It is obvious that the

enactment of the law was intended primarily for the protection of the traveling public and passengers;' and further, 'that the draftsman of the law used the word "person" in the sense that it should apply to the classes above referred to, and without any intention of changing the common law construction, can scarcely be questioned.' After referring to the second section of the Damage Act, and the *Schultz* case, 36 Mo. 13, the court further say, 'both Acts were passed by the same legislature. They show clearly that the law as it existed was understood by that body; that in one case a modification was intended to be made, and in the other not. If it had been intended that section thirty-eight should change the law, so as to allow persons to sue, who had been previously barred, words of similar import to those used in the Damage Act would have been employed.'"

thereof, or in any stage coach or other public conveyance, the corporation, individual or individuals in whose employ any such officer, agent, servant, employee, master, pilot, engineer or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stage coach, or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars, which may be sued for, or recovered; first, by the husband or wife, of deceased; or, second, if there be no husband or wife, or, he or she fails to sue within six months after such death, then by the minor child, or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency."

The next succeeding sections are as follows:

"Sec. 3. Whenever the death of a person shall be caused by a wrongful act, neglect or default of another, and the act, neglect or default is not such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

"Sec. 4. All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner, as provided in the second section of this chapter and in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand dollars, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default."

THE MISSOURI DAMAGE ACT. — Another case in which the construction of the Damage Act is the question in issue is that of **PROCTOR v. HANNIBAL & ST. JOSEPH R. R. Co.**, 64 Mo. 112 (*October Term, 1876*), an action by the widow of a deceased engineer in defendant's employ, who was killed in a collision between trains, where judgment for plaintiff for \$5,000 in the Sullivan County Circuit Court was *reversed*. The opinion was rendered by NORTON, J., concurred in by SHERWOOD, NAPTON and HOUGH, JJ.,

and the rulings are set out in the syllabus to the official report as follows:

"Where particular words or clauses of a statute are of doubtful import, they should be construed in connection with the entire statute, and if literal construction would lead to a conflict in the statute, or to absurd conclusions, they should be restricted or enlarged so as to render the statute harmonious and sensible.

"2. The master cannot be held for injuries received by one servant through the negligence and unskilfulness of his fellow-servant, unless in the selection of the latter the master fails in care and diligence, or retains him after knowledge of his character; and section 2 of the Damage Act, properly construed in its context, gives the representative of a deceased railroad employee no right of action against the company for death caused by the negligence and unskilfulness of a co-employee, except where his selection or retention is attributable to the want of care in the company.

"The phrase 'any person,' as used in that section, does not include fellow-servants.

"The right designated to be conferred by section 2 is analogous to that given by section 3, and not an original one created after the death of the employe, but a right which the deceased might have exercised, had he survived, and which is transmitted to his representative. Nor is any new right of action given by the latter clause of section 2 to the representatives of a deceased passenger against an owner of the road as contradistinguished from the corporation having charge of it. The term 'owner' is therein used in the sense of proprietor or operator at the time of the accident. The above construction is aided by the following considerations: a. Were the interpretation different, the deceased might recover for his injuries independently of the statute, if he survived long enough, and after his death recovery might again be had under section 2, for the same casualty. b. Under the first clause of the section, in case of death from the negligence of the co-employe, a right is given the representative after the decease, which has no existence before. c. And under the second clause, in case of death resulting from defective appliances, the representative is denied a right which the deceased might have exercised, had he survived. *Schultz v. Pacific R. Co.*, 30 Mo. 13, *overruled*.

Per HENRY, J., *dissenting*.

"1. Sections two and three of the Damage Act, in regard to their intents and purposes, differ in several important particulars.

"Section 2 is in derogation of the common law. (a.) It gives the representatives of the servant killed by the negligence of the fellow-servant an action against the master, regardless of the care bestowed by the latter in the selection or retention of the fellow

workman. Such right is not a transmitted one, for the servant himself could not have sued under that section. (b.) It gives the representative of the deceased passenger an action against the owner, whether operating the road or not. The word "owner" is not restricted in that section to the operator.

"It is penal in its phraseology (*sic.* making the road "pay a forfeit," and in its designation of the sum to be assessed inflexibly fixed at \$5,000 regardless of the losses entailed on the family of the servant by his death).

"Section 3 was designed merely to prevent the abatement of a common law cause of action by death. It gives the representatives of the deceased an action against the operator of the road, but not against the owner not so operating it. It is not penal but compensatory in its terms, the amount recoverable being "damages" such as may be "fair and reasonable, not exceeding \$5,000."

"2. The latter clause of section 2 does not take from the representative of the servant his right of action against the master at common law for defective machinery.

"3. The term 'any person,' used in section 2, includes servants as well as passengers."

RAILROAD CORPORATION STATUTE — CONSOLIDATION — DAMAGE ACT — STATUTORY CONSTRUCTION — EMPLOYEE OF ONE RAILROAD INJURED BY ANOTHER. — In **SMITH v. PACIFIC R. R. CO.**, 61 Mo. 17 (*October Term, 1875*), judgment for plaintiff in the Cole County Circuit Court was *reversed*. The sole question related to the construction of the Damage Act, and the opinion rendered thereon by NAPTON, J., states the decision as follows:

"The only question in this case is upon the construction of the Act of the Legislature of March 24, 1870, which provides for the consolidation of railroads under certain restrictions, and for leasing or purchasing foreign railroads, or the leasing or purchasing by foreign railroads of railroads in this State. One of its provisions is, that "a corporation in this State, leasing its road to a corporation of another State, shall remain liable, as if it operated the road itself, and a corporation of another State being the lessee of a railroad in this State, shall likewise be held liable for the violation of any of the laws of this State, and may sue and be sued in all cases and for the same causes and in the same manner as a corporation of this State might sue or be sued, if operating its own road; but a satisfaction of any claim or judgment by either of said corporations shall discharge the other, etc."

"The suit was brought under the second section of the Damage Act, against the Pacific Railroad for damage occasioned by ser-

vants of the Atlantic and Pacific Railroad, upon the branch from Tipton to Boonville, and after the main road and the branch has been leased to the Atlantic and Pacific Railroad. The lease was made under this Act and by its authority, and however singular the above provision may seem, it was accepted by the companies who bought and sold under it. This construction seems plain. It is evident that although the words used are "corporation of another State," and the Atlantic and Pacific Railroad was chartered by Congress, the section was designed to embrace any corporation outside of this State, whether chartered by Congress or another State. Both corporations are expressly declared liable — the leasing corporation as though no lease had been made.

"As to the particular language of the second section of the Damage Act, it must be construed in connection with the provision in the act of 1870. The judgment must be reversed and the cause remanded." Judges WAGNER and SHERWOOD concurred.

SETTLE V. ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY.

Supreme Court, Missouri, Division 1, March, 1895.

[Reported in 127 Mo. 336.]

BRAKEMAN FALLING FROM CAR AND RUN OVER — DEFECTIVE HANDHOLD. — Where a brakeman, in defendant's employ, while engaged in making a running switch, after uncoupling car from engine, fell from the car to the handhold of which he was hanging and was run over and fatally injured, the handhold being so out of repair that it could not be readily grasped with both hands, the railroad company was liable for its negligence in sending out such a defective car (1).

1. *Defective handholds on foreign cars.* — In *GUTRIDGE v. MISSOURI PACIFIC R'y Co.*, 94 Mo. 468 (1887), judgment for plaintiff in the Henry Circuit Court was *reversed*, the case being stated in the syllabus to the official report (opinion by BLACK, J.) as follows:

"In an action by plaintiff against a railroad company for damages for the death of her husband, who was a brakeman on the company's road, and was, by the breaking of a handhold, thrown under the cars and killed,

while descending a ladder on a moving car, in the proper discharge of his duties, the testimony of a carpenter, that, in his opinion, it would have been disclosed by reasonable inspection that the handhold was not tightly fastened to the top of the car, was inadmissible, it not being a case calling for the introduction of expert evidence.

"In an action against a railroad company for damages for the death of an employee, caused by a defective appliance, it is not material that the

PROXIMATE CAUSE. — The evidence held to sustain the finding that the defective handhold was the proximate cause of the injury.

SAFE MACHINERY AND APPLIANCES. — The duty of a railroad company to keep the instrumentalities used by employees in their work in good condition is a continuing one, and a failure of the company to discharge its duty in this respect is negligence, though the servant may continue in the service after knowledge thereof.

KNOWLEDGE OF DEFECT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — A servant cannot wholly ignore a known defect in the instrumentality provided for him, but must exercise care and caution in its use, and whether he is negligent in so doing is a question for the jury.

APPEAL from order granting new trial to plaintiff in the Lawrence Circuit Court. The case is stated in the opinion. *Affirmed.*

E. D. KENNA, L. F. PARKER, and H. S. ABBOTT, for appellant.

CLOUD & DAVIES, and T. D. STEELE, for respondent.

Macfarlane, J. — Plaintiff sues, under the provisions of the laws of the State of Kansas, for the death of her husband, William F. Settle, which occurred in said State in January, 1892, while in the employment of defendant as a brakeman.

The petition contains three counts, which do not differ

petition allege whether the defect was in the construction, or arose from want of repair, where the alleged defect is pointed out with particularity.

"While it is not the duty of a railway company, at the time of receiving foreign cars for transportation over its road, to make tests to discover hidden defects in their construction, or in the materials used in their construction, yet it is bound to inspect them, as it must its own, after they have been in use. If such cars have obvious defects which render them unfit for use, they should not be received.

"A railroad company is not bound at all hazards to furnish safe machinery, cars and other appliances. Its duty in this respect is to use reasonable care in maintaining suitable cars and appliances, and it is liable to ser-

vants for injuries resulting from defects which are known, or ought to have been known, and could have been prevented by the exercise of such care."

The Gutridge case, 94 Mo. 468, was distinguished on the point as to expert evidence, in *JOHNSON v. MISSOURI PACIFIC R'y Co.*, 96 Mo. 340 (October Term, 1888), the facts in which case were that plaintiff was employed by defendant as foreman or section boss on a branch road, and while using a hammer for driving spikes a piece of the hammer flew off and struck plaintiff in the eye. The evidence of two blacksmiths as to defective condition of hammer was admissible not only as to defect but as bearing on defendant's knowledge. Judgment for plaintiff in the *JOHNSON* case, on verdict for \$5,000 in the

materially in their averments of negligence. The charge of negligence is that the handhold, on the end of one of the defendant's cars, which was provided for the use of plaintiff and other brakemen, was permitted "to get out of repair and in dangerous condition, having been mashed in so it could not be readily grasped with the hand, and that by reason thereof, while deceased was performing his duties he lost his hold and fell from the car, and was run over, receiving injuries from which he died." The answer was a general denial.

At the close of the evidence offered by plaintiff, the court directed a verdict for defendant. This verdict the court afterward set aside, on motion of plaintiff, and granted a new trial, and from this order defendant appealed. The only question to determine, therefore, is whether there was evidence of negligence and the resulting death therefrom, which should have been submitted to the jury; if there was, then the new trial was properly granted, if not, then judgment should be entered upon the verdict for defendant.

Plaintiff's husband was rear brakeman on one of defendant's trains, and at the time had charge of switching some cars, the conductor being temporarily absent. The work immediately in hand was to take a car from one track and place it upon

Morgan Circuit Court, was *affirmed*. Opinion by NORTON, Ch. J.

On a subsequent trial of the GUTRIDGE case, plaintiff recovered a verdict and judgment which, on appeal by the railway company, was *affirmed*. See GUTRIDGE v. MISSOURI PACIFIC R'Y Co., 105 Mo. 520 (Division 2, April Term, 1891). Opinion by THOMAS, J.

See, also, CONDON v. MISSOURI PACIFIC R'Y Co., 78 Mo. 567 (1883), which was cited in the GUTRIDGE case preceding paragraphs), as being substantially like that case in its petition, the defect being pointed out with reasonable particularity. In the CONDON case, a brakeman was injured by falling from a foreign car, defective handhold being alleged. The petition stated that the handhold on the car "was not safe and sufficient, and by reason of said defectiveness

and insufficiency said handhold broke."

It was held that this averred weakness in the handhold, and was sufficiently specific as to negligence intended to be charged. Opinion by HENRY, J. Judgment for plaintiff in the St. Louis Court of Appeals *affirmed*. In the CONDON case it was held that a car inspector was not a fellow-servant of the brakeman.

In CURRENT v. MISSOURI PACIFIC R'Y Co., 86 Mo. 62 (1885), brakeman injured by alleged defective handhold on freight car, judgment for plaintiff was *reversed*. It was held that petition alleging failure of master to keep machinery in repair must allege master's knowledge of condition. Master not liable for injury caused by latent defect in machinery, unless he knew or by due care could have known of such defect.

another. This, deceased undertook to do by making what is known as a running switch. To do this it was necessary to couple the car to the engine and pull it toward the switch, to uncouple it from the engine and after the engine had passed to turn the switch and let the car go in on the side track. This operation required the car to be uncoupled from the engine while they were in rapid motion. This was a box car and had, on the end and near the corner, a foothold for brakemen to stand upon. About three feet ten inches above this was a handhold. These were similarly constructed and consisted of an iron rod about one inch in diameter, bent at the ends and fastened to the car with bolts. The holds were about eighteen inches long, and, when in proper condition, stood out from the car two or three inches. These holds were used in uncoupling cars while in motion. On the sides of the car near the end were similar holds, one above the other, making a ladder by means of which trainmen could go up and down the car. The handhold on the end of this car was bent or mashed in at the center to within an inch or less of the car, leaving, however, a sufficient hold of five or six inches at each end.

Plaintiff's husband undertook to handle the cars in making this running switch. The car was coupled to the engine and was run toward the switch. Deceased, being at the time on top of the car, went down the ladder, reached round the corner, took hold of the end handhold and swung round the corner of the car, placing his feet upon the footrest at the bottom. When the proper momentum had been obtained, and the proper distance from the switch had been reached, he held with his left hand, standing with his feet on the hold at the bottom of the car, and reached down and drew the coupling pin, thereby uncoupling the car from the engine; the engine was then run forward, leaving the car to follow to the switch. Deceased was seen to assume these positions and make these movements. As soon as the engine pulled away from the car, deceased was seen, in an erect position, hanging to the handhold, his feet having slipped off the hold upon which he was standing. After hanging in that position for a moment his hand gave way and he fell upon the track and the car ran over him, causing his death.

The engineer testified: "I had started ahead and increased

the speed of the engine, and got something like thirty feet from the car when I saw him drop down. He sort of dropped a little ways, and then retained himself for an instant, and then went down."

Worthington, telegraph operator, testified: "As they made the flying switch I saw the engine leave the car. I saw him hanging by his hands before his handhold loosened. His feet had slipped from the foothold. He was holding by his hands and held himself there for a moment. * * * I think he held with both hands. * * * He was upright, holding by his hands. His feet were not on the rest at all then."

This was the substance of the evidence as to the manner in which the accident occurred.

Defendant insists that the court properly directed a verdict for defendant, and that the court erred in granting the new trial.

1. The first proposition urged by defendant is that there was no evidence of negligence on the part of defendant, and for that reason the court properly instructed the jury. This proposition cannot be maintained. The handhold was a necessary appliance for performing the service required of deceased under his employment. The duty of defendant required the exercise of reasonable care to furnish a handhold suitable for the purpose, and to keep it in repair. The suitability and efficiency of this handhold was shown to have been greatly impaired, and its condition was obvious to one making the most casual inspection. The handhold was necessary for the safe and prompt performance of one of the most perilous duties a brakeman is called upon to discharge, and it was a disregard of duty, amounting to negligence on the part of defendant, to send the car out in that defective condition.

2. It is next insisted that the evidence failed to show any causal connection between the bent condition of the handhold and the injury which resulted in the death of plaintiff's husband.

It is undoubtedly true, as insisted by defendant's counsel, that in actions for damages on account of negligence, plaintiff is bound to prove, not only the negligence, but that it was the cause of the damage. This causal connection must be proved by evidence, as a fact, and not be left to mere specu-

lation and conjecture. The rule does not require, however, that there must be direct proof of the fact itself. This would often be impossible. It will be sufficient if the facts proved are of such a nature and are so connected and related to each other that the conclusion therefrom may be fairly inferred.

The facts proved are that the handhold was bent in the center to such an extent as to prevent the hand from grasping it securely for a space of some six inches, while at each end there was a sufficient hold for one hand. Deceased held up most of his weight with one hand while he leaned over and with the other drew the pin. He then raised himself to an upright position and immediately his feet slipped from the end of the rod upon which he was standing. He was seen to swing by his hands a moment, and, not being able to sustain himself, fell upon the track. With a firm hold on the rod with both his hands, being a young and active man, we may reasonably infer that he could have regained his footing, or held himself up until the car stopped. Now, from these established facts, it seems to us that the inference might fairly be drawn by a jury that deceased fell because, in the emergency, he was unable to secure a firm hold on the rod by reason of its defective condition. This inference, it is true, is not a necessary one. On the contrary, it might as readily and fairly be inferred from these facts that the slipping of the feet was the sole cause of the fall; that the hold, taken by the hands at the time, was only such as was necessary to sustain a balance while standing, or attempting to get round the car to the side ladder, and not to support the entire weight of the body, and a firmer hold could not have been taken after the support from the feet had given away. But the question we have to deal with here is whether there was evidence from which the jury could reasonably conclude that the bent condition of the handhold was the cause of the injury. This question being ruled affirmatively, the jury should have been left to draw the correct inference from all the facts in evidence.

3. It is said, also, that the condition of the handhold being obvious, deceased assumed the risk of injury therefrom.

The rule is too well settled in this State to require the citation of the cases, that a person, when he enters the service of another, assumes all the risks and dangers usually incident to the employment in which he engages. But the rule is

equally well settled that the employer is charged with the duty of not subjecting his servants to risks by his own negligence. Under this rule he is required to use ordinary care, not only in providing sound and secure instrumentalities which they are required to employ in their work, but of keeping them in such condition. This is a continuing duty of the master, and a neglect of it is negligence. On entering the employment the servant does not assume the risk of dangers arising from its neglect.

These general propositions we do not understand defendant to deny, but it is claimed that though the duty to repair defects is neglected by the master, if the servant is advised of it, and thereafter elects to continue in the service, and to use the defective means, he thereby assumes the risk of injury therefrom. The rule thus invoked would relieve the master of his duty as soon as the servant became aware of its violation. Such is not the law in this State. The duty to repair is a continuing one, and a failure to discharge it is negligence, though the servant may continue in the service after knowledge thereof. An express contract will not relieve him. *Blanton v. Dold*, 109 Mo. 75, 16 Am. Neg. Cas. 378, *ante*.

The question has often been raised, discussed and decided, whether a servant can recover for injuries incurred in the use of machinery or appliances known by him to be defective. The non-liability of the master in such cases, however, is properly placed upon the ground of contributory negligence rather than that of assumption of risk. *Gibson v. R. R. Co.*, 46 Mo. 163, 16 Am. Neg. Cas. 442, *ante*; *Huhn v. R. R. Co.*, 92 Mo. 447, and cases cited; *Soeder v. R. R. Co.*, 100 Mo. 681; *Blanton v. Dold*, 109 Mo. 75, 16 Am. Neg. Cas. 378, *ante*.

"Where the instrumentality with which the servant is required to perform service is so glaringly defective that a man of common prudence would not use it, the master could not be held responsible for it." *Huhn v. R. R. Co.*, 92 Mo. 447 (1).

1. In *HUHN v. MISSOURI PACIFIC R'y Co.*, 92 Mo. 440 (1887), yardman in defendant's employ fatally injured while switching train, his foot catching between guard rail and track rail, judgment for plaintiff in the Jackson Circuit Court was *affirmed*.

The rulings are stated in the syllabus to the official report (opinion by BLACK, J.) as follows:

"Where the instrumentality with which a servant is required to perform service is so glaringly defective that a man of common prudence

"If the instrumentality by which he is required to perform his service is so obviously and immediately dangerous that a man of common prudence would refuse to use it, the master cannot be held liable for the resulting damage. In such case the law adjudges the servant guilty of concurrent negligence." *Patterson v. R. R. Co.*, 76 Pa. St. 389.

"There may be cases where a servant would be wanting in due care by incurring the risk of injury in the use of defective or imperfect machinery or apparatus, after he knew it might cause him bodily harm." *Snow v. R. R. Co.*, 8 Allen, 441, 15 Am. Neg. Cas. 417.

The question is one of contributory negligence which should be submitted to the jury unless the defect is so manifestly and glaringly hazardous that the court could declare, as a matter of law, that a person of ordinary prudence would

would not use it, the master cannot be held responsible for damages resulting from its use. But if a servant incurs the risk of machinery which, though dangerous, is not so much as to threaten immediate injury, or where it is reasonable to suppose it may be safely used, with great skill or care, mere knowledge of the defects on the servant's part will not defeat a recovery. Negligence on the part of the servant, in such cases, does not necessarily arise from his knowledge of the defect, but is a question of fact, to be determined from such knowledge and the other circumstances in evidence.

"There is no obligation on the part of the master to furnish absolutely safe appliances, nor is a railroad bound to adopt every new invention, though it be an actual improvement. It is not required to discard its implements and machinery, because better have come into use. But it is the duty of the company to use reasonable care and precaution in procuring and keeping its appliances in good condition and order, and it cannot wholly disregard the improvements of the day."

In the *HUHN* case, *supra*, the learned judge distinguished another Missouri case as follows:

"In *SMITH v. R. R. Co.*, 69 Mo. 32 (1878), the complaint relied upon was that the guard rail was constructed of the T rail, when a different one would have been as serviceable, and less dangerous, and the proof was that a V rail would have been as serviceable, and, on account of its form, less dangerous to the employees. The V rail was shown to be used as a guard rail, on one bridge, but the T rail was in general use. Some of the witnesses, though engaged in railroading for years, had never seen the V rail in use. It was held that, although the V rail would have been safer, that fact would not establish negligence on the part of the defendant, and it was also said there was no evidence of any negligence on the part of the defendant. That case ought not to control the disposition of this one, for here negligence is clearly alleged in the petition, and the proof as to the use of blocked guard rails, in this case, is essentially different from the evidence of the use of the V rail in that case." The

not use it. A servant could not wholly ignore a known defect in the instrumentality provided for him, but would be required to exercise care and caution in its use. The degree of care would depend upon the nature of the defect, and the character of the use made of the instrumentality.

Under ordinary circumstances the handhold, in its defective condition, by exercising care, could have been used for the purposes for which it was designed. It was not so dangerous as to threaten immediate injury by its use, and deceased was not guilty of contributory negligence in using it, though he had knowledge of its defects. *Soeder v. R. R. Co.*, 100 Mo. 681.

Neither do we think deceased guilty of negligence in law in the manner in which he used the handhold on this occasion.

Smith case was an action by a brakeman for injuries sustained while coupling cars, his foot being caught between the guard rail and that of the main track. Judgment for defendant in the Jackson Circuit Court *affirmed*.

In *SOEDER v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'y Co.*, 100 Mo. 673 (1890), brakeman killed, judgment for \$3,500 for plaintiff in the St. Louis City Circuit Court was *affirmed*. Opinion by BRACE, J. The syllabus to the official report (paragraph 1) states the case as follows: "In an action by a widow against a railroad company for the death of her husband, a brakeman, it was shown by the plaintiff that the deceased was engaged at night in switching cars on a track where there was a rail so worn for the space of from four to six feet as to make a depression for that distance of an inch and a quarter, so that a car passing over it would be jolted or jarred and that deceased fell from the car on which he was riding at his post of duty, striking the ground at a point consistent with the theory that he was thrown from the car by the jar in passing over the depression in the rail and that he was

dragged some distance and was killed, though nobody saw the accident. *Held*, that the evidence was sufficient to authorize the case to go to the jury."

In the *SOEDER* case, *supra*, BRACE, J., said: "As to whether there was a substantial defect in the track occasioned by the defective rail or whether the deceased was familiar with this particular track were questions also for the jury, as different conclusions might be drawn from the evidence on these subjects. Conceding, however, that the deceased was perfectly familiar with this track and remained in defendant's employment, this of itself would not have been sufficient to defeat a recovery. The deceased's knowledge of the unsafe condition of the track, if it was unsafe, would not defeat a recovery, if 'it was not so dangerous as to threaten immediate injury or if he might have reasonably supposed that he could safely work about it by the use of care and caution.' *Huhn v. Mo. Pac. R'y Co.*, 92 Mo. 440, and cases cited. The court committed no error in refusing to take the case from the jury."

in the train upon which plaintiff was directed to ride; but the fact that a heavy switch rope for coupling between cars was used, on the occasion in question, instead of the usual drawhead, was not, as a matter of law, a failure on defendant's part to exercise ordinary care in the circumstances. But it is unnecessary to repeat the views expressed in the cases cited. The reference to the former opinion (which we regard as decisive of this appeal) will suffice." Judgment reversed. All concur. See also same case in the Kansas City Court of Appeals, where there was a division of opinion, reported in 31 Mo. App. 578. See also another decision in 19 Mo. App. 634.

SECTION HAND STRUCK BY CAR — ASSUMPTION OF RISK — FELLOW-SERVANT RULE. — In **PARKER v. HANNIBAL & ST. JOSEPH R'Y CO.**, 109 Mo. 362, (*In banc*, October Term, 1891), judgment for plaintiff for \$5,000 in the Jackson Circuit Court was *reversed*, on the ground that plaintiff's intestate assumed the risks of employment. Plaintiff's husband was a section hand in the service of defendant at the time he was killed. He had been in this same employment for about two years prior to his death. At the time of his death, he was tamping rock under the head block at the switch, stooping, with his back toward the west. He was struck by a car in a construction train coming from the west, on defendant's track, in charge of defendant's trainmen, who were and had been for some three months engaged in hauling and unloading crushed rock for ballast for this section. **STRONG & MOSMAN**, appeared for appellant (defendant below); **T. T. CRITTENDEN**, **E. H. STILES** and **J. F. WATERS**, for respondent. The leading opinion was delivered by **GANTT, J.**, in which **SHERWOOD, P. J.**, **MACFARLANE** and **BLACK, JJ.**, concurred, *reversing* the judgment (**SHERWOOD, P. J.**, and **BLACK, J.**, rendering separate opinions). **BARCLAY, BRACE** and **THOMAS, JJ.**, *dissented*. The several opinions discuss very fully the fellow-servant question, citing numerous authorities (see 109 Mo. 365-413), the ruling on that question being stated in the syllabus to the official report as follows: "Railroad sectionhands, engaged in ballasting the railroad track with stone, which is hauled to them on a construction train, and is unloaded by the trainmen, are not fellow-servants with the trainmen, where the two groups are independent of each other and work under different foreman, to whose orders they are respectively subject." **SHERWOOD, Ch. J.**, **GRANT** and **MACFARLANE, JJ.**, *dissented*.

SECTION FOREMAN INJURED BY OBJECT THROWN FROM PASSING TRAIN — VICE-PRINCIPAL — FELLOW-SERVANT — IMPORTANT RULING ON THE FELLOW-SERVANT QUESTION. — In **CARD v. EDDY et al.** (**Receivers of the Missouri, K. & T. R'y Co.**), 129 Mo. 510 (*In Banc*, July, 1895), judgment for plaintiff for \$3,000 in the Cooper Circuit Court was *reversed*. The opinion rendered by MACFARLANE, J., in which the majority concurred, and the ruling is stated in the syllabus to the official report as follows: "Plaintiff, a section foreman on a railroad operated by receivers, was injured by a piece of coal thrown from a passing engine by the fireman. It appeared from the evidence that it had been the custom to transmit along the road orders of the roadmaster to the section foreman, by forwarding them to the nearest station, and by then sending the order by some employee on the next train, who, in passing, would throw it off to the person for whom it was intended. The order in this instance was inclosed in an envelope and was given to the fireman, who tied it to the piece of coal and as he passed plaintiff threw it to him, and in such manner that the latter's eye was struck and put out. *Held*, that, under the facts stated, the fireman was not the vice-principal or agent of the roadmaster in the delivery of the order, but was a fellow-servant of plaintiff, and the receivers were not responsible for his negligence whereby plaintiff was injured." BRACE, Ch. J., BARCLAY and BURGESS, JJ., *dissented*.

In commenting on the foregoing decision in **CARD v. EDDY**, the opening paragraphs of the dissenting opinion by BARCLAY, J., indicates the importance of the decision as it affects the fellow-servant rule. The learned judge said: "This case is remarkable in several respects. It has had four hearings since it came into the court. First, the circuit judgment in favor of plaintiff was affirmed, all the judges of the first division concurring (24 S. W. Rep. 746). On motion for rehearing, the cause was transferred to court *in banc* where the judgment was again affirmed (28 S. W. Rep. 753), all concurring except Judges GANTT and SHERWOOD. Since then there have been two more hearings by the court *in banc*. On each occasion a judgment of reversal has been rendered, for the reasons given by our learned associate, Judge MACFARLANE (28 S. W. 979). We have always dissented from such a result, and dissent again as the case comes to its close. The suit is remarkable from another point of view. It is the first judgment in many years, pronounced by a majority of this court, which seems to undermine the important proposition, in the modern Missouri law of master and servant, that the duty to direct the work is a personal duty of the master." * * *

The affirmative and dissenting opinions in **CARD v. EDDY**, *supra*,

each discuss the questions at length, citing and reviewing many Missouri and other authorities in support of their rulings. The majority opinion by MACFARLANE, J., cites the following Missouri cases: *Miller v. R. R. Co.*, 109 Mo. 350; *Dixon v. R. R. Co.*, 109 Mo. 419; *Schlereth v. R. R. Co.*, 115 Mo. 87; *Sullivan v. R. R. Co.*, 97 Mo. 117; *Parker v. R. R. Co.*, 109 Mo. 362; *Relyea v. R. R. Co.*, 112 Mo. 86; *Murray v. R. R. Co.*, 98 Mo. 574.

The dissenting opinion by BARCLAY, J., cites the following Missouri authorities: *Hall v. R. R. Co.*, 74 Mo. 298 (1881); *Coontz v. R. R. Co.*, 121 Mo. 652 (1894); *Barry v. R. R. Co.*, 98 Mo. 62 (1889); *McDermott v. R. R. Co.*, 30 Mo. 115 (1860); *Gibson v. R. R. Co.*, 46 Mo. 163 (1870); *Lewis v. R. R. Co.*, 59 Mo. 495 (1875); *Long v. R. R. Co.*, 65 Mo. 225 (1877); *Henry v. R. R. Co.*, 109 Mo. 488 (1891); *Swadley v. R. R. Co.*, 118 Mo. 268 (1893); *Stephens v. R. R. Co.*, 96 Mo. 207 (1888); *Miller v. R. R. Co.*, 109 Mo. 350 (1891); *Russ v. R. R. Co.*, 112 Mo. 45 (1892); *Smith v. R. R. Co.*, 92 Mo. 359 (1887); *Reagan v. R. R. Co.*, 98 Mo. 348 (1887).

The foregoing cited cases will be found noted or reported with the Missouri cases in this volume of Am. Neg. Cas.

PLEADING AND PROOF — VARIANCE — STATUTE — MINOR EMPLOYEE, A SWITCHMAN, RUN OVER BY CAR — HEAVY DAMAGES. — In **WALDHIER v. HANNIBAL & ST. JOSEPH R. R. CO.**, 71 Mo. 514 (*April Term, 1880*), switchman engaged in switching in defendant's railroad yard, run over by car and both legs injured, judgment for plaintiff for \$8,000 was *reversed*, for variance in pleading and proof, etc. Opinion by HENRY, J. The petition alleged negligence in having defective machinery and in running of cars, but the proof was that the injury was occasioned by a broken frog. "A petition by an employee stating, without any specific facts, that plaintiff was injured in consequence of the negligence of a railroad company, in using defective machinery, and in running and managing its railroad and cars, would be fatally defective; and when such general allegations are used in connection with a specific statement of a cause of action, they do not enable the plaintiff to recover for any cause of action, except that specifically stated." On rehearing SHERWOOD, Ch. J., said: "We discover no reason for departing from the conclusion reached in the original opinion — that plaintiff having declared upon one cause of action could not recover upon another. Our statute (2 Wagner Stat. p. 1033, sec. 1), it is true, provides that "No variance between the allegation in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party, to his prejudice, in maintaining his action or defense upon the merits. When it shall be alleged that a party has been so misled,

that fact shall be proved to the satisfaction of the court by affidavit, showing in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just." And it has been ruled that an affidavit of having been misled was the only statutory test of such fact. *Turner v. R. R. Co.*, 51 Mo. 501, and cases cited. But that statute has reference to mere discrepancies between the issues raised by the pleadings and the evidence offered in support, of such issues, and not to cases where the substance of the issue, so to speak, has no support in the testimony adduced. The correctness of this view finds ample confirmation in the subsequent provisions of the statute relating to new trials, where it is provided that, "Where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, but a failure of proof." 2 Wagner Stat. p. 1058, section 1. The case was held to show an entire failure of proof within the statute.

The pleadings in the *WALDHIER* case being amended, another trial was had, which resulted in verdict and judgment for plaintiff for \$25,000. The defendant appealed, but the Supreme Court *affirmed* the judgment on remittitur by plaintiff of \$5,000 and accrued interest to date of appeal. The plaintiff at the time of the accident was seventeen years old, and in the employ of defendant as a switchman. He was run over by a freight train, his right foot and left leg being so crushed that both had to be amputated. Plaintiff having offered to remit \$5,000 of the verdict, the damages were not considered so excessive as to warrant a third trial, and judgment for \$20,000 was *affirmed*. The law of master and servant was discussed. G. W. EASLEY appeared for the railway company; C. O. TICHENOR and EDWIN SILVER, for plaintiff. Opinion by BLACK, J. See *WALDHIER v. HANNIBAL & ST. JOSEPH R. Co.*, 87 Mo. 37 (*October Term, 1885*).

See also *BUFFINGTON v. ATLANTIC & PACIFIC R. R. Co.*, 64 Mo. 246 (1876), 12 Am. Neg. Cas. 205*n*, where the action being grounded on defective construction of engine, recovery could not be had where defective track was cause of injury. Judgment for plaintiff, a brakeman, was *reversed*.

SWITCHMAN KILLED BY FALLING FROM FOOT-BOARD OF SWITCH ENGINE — DEFECTIVE FOOT-BOARD — KNOWLEDGE OF DEFECT — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE — LIABILITY OF RAILROAD COMPANY — EVIDENCE — EXPERT — CUSTOM — DEATH — DAMAGES — LIFE EXPECTANCY — MORTALITY TABLES. — In *O'MELLIA v. KANSAS CITY*,

ST. JOSEPH & COUNCIL BLUFFS R. R. CO., 115 Mo. 205 (*Division 2, March, 1893*), switchman killed by switch engine, judgment for plaintiff for \$5,000 in the Jackson Circuit Court was *affirmed*. The case is very fully discussed by GANTT, P. J., and a full abstract of the rulings of the court is given in the syllabus to the official report as follows:

" 1. A series of instructions as to the duty of the master in furnishing suitable appliances for the use of the servant and the risks assumed by the servant in using them approved.

" 2. A railroad is responsible for the death of a switchman killed while in the performance of his duty and using ordinary care in attempting to get on the footboard of a slowly moving locomotive, if the company knew, or by the exercise of ordinary care might have known that the footboard which it had provided for deceased to ride on was defective or unsafe by reason of its slanting condition.

" 3. Though the board was slanting, the company would not be liable for the switchman's injury, if he negligently got in front of the moving engine and without care attempted to get on the footboard and slipped and fell.

" 4. Knowledge by the switchman of the slanting and dangerous condition of the footboard, by reason of which he was killed will preclude a recovery for his death, unless the foot-board was not so dangerous as to threaten immediate injury, or the deceased might have reasonably supposed that he could with care and caution have safely used it.

" 5. Whether the footboard was unsafe because of its slanting condition was, under the evidence, a question for the jury.

" 6. The risk of a defective footboard was not one assumed by the switchman by virtue of his employment.

" 7. It is not necessarily negligent for a switchman accustomed to the work to step upon a properly constructed footboard of a slowly-moving engine, especially where there is no rule forbidding it.

" 8. Where a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the matter is for the jury.

" 9. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court.

" 10. An expert builder of stairs may give his opinion as to the proper slant of a step.

" 11. An error in the admission of evidence is in a civil case cured by an instruction withdrawing it from the consideration of the jury.

" 12. Evidence as to a custom of switchman in yards other than defendant's, of getting on and off footboards of moving engines,

it seems was admissible as bearing on the question of the negligence of the conduct of the deceased in this case.

" 13. It is not error to permit a widow suing for the death of her husband, an employee of a railroad company and charged to have been killed by its negligence in furnishing him with a defective appliance, to testify as to the number of her children.

" 14. The reasonable expectancy of decedent's life as shown by the testimony of a physician and by mortality tables, is in such action a proper fact to be considered by the jury in estimating the damages."

SWITCHMAN INJURED WHILE UNCOUPLING CARS — RULES AND REGULATIONS — FELLOW-SERVANT — EVIDENCE — PLEADING AND PRACTICE. — In **RUTLEDGE v. MISSOURI PACIFIC R'Y CO.**, 123 Mo. 121 (*April Term, 1894*), switchman injured while uncoupling cars in railroad yard, judgment for plaintiff in the Osage Circuit Court was *reversed*, and subsequently modified so as to remand the cause and give plaintiff an opportunity to amend. There was a former decision in the **RUTLEDGE** case, 110 Mo. 312. The case is very fully discussed by **BARCLAY, J.**, and the rulings are set out in the syllabus to the official report as follows:

" 1. It is the duty of an employer, operating a railroad, to use ordinary care in so doing; and, accordingly, to adopt and to enforce reasonable rules for the protection of employees engaged in such a service.

" 2. Where a rule is habitually disregarded with the knowledge of the master, it amounts to no rule.

" 3. The master is not an insurer of the observance of rules, though obliged to use reasonable care to enforce them.

" 4. Plaintiff, a switchman, while attempting to uncouple a car in a railway yard, was injured in consequence of an unexpected movement of the train, without signal from him. The movement was caused by the act of the locomotive engineer in response to a signal from some employee on the train. Held, that these men were fellow-servants.

" 5. Plaintiff counted on the absence of a rule, that a person uncoupling cars should alone give the signal for the necessary movement of the train while so engaged; but it appeared that there were printed rules, prescribing the signals for such train movements, and a long established custom among the employees to the same effect as the proposed rule which plaintiff demanded. *Held*, in the circumstances stated in the opinion, that the absence of such a formal rule could not reasonably be found to be the cause of plaintiff's injury. (**MACFARLANE, J.**, *dissenting*.)

" 6. Negligence is an affirmative fact to be established by proof.

" 7. Where evidence tends to show that one of three persons (standing in diverse relations to a common master), gave a certain signal: *Held*, that it did not of itself tend to identify a particular one of them as the person who gave it.

" 8. The general rule of law is that parties are concluded on a second appeal in the same cause by the rulings on the first; though this rule is subject to some exception as stated in the opinion.

" 9. Where it appears, from plaintiff's own testimony, that he has no cause of action upon any view of the facts, the Supreme Court will reverse the judgment without remanding; but where it is suggested that he may be able to amend so as to present a case on the same facts, opportunity for so doing will be given, especially where his demand would otherwise be barred by limitation."

The former appeal in the RUTLEDGE case, 110 Mo. 312 (*Division 2, May, 1892*), resulted in judgment for plaintiff for \$5,000, being *reversed* for several errors.

DAMAGES — REMITTITUR — PRACTICE OF SUPREME COURT — SWITCHMAN INJURED. — In **BURDICT v. PACIFIC R'Y CO.**, 123 Mo. 221 (*Division 2, April Term, 1894*), switchman endeavoring to make coupling in defendant's switch yards in Kansas, stepping into ditch in roadbed causing his left arm to be caught between bumpers of car, necessitating amputation of hand and part of the forearm, judgment for plaintiff in the Jackson Circuit Court was *affirmed*. Opinion by BURGESS, J., who stated the case at length. In the absence of evidence to the contrary, the common law is presumed to prevail in another State where injury to plaintiff occurred. Plaintiff recovered verdict for \$12,500, but the trial court required plaintiff, as a condition to overruling of motion for new trial to remit \$2,500, which was done, and judgment rendered for \$10,000. The Supreme Court thought this sum excessive and that judgment should be reversed unless plaintiff remitted \$3,000. All concurred except as to remittitur. The case was then transferred to the court *in banc*, which affirmed the judgment of Division 2, citing numerous cases on the right to require a remittitur. The plaintiff remitted the \$3,000 and judgment was affirmed for the residue (\$7,000). The opinion was rendered by BLACK, Ch. J., in which BRACE, MACFARLANE and BURGESS, JJ., concurred; BARCLAY, GANTT and SHERWOOD, JJ., *dissented*. "Where the damages are excessive the Supreme Court may indicate such excess and require the plaintiff to remit the same as a condition of affirmance."

But see the RODNEY case, 127 Mo. 676, where the contrary to

what was ruled in the BURDICT case, 123 Mo. 221, on the question of remittitur was decided. The Rodney case was an action by a switch foreman for injuries sustained while uncoupling a car, defective condition of car being alleged.

In **RODNEY v. ST. LOUIS SOUTHWESTERN R'Y CO.**, 127 Mo. 676 (*In banc*, March 1895), appeal from judgment for plaintiff for \$12,500 in the Mississippi Circuit Court, judgment was *affirmed*, the opinion in Division 1 of the Supreme Court being delivered by BRACE, P. J., in which the judgment for plaintiff was affirmed on condition that he remitted \$2,500 thereof, but the majority of the court dissented on this point. The opinion *in banc* is as follows: "The foregoing opinion of BRACE, J., in Division No. 1, except the fourth paragraph, is adopted as the opinion of the court *in banc*. In the fourth paragraph, BRACE, Ch. J., and MACFARLANE and BURGESS, JJ., only, concur; BARCLAY, GANTT, SHERWOOD and ROBINSON, JJ., being of the opinion that this court has no power to require a remittitur as a condition of affirmance in this class of cases. The order requiring a remittitur is, therefore, set aside, leave given to the respondent to withdraw the same, and the judgment of the Circuit Court affirmed. All concurring, except SHERWOOD, J., who dissents."

The seventh and eighth paragraphs of the syllabus to the official report states the decision in the RODNEY case on the questions of damages and remittitur as follows:

"In an action by a switch foreman for personal injuries received when he was about twenty-eight years of age, strong and healthy and earning about \$100 per month, his arm being badly mashed between the elbow and shoulder, causing intense pain and necessitating amputation thirteen days after the accident, after which erysipelas set in all over his body and continued eight or ten days, producing great suffering; he was confined to the hospital for eight weeks, spent about \$200 for board, medical attention, medicine and nursing, and is a cripple for life and dependent on manual labor for support, a verdict for \$12,500, while large, is not so excessive as to induce the belief that it is the result of favor, passion or prejudice and to entitle the defendant, as a matter of right, to have the judgment reversed for that reason.

"The Supreme Court has no power to require a remittitur as a condition of the affirmance of the judgment of the trial court in actions for damages for personal injuries. BRACE, Ch. J., and MACFARLANE and BURGESS, JJ., *dissenting*."

ACTION BY ADMINISTRATOR IN MISSOURI UNDER KANSAS STATUTE — DEATH — STATUTE — EXTRA-TERRITORIAL EFFECT — RAILROAD EMPLOYEE KILLED IN COLLISION OF TRAINS. — In **VAWTER v. MISSOURI PACIFIC R'Y CO.**, 84 Mo. 679 (*October Term, 1884*), the question in issue was the right of action by an administrator in Missouri under the Kansas statute. In reversing judgment for plaintiff, the Supreme Court (per BLACK, J.), stated the case as follows:

“Plaintiff is the widow of W. R. Vawter, and was appointed administratrix of his estate by the probate court of Schuyler county, Missouri. She brings this suit in her representative capacity against the defendant to recover damages for the death of her husband. He was in the employ of the defendant. While making a trip over the road, his train left the main track and ran on a side track, at Parsons, in the state of Kansas, came in collision with a stock train, and he was killed. His death, it is alleged, was caused by the negligence of defendant's servants, in leaving the switch at that place in an improper position. Defendant contends that he and those engaged with him on his train were guilty of negligence in running the train at a rate of speed prohibited by the defendant's rules, because of which he was killed.

“Civil actions for the death of a person caused by the wrongful act, neglect, or omission of another, did not exist at common law. A right of action in such cases is given by the statute law of many of the States. These statutes have no extraterritorial effect, so that, as is conceded in this case, the plaintiff, if she can recover at all, must do so by force of the statutes of the State of Kansas, and not because of any statute of this State. To that end she pleads and bases her right to recover upon two sections of the statute of that State, which are as follows: “When the death of one is caused by a wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.” Also: “Every railroad company organized, or doing business in this State, shall be liable for all damages done to employees of such company in consequence of any negligence of its agents, or any mismanagement of its engineers, or other employees to any person sustaining such damages.”

“The question arises whether she can maintain this action in

this State. The following authorities support her claim of right so to do." *Leonard v. Columbia Steam Nav. Co.*, 84 N. Y. 48; *Dennick v. R. R. Co.*, 103 U. S. 11; *Stoeckman v. Terre Haute & Ind. R. Co.*, 15 Mo. App. 503; *Taylor v. Penn. Co.*, 78 Ky. 348; *Woodward v. Mich. So. & Nor. Ind. R. Co.*, 10 Ohio St. 121; *Richardson v. N. Y. Cent. R. Co.*, 98 Mass. 85. (The court reviewed these cases). * * *

"By the statute of Kansas, the right of action accrues to the personal representative, the executor or administrator (1). The damages inure to the exclusive benefit of the widow and children, or next of kin, and do not constitute assets of the estate, but rather a trust fund for the designated persons. Here the amount is fixed, is, in part, of the nature of a penalty, and can only be recovered by designated relatives. The rule of law which exempts the master from liability for damages occasioned to one servant by the negligent act of a fellow-servant, is in force in this State, but by the statute of that State, so far as relates to employees of railroad companies, has been abrogated by the statute pleaded in this case. An administrator appointed in this State receives his power and authority to sue from the laws of this State, and from this State alone, to which he is amenable throughout the entire course of the administration. There is no statute of this State by which he has or can have anything to do with suits of this character, or the damages when recovered. He may, by section 96, Revised Statutes, 1879, bring an action for all wrongs done to the property rights or interests of the deceased against the wrongdoer. Section 97 provides: "The preceding section shall not extend to actions * * * on the case for injuries * * * to the person of the testator or intestate of any executor or administrator." For fear that section 96 might be construed to confer upon the administrator a right to sue for injuries to the person of the intestate, the next, as will be seen, declares in express terms that he shall not do so. To sustain this action we must say he may maintain such action, and that, too, because of a statute of another State. In

1. See, also, *OATES v. UNION PACIFIC R'y Co.*, 104 Mo. 514 (Division 1, April Term, 1891), action by widow of a deceased person, a resident of Missouri, who, while in the employ of another railroad company, was killed by a train operated by defendant in the State of Kansas. The judgment of the Jackson Circuit Court sustaining demurrer to plaintiff's petition was *affirmed*. The court

cited the *Vawter* case (the case at bar). *Held*, that plaintiff, as widow, could not recover in an action in Missouri though no administrator could be appointed in Kansas, because the deceased left no estate there, and though the action could be brought in either State by an administrator appointed in Missouri. Opinion by BLACK, J., who cited the statutes as set out in the *Vawter* case.

short, we must convert him into a trustee for purposes entirely foreign to any duty devolved upon him as administrator by the laws of this State. This we cannot do.

"We understand a general law of the State of Kansas permits foreign administrators to sue and be sued in the courts of that State, and that he may there prosecute a suit under this Damage Act, if the law of the State from which he gets his appointment gives him like powers. *R. R. Co. v. Cutter*, 16 Kan. 568. But if the law of the State where the appointment is made prohibits him from prosecuting an action for damages occasioned by the wrongful act of another, and resulting in death, then he cannot maintain the suit in the courts of that State. This appears to be the result of a recent decision, a short note of which is given in the *Kansas Law Journal* of February 14, 1885. Most courts and text-writers of acknowledged authority hold that these actions, given by statute for causing death by neglect, default, or a wrongful act, can only be enforced by the courts of the jurisdiction where the wrong is suffered and the right of action is given. Other courts treat such actions as transitory, and enforce the statute law of the State where the injury was suffered, though the action be not one of any general recognized right. Others again entertain such actions when the laws of the two States upon the same subject are similar. If these statutes are administered outside of the jurisdiction where enacted, it must be done on principles of comity. Such principles are not to be narrowed, but they do not justify the courts in going to the extent to which we must go to sustain this action, *i. e.*, to say to an administrator you may sue in the county of the State of your appointment, under the law of another State, when denied the right to bring the same, or a like suit, by the laws of the State conferring the appointment."

INDEPENDENT CONTRACTOR — LABORER STRUCK BY TRAIN — FAILURE TO SIGNAL — RAILROAD COMPANY NOT LIABLE. — In **SPEED v. ATLANTIC & PACIFIC R. R. CO.**, 71 Mo. 303 (1879), appeal by railway company from St. Louis Court of Appeals, judgment was *reversed*, the syllabus to the official report stating the case as follows:

"1. The defendant, a railroad company, made a contract with one M., by which he was to take entire charge and control of defendant's freight business at the St. Louis station, loading and unloading cars, switching them back and forth in the yard, making up freight trains, and doing all other yard service necessary in the transaction of defendant's freight business. He was also, when requested, to haul freight from the levee for defendant; to prepare, execute and receive all necessary freight bills; to keep all necessary

books of account, collect freight money and generally act as, and discharge all the duties of, a station agent. To enable him properly to discharge his duties he was to have control over the grounds, yards and buildings, engines and cars of defendant at the station. Defendant was to furnish the necessary engines, and keep them in repair and supplied with fuel, etc., and to employ the engineers and firemen, who were to be under M.'s control, and were to be paid by him. For his services, M. was to be paid monthly at the rate of fifteen cents for each ton of freight received or delivered, and fifty cents for each car hauled from the levee. The contract was to continue for five years. The business was to be done under the control of defendant's superintendent and to his satisfaction, and if not so done, defendant could revoke the contract on twenty-four hours' notice. M. performed no service for any other person than defendant. In an action to recover damages for injuries alleged to have been occasioned through the negligence of trainmen in the employ of M.: *Held*, that M. was not an independent contractor, but stood in the relation of servant to the defendant.

"2. The signal adopted and habitually used at a certain elevator to notify the laborers engaged in loading and unloading railroad cars, of the incoming of a train, was a cry by one of the employees of the elevator company: "The cars are coming." The evidence showed that this was a safer signal at that place than the ringing of a bell, or sounding of a whistle would have been. In an action brought against the railroad company by a laborer who had been at work at the elevator for some weeks and knew the accustomed signal, to recover damages for an alleged negligent wounding by an incoming train: *Held*, that the failure to ring or whistle was not negligence.

"3. But the fact that the accustomed signal was given by the servant of the elevator company would not exempt the railroad company from liability, if its servants were guilty of negligence occasioning plaintiff's injury."

EMPLOYEE OF ANOTHER INJURED ON SIDE TRACK BY NEGLIGENCE OF RAILROAD COMPANY — ORDINANCE — CONTRIBUTORY NEGLIGENCE — FAILURE TO KEEP WATCHMAN TO GIVE WARNING OF APPROACH OF TRAINS — RAILROAD COMPANY LIABLE. — In **DUNKMAN v. WABASH, ST. LOUIS & PACIFIC R'Y CO.**, 95 Mo. 232 (*April Term, 1888*), appeal by plaintiff from judgment of St. Louis Court of Appeals, reversing judgment for plaintiff in the St. Louis Circuit Court, judgment of the Court of Appeals was *reversed*, with directions to enter judgment affirming that of the

Circuit Court. See 16 Mo. App. 547. The opinion was rendered by RAY, J., in which all concurred, except SHERWOOD, J., who dissented, and the points decided are set out in the syllabus to the official report as follows:

" 1. An objection to the introduction in evidence of a city ordinance, on the ground that the subject is not clearly expressed in its title, will not be considered on appeal where such objection was not made at the time of the offer of the ordinance.

" 2. Notwithstanding the injured party may have been guilty of contributory negligence, the railroad, in an action against it for negligence, is still liable for the injury, if it could have been prevented by the exercise of reasonable care on its part, after the discovery of the danger in which the injured party stood; or if the defendant failed to discover the danger through its own recklessness, when the exercise of ordinary care would have discovered it and averted the calamity (1).

" 3. The foregoing rule applies in populous districts and large cities, especially where by ordinance precautions and safeguards are required to be observed in the management of trains within the city limits, or where a limitation has been imposed by like ordinance on their rate of speed.

" 4. But in the country and in villages, the liability of the company is limited to negligence and want of care occurring after the exposed and dangerous position of the injured party came to the knowledge of the servants charged with the want of care.

" 5. This case distinguished from *Rine v. Railroad*, 88 Mo. 392 (2).

1. The court said: "This doctrine is recognized, in terms more or less explicit, in repeated decisions of this court, and among them are *Harlan v. R. R. Co.*, 65 Mo. 22; *Kelley v. R. R. Co.*, 75 Mo. 140; *Scoville v. R. R. Co.*, 81 Mo. 440; *Welsh v. R. R. Co.*, 81 Mo. 466; *Bergman v. R. R. Co.*, 88 Mo. 678; *Rine v. R. R. Co.*, 88 Mo. 392; *Frick v. R. R. Co.*, 75 Mo. 595; *Merz v. R. R. Co.*, 88 Mo. 677; *Drain v. R. R. Co.*, 86 Mo. 574; s. c., 10 Mo. App. 531; *Karle v. R. R. Co.*, 55 Mo. 476; besides other cases, where the same exception and qualification of the rule is recognized."

2. The court said: "In the case of *RINE v. CHICAGO & ALTON R. R. Co.*,

88 Mo. 392, Judge BLACK, speaking of that case, uses this language: 'There is no analogy between the case at bar, as respects the question under consideration, and those cases where the servants fail to observe some municipal or statutory regulation, and the injury is attributed in whole or in part to that, or where they are not found at their proper places when passing a public crossing, or going through a populous city or district, or fail to heed due warning of danger. These observations are sufficient to distinguish this case from *Frick v. R. R. Co.*, 75 Mo. 595, and *Kelley v. R. R. Co.*, 75 Mo. 138.' In the case at bar, it will be observed that the provisions of section two of city ordinance 10,305, hereinbefore set out in

"6. Where coal merchants, for their exclusive use and benefit, and for the purpose of facilitating the reception of carloads of coal, had caused, by agreement with defendant railroad, a switch track to be connected with the track of defendant, the coal merchants agreeing that they would keep a watchman to notify employees of their patrons of the approach of trains, and such employee is injured through failure of the merchants to provide a watchman to give warning, such failure is no defense to the railroad in an action against it for an injury to such employee caused by its failure to observe a city ordinance requiring it to keep a watchman on the rear end of its freight trains to warn persons of danger and to sound the bell if its locomotives are within the city limits."

NOTES OF MISSOURI CASES ARISING OUT OF INJURIES TO EMPLOYEES IN SERVICE OF RAILROAD COMPANIES.

1. Brakemen.
2. Car repairers.
3. Conductors.
4. Engineers.
5. Firemen.
6. Section and track hands.
7. Switchmen.
8. Yardmen.
9. Miscellaneous.

Among the numerous Missouri Railroad cases, arising out of injuries to employees, not reported with the Missouri cases in this volume of AM. NEG. CAS., are the following:

1. Brakemen injured.

Coupling cars — Defective track.

In *LEWIS v. ST. LOUIS & IRON MOUNTAIN R. R. Co.*, 59 Mo. 495 (March Term, 1875), brakeman injured while coupling cars, he having stepped into a hole in the roadbed and his feet were run over and crushed by the car, the injuries resulting in one of his legs being amputated, verdict and judgment was rendered for plaintiff in the Special Term of St. Louis Circuit Court but reversed at General Term. On appeal the Supreme Court reversed the latter and affirmed the judgment of the Special Term. Railroad

connection with the evidence in the cause, sufficiently distinguish this case from that of *Rine v. R. R. Co.*, *supra*, and at the same time show that it falls within the recognized principle of the cases there cited with approval."

The *RINE* case was an action for

damages for the negligent killing of plaintiff's minor son, nineteen years old, who was run over by defendant's engine, while working near side track. The deceased was not an employee of defendant. Judgment for plaintiff was reversed. See, also, *RINE v. R. R. Co.*, 100 Mo. 228.

company liable for negligence of agents in failing to keep roadbed in repair. Section foreman, whose duty it was to keep track in repair, not fellow-servant of injured brakeman, but represented the company, and notice to him was notice to the company, and his negligence was that of the company. Opinion by WAGNER, J.

Coupling cars — Hole in track — Release.

In VAUTRAIN *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'y Co., 78 Mo. 44 (April Term, 1883), brakeman coupling cars injured by foot catching in hole under switch rod, knocked down and run over by cars, his foot and arm being crushed, judgment for plaintiff for \$6,000 was *affirmed*. Opinion by NORTON, J. The Supreme Court affirmed the judgment of the St. Louis Court of Appeals which affirmed judgment of the St. Louis Circuit Court. On the question of release and receipt of sum in satisfaction of claim the Court of Appeals ruled that "if, after the injury, the plaintiff receives money from the defendant, its return is not a condition precedent to a recovery, unless it be shown that it was paid under an agreement of settlement of the damages." See 8 Mo. App. 538 (April, 1880).

Defective brake.

In LONG *v.* PACIFIC R. R. Co., 65 Mo. 225 (April Term, 1877), it was held (as per syllabus to the official report) that: "A railroad company is liable to a brakeman for injuries received in the performance of his duties, through the negligence of the company's inspector of machinery in failing to discover and remedy defects in a brake. The inspector represents the company, and is not a fellow-servant of the brakeman." Judgment for plaintiff in Cole Circuit Court *affirmed*. Opinion by NAPTON, J.

Coupling cars of unequal height.

In HULETT *v.* ST. LOUIS, KANSAS CITY & NORTHERN R'y Co., 67 Mo. 239 (April Term, 1878), the syllabus to the official report states the case as follows: "An experienced brakeman undertook to couple together two cars of unequal height without using the ordinary crooked link adapted for preventing accidents in such cases. He knew of the inequality in height, and had the entire charge of the train. Owing to miscalculation on his part, and without any defect in the construction of either car, they came together, and he was crushed between them. *Held*, that he was not entitled to recover for the injuries so sustained." Judgment of Boone Circuit Court *reversed*. Opinion by NAPTON, J.

See, also, REARDON *v.* MISSOURI PACIFIC R'y Co., 114 Mo. 384 (Division 2, February, 1893), where plaintiff, having stepped on defendant's track in railroad yard, fell backward on the track, and in trying to get off was struck by train and run over. Judgment for plaintiff was *reversed* for errors in admission of certain evidence and in giving instructions inconsistent with others. It was held that even if plaintiff was a trespasser the question whether the defendant's engineer used due care to avoid the injury was for the jury. Citing RINE *v.* R. R. Co., 100 Mo. 228.

Coupling cars — Caught between freight cars.

In *KERSEY v. KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS R. R. Co.*, 79 Mo. 362 (October Term, 1883), brakeman's hand caught between freight cars while attending to the coupling, the negligence alleged being incompetency of fireman operating the engine, judgment of nonsuit in the Holt Circuit Court was *affirmed*. Opinion by HOUGH, Ch. J. It is not enough to show incompetency of fellow-servant, but it must also be shown that he was guilty of some act of negligence directly contributing to the injury.

Defective machinery.

In *ELLIOTT v. ST. LOUIS & IRON MOUNTAIN R. R. Co.*, 67 Mo. 272 (April Term, 1878), the syllabus to the official report states the case as follows: "An action by the legal representatives of a deceased person under the third section of the Damage Act (Wag. Stat., p. 520) can only be maintained where the deceased, had he survived, could have recovered damages for the injury; and the same evidence as to the cause of the injury is required in the one case as in the other; proof of the fact, that the employee was injured or killed in consequence of the use of defective machinery, will not, of itself, make out a case against the employer. It must also be shown that the employer was aware of the defect, or that, by the use of reasonable care on his part, it would have been discovered." *Proctor v. Hann. & St. J. R. R. Co.*, 61 Mo. 112, affirmed. Plaintiff's intestate was a brakeman in defendant's employ and was killed while discharging his duties, defective machinery being alleged. Judgment for plaintiff in Washington Circuit Court *reversed*. Opinion by HENRY, J.

Thrown from top of freight car.

In *HUFFMAN v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 78 Mo. 50 (1883), judgment for plaintiff was *reversed* for insufficiency of proof. It was held (as per syllabus to the report) that: "Mere proof of specific acts of carelessness on the part of a servant, without evidence of actual, or reasonably chargeable, knowledge thereof, on the part of the master, is insufficient to warrant a jury in inferring negligence on the part of the master in retaining such servant in his employ." Opinion by SHERWOOD, J. The action was by the widow of a deceased brakeman, who was thrown from top of car of freight train, caused by alleged carelessness of the engineer.

In *NEILON v. KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS R'y Co.*, 85 Mo. 599 (1885), brakeman injured by being thrown from top of car owing to parting of train due to alleged carelessness of another employee, judgment for plaintiff was *affirmed*. The syllabus to the official report states the ruling as follows: "Where a railroad has knowledge of the unfitness and incompetency of a conductor in charge of its train, and another servant, while engaged in the proper discharge of his duties as brakeman, is precipitated between two cars of the train and injured, by reason of such incompetency of the conductor and his carelessness in having drawn the pin coupling between said cars without notifying the brakeman, the company is liable for such injury." Opinion by RAY, J.

Projecting rails on car.

In *JACKSON v. MISSOURI PACIFIC R'y Co.*, 104 Mo. 448 (Division 1, April Term, 1891), brakeman fatally injured, judgment for plaintiff in the Bates Circuit Court was *reversed* on the ground of assumption of risk. The syllabus to the report (opinion by BLACK, J.) states the case as follows: "When a railroad company is in the habit of receiving and transporting cars laden with timbers and iron rails projecting over the laden cars, the risk arising therefrom is the ordinary one assumed by a brakeman engaged in the company's service. Nor is the rule inapplicable because the company's train dispatcher directed the brakeman to go with a locomotive and tender on a side track on which the dangerous car stood and with which the tender collided, thereby causing the injury, it not appearing what the duties of the train dispatcher were, nor that he knew of the location of the dangerous car on the side track, or of its being laden with projecting rails."

Struck by car on side track.

In *SCHAUB v. HANNIBAL & ST. JOSEPH R. R. Co.*, 106 Mo. 74 (Division 2, April Term, 1891), where plaintiff's intestate, a brakeman on defendant's train was injured while endeavoring to get off train to uncouple some cars, he being struck by a car which was alleged to have been negligently left standing on a side or switch track so close that it was dangerous, judgment for plaintiff for \$4,000 in the Hannibal Court of Common Pleas was *reversed*, the fellow-servant rule being applied. It was also held that the deceased was guilty of negligence in violating a rule prohibiting him from going between cars in motion to uncouple them. The cars were placed on the side track by fellow-servants of the injured servant, and the latter assumed the risk of injury therefrom.

Collision — Negligence of engineer.

In *WILLIAMS v. MISSOURI PACIFIC R'y Co.*, 109 Mo. 475 (Division 1, October Term, 1891), action by plaintiff, head brakeman on defendant's freight train, for injuries sustained by reason of negligence of engineer alleged to be incompetent and intemperate, a collision resulting from such negligence, judgment for plaintiff in the Jackson Circuit Court was *affirmed*. Opinion by BLACK, J.

Struck by switch engine — Violation of rule.

In *FRANCIS v. KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS R. R. Co.*, 127 Mo. 658 (In Banc, October Term, 1894), brakeman and switchman killed by switch engine with which he was working in defendant's yard, judgment for plaintiff in the Buchanan Circuit Court was *affirmed*. Negligence alleged was employment of incompetent engineer and his retention in defendant's employ after notice thereof. It was held that while switchmen and brakemen habitually board moving switch engines, assume the risks, they do not assume risk from incompetency of engineer. Questions of contributory negligence of brakeman and negligence of engineer were for the jury. Notice to trainmaster, foreman of roundhouse and the yardmaster is notice to railway company. Evidence as to company's knowledge of violation of rules by employees is admissible to show habitual violation. Opinion by GANTT, P. J.

There was a former appeal in the FRANCIS case where the reversal was on ground of want of evidence that defendant knowingly permitted its employees to violate the rule against boarding moving switch engines. See 110 Mo. 387.

Defective appliance.

In HURLBUT *v.* WABASH R. R. Co., 130 Mo. 659 (Division 1, November, 1895), brakeman on freight train running over track of the Omaha & St. Louis R. R., between certain points in Missouri, injured by reason of a side rod on the locomotive breaking and striking the cab in which he was sitting, throwing him to the ground, judgment for plaintiff for \$6,000 in the Linn Circuit Court was *affirmed*. Opinion by MACFARLANE, J. The second paragraph of the syllabus to the report is as follows: "There was a contract between defendant and another railway company by which continuous trains were run over the connected roads. Defendant had the exclusive authority to employ and discharge trainmen and was required to furnish and repair the locomotives for both roads, but they were under the control of the other road while running on its track and the men were paid by each company in proportion to the work done on the respective roads. Plaintiff was injured on the other company's road by a defective engine. *Held*, that plaintiff was in the service of the defendant and the latter was liable for the injury." Plaintiff was not negligent in not being on top of train as it was running down grade as required by defendant's rules, where the conductor directed him to ride in the locomotive cab because of the severe cold weather.

Riding in baggage car — Dangerous place.

In HIGGINS *v.* HANNIBAL & ST. JOSEPH R. R. Co., 36 Mo. 418 (1865), an action by plaintiff, an infant and only child of Thomas C. Higgins, who was killed while riding in baggage car on defendant's railroad in September, 1861, the question turned on whether the deceased was a *passenger* within the meaning of the Damage Act (R. C. 1855, p. 647). It appeared that he had been in defendant's employ as engineer and brakeman for several years; that for several days before the accident he had not been in actual service on any train; but his name still remained on the company's roll. The court (per HOLMES, J.) said: "On the morning of the accident, he signaled the train to stop and take him up, as it passed where he was; he took his place in the baggage car among other employees; he appears to have treated himself as an employee, and he was received by the conductor as an employee who was passing from one point to another on the road, in the usual manner. He engaged no passage, took no seat in any passenger car, paid no fare, and evidently did not expect to pay any, and none was exacted from him. He did not claim to be a passenger, nor was he considered otherwise than as an employee by the conductor. Upon a careful examination of the evidence on this point, we think it tended to prove that he was an employee, and not a passenger, within the purview of the Act, and that, under all the circumstances, the conductor had a right to presume that he was traveling as an employee of the company merely. Such being the relation of the parties, the mere circumstance that he had been off duty as a

brakeman for some days, or that he was then passing on his own private errand, and not immediately engaged on the business of the company, or in running that very train, cannot be allowed to make any difference." The court cited several cases sustaining the point. Even if deceased could have been considered a passenger he voluntarily placed himself in a position of danger. "A baggage car is no place for a passenger and the proof showed he had no business to be there at all." Judgment for plaintiff in the Hannibal Court of Common Pleas *reversed*. Questions of pleading and practice were also passed upon.

2. Car repairers injured.

In *HALLIHAN v. HANNIBAL & ST. JOSEPH R. R. Co.*, 71 Mo. 113 (1879), judgment for plaintiff was *reversed*, the case being set out in the syllabus to the official report as follows: "In an action against a railroad company to recover damages for the killing of plaintiff's husband the evidence showed the circumstances of his death to have been as follows: Deceased was a repairer of cars, of some years' experience, in the service of another company, and was familiar with defendant's freight yard, and knew that the work of switching and making up trains was constantly going on there. He also knew the customary mode of doing this work. Defendant had in its yard a repair track, and separate from it, a track known as a transfer track, which was specially set apart for cars whose contents were to be transferred to other roads. On the day of the accident defendant's car repairer was engaged in inspecting a car standing on this transfer track, when deceased happened to pass by. He called to deceased to look at some work that had been done upon the car. Deceased was in the act of complying with this request, and was probably standing or stooping on the track at one end of the car, when another car switched down the track from the opposite direction in the usual manner, struck the first and sent it forward several feet, running over him and inflicting the injuries of which he died. Defendant's car repairer (who was the only eye-witness) testified that the accident happened almost the instant he spoke to deceased. The evidence tended strongly to show that there was a brakeman in charge of the colliding car, but that it would have been impossible for him, if he was on the lookout, to see deceased. *Held*, that plaintiff was not entitled to recover."

In *MOORE v. WABASH, ST. LOUIS & PACIFIC R'y Co.*, 85 Mo. 588 (1885), car repairer at work between two freight cars injured by engine being driven against the cars, his arm being crushed, the negligence charged failure of foreman to protect him from danger while at work as promised, judgment for plaintiff was *affirmed*. The foreman was held to be a vice-principal for whose negligence the company was liable. Opinion by HENRY, Ch. J.

In *HOKE v. ST. LOUIS, KEOKUK & NORTHERN R'y Co.*, 88 Mo. 360 (October Term, 1885), the Supreme Court (per RAY, J.) said: "The case at bar, in all its essential features and principles, is identical with that of *Moore v. Wabash, St. L. & P. R'y Co.*, 85 Mo. 588 (preceding paragraph). The court referred to the elaborate review of the fellow-servant question by HENRY, Ch. J., in the *Moore* case, and followed the ruling in that case on the subject. In the *Hoke* case plaintiff was engaged in loading a wrecked car upon a wrecking train under the direction of defendant's roadmaster,

and was injured by the car falling upon him. In the St. Charles Circuit Court there was a verdict and judgment for plaintiff for \$10,000 which was reversed by the St. Louis Court of Appeals, from which plaintiff appealed. The Supreme Court reversed the Court of Appeals and directed judgment to be entered in the Circuit Court for plaintiff. The roadmaster was held to represent the defendant and was not a fellow-servant of plaintiff.

The decision in the St. Louis Court of Appeals in the HOKE case is reported in 11 Mo. App. 574.

In *RENFRO v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 86 Mo. 302 (1885), car repairer while repairing a car standing on a track fatally injured by a train being backed against the car, judgment for plaintiff in the Grundy Circuit Court was *reversed*, it being held that the deceased assumed the risks and that both he and a fellow-servant failed to exercise due care to avoid the injury. Opinion by BLACK, J.

3. Conductors injured.

Thrown from construction train — Incompetent employee.

In *HARPER v. INDIANAPOLIS & ST. LOUIS R. R. Co.*, 47 Mo. 367 (March Term, 1871), conductor of construction train injured, judgment for plaintiff in the St. Louis Circuit Court was *affirmed*. The amended petition states "that on July 9, 1867, plaintiff was in the employ of defendant as conductor of one of its construction trains running on said road; that on said day, while plaintiff was discharging his duties as conductor of said train, he was, without any carelessness or negligence on his part contributing thereto, but solely through the mismanagement of the locomotive engine attached to and drawing said train, thrown on the railroad track and injured, etc.; that the injuries so complained of resulted to plaintiff while he was in the performance of his duties as aforesaid, without any carelessness on his part contributing thereto, solely and directly from the fault, negligence and want of care of defendant in this; that there was no engineer at said time upon or in charge of said locomotive engine, but the same was then and there, without the knowledge or consent of plaintiff, but with the knowledge and by permission and authority of defendant, being managed and controlled by a fireman, said fireman being then and there, with the knowledge and by permission and authority of defendant, in the performance of an engineer's duties in and about said locomotive engine; that said fireman was not an engineer, nor was he fit or competent to perform the duties of an engineer in and about said locomotive engine, of all which defendant at said time had full and competent knowledge." The defendant, in its answer, failed to deny, and therefore admitted, that the fireman was not fit or competent to perform the duties of an engineer. Defendant liable for the injury caused by the act of an incompetent employee. Opinion by WAGNER, J.

There was a former appeal in the HARPER case, where the case was sent back for retrial. See 44 Mo. 488.

Derailment of engine — Defective appliance.

In *COONTZ v. MISSOURI PACIFIC R'y Co.*, 115 Mo. 669 (Division 2, May, 1893), conductor of engine used as a pusher, judgment for plaintiff for

\$6,500 in the St. Charles Circuit Court was *reversed* for error in admission of evidence as to plaintiff's loss of earnings, the same not being specially averred as an element of damages. The negligence complained of on the part of defendant which is alleged to have been the cause of the accident and consequent injury, is "that at the time of said injury, said engine and tender were greatly worn and in a dangerous and defective condition; that the wheel or truck of the tender was worn out and defective and crooked, and the material of said wheel had sand holes in it, thereby weakening it and making it defective and insufficient for the use to which defendant was applying it. And the coupling apparatus of said engine and tender was worn out and defective and insufficient for the purpose to which defendant was applying it; that by reason of said defects and insufficiencies of said engine and tender, * * * the wheel of said tender was caused to break and said engine and tender to be derailed and plaintiff to be injured, and that defendant knew or might have known by the exercise of reasonable and ordinary care the unsafe condition of said engine and tender."

A subsequent trial of the COONTZ case, resulted in verdict and judgment for plaintiff which was *affirmed* by the Supreme Court. See 121 Mo. 653 (1894).

Derailement of train.

BROWNELL *v.* PACIFIC R. R. Co., 47 Mo. 239 (January Term, 1871), appears to be an action for the negligent killing of plaintiff's husband, who was a conductor of one of defendant's trains which was derailed. The case turned on questions of practice. Judgment for plaintiff in the First District Court *affirmed*.

Collision between two parts of train.

In ROBLIN *v.* KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS R. R. Co., 119 Mo. 476 (Division 2, January, 1894), conductor killed in collision between two parts of a train, the negligence alleged being the incompetency of the engineer in backing the detached part of a train which had broken apart against the other part while the deceased was endeavoring to fasten the parts together, throwing him from the train, judgment for defendant in the Buchanan Circuit Court was *affirmed*, the engineer and the conductor being fellow-servants.

4. Engineers injured.

Collision between trains.

In MURPHY *v.* ST. LOUIS & IRON MOUNTAIN R. R. Co., 71 Mo. 202 (October, 1879), engineer of passenger train injured in collision with freight train due to alleged incompetency of conductor of latter train, judgment for plaintiff in the St. Louis Court of Appeals was *reversed* for erroneous instruction that burden of proof was upon defendant to establish that it used due care in selection of servant. Mere fact of incompetency of servant not sufficient to warrant finding of negligence of master in employing him. Opinion by HOUGH, J. See, also, 4 Mo. App. 565.

In BLESSING *v.* ST. LOUIS, KANSAS CITY & NORTHERN R'y Co., 77 Mo. 410 (April Term, 1883), an action for the death of a locomotive engineer killed in collision, through the negligence of the train dispatcher, where the plain-

tiff failed to show that the train dispatcher and the engineer were not fellow-servants, it was *held* that for this omission the plaintiff was properly non-suited. Judgment of St. Louis Court of Appeals *affirmed*. Opinion by HENRY, J. See, also, 7 Mo. App. 594.

In SMITH *v.* MISSOURI PACIFIC R'y Co., 113 Mo. 70 (October Term, 1892), engineer of mail train killed by running into freight train standing on main track, judgment for plaintiff in the Pettis Circuit Court was *reversed*, it being held that the evidence did not sustain plaintiff's petition. It was averred that the plaintiff's intestate ran the "fast mail train," but there was no evidence to sustain the claim. The evidence showed that he was engineer of second section of a regular passenger train; consequently the allegation as to being entitled to right of way over all trains failed. Allegation that he was required to run through stations at full speed also failed, the defendant showing rules to the contrary. Defendant's demurrer to the evidence should have been sustained. Opinion by GANTT, P. J.

Collision with cars.

In BROWNING *v.* WABASH WESTERN R'y Co., 124 Mo. 55 (In Banc, July, 1894), engineer killed by collision with loose freight cars which escaped from side track, judgment for plaintiff in the Chariton Circuit Court for \$4,000 was *affirmed*.

Collision with animal on track.

In DICKSON *v.* OMAHA & ST. LOUIS R. R. Co., 124 Mo. 140 (April Term, 1894), engineer killed by train colliding with bull on track, causing the engine to be overturned, judgment for plaintiff for \$5,000 in the Daviess Circuit Court was *affirmed*. Opinion by MACFARLANE, J.

Engine overturned — Defective appliance.

In FLYNN *v.* KANSAS CITY, ST. JOSEPH & COUNCIL BLUFFS R. R. Co., 78 Mo. 195 (April Term, 1883), engineer killed by the upsetting of his engine, caused by alleged defective condition of track, engine, and air brakes, judgment for plaintiff in the Buchanan Circuit Court was *reversed* for erroneous instruction on damages, etc. The third section of the Damage Act fixes the measure of damages at "not exceeding \$5,000," and the court charged that if jury found for plaintiff, to assess damages at \$5,000. The law of master and servant was also discussed at length. Opinion by PHILIPS, C.

Derailment of engine — Falling down embankment.

In DEVLIN *v.* WABASH, ST. LOUIS & PACIFIC R'y Co., 87 Mo. 545 (October Term, 1885), engineer in defendant's employ ordered out with another engineer to clear the track of snow, the engines and cars of each forming one train, injured by his engine being thrown off the track and rolling down an embankment, caused by the engine of the other employee, which was the forward part of the train, breaking a rail, judgment for plaintiff in the Ray Circuit Court was *reversed* for error in charging that defendant was bound to keep a safe track, its duty being only to use due care to keep track in good order and condition. Opinion by BLACK, J.

Derailment of engine — Track flooded.

In *McPHERSON v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'y Co.*, 97 Mo. 253 (October Term, 1888), engineer killed in derailment of engine, judgment for plaintiffs (infants suing by next friend for death of their father) in the St. Louis Court of Appeals, was *affirmed*. Opinion by RAY, Ch. J.

See, also, *STOHER v. ST. LOUIS, I. M. & S. R'y Co.*, 105 Mo. 192 (1891), fireman killed in same accident as in the *McPHERSON* case, *supra*.

Struck by hand car.

In *BARRY v. HANNIBAL & ST. JOSEPH R. R. Co.*, 98 Mo. 62 (October Term, 1888), judgment for plaintiff in the Linn Circuit Court was *affirmed*. It appears that plaintiff's intestate, her husband, was an engineer in defendant's employ. He had pulled his freight train of twenty-two cars in at the west switch to clear the main track for a passenger train. He supposed that his train was in on the side track, but his view was obstructed on the north and south sides. While on the ground examining his engine he heard a call from the rear brakeman and in response he directed the fireman to move the train forward. He was standing on the main track looking to the rear of his train, when a hand car with several sectionmen on it came from another direction at a rapid speed and ran on him inflicting fatal injuries. The questions of negligence held proper for the jury to determine. *Held*, also, that the deceased was not guilty of contributory negligence for violating a rule of the company not to permit firemen to operate the engine when the engineer was not upon it, where there was an established usage among the engineers to permit firemen to make short moves when engineers were not on engines, and where such custom was known to and acquiesced in by the superior officers.

5. Firemen injured.*Sleeping on roundhouse track and run over.*

In *PRICE v. HANNIBAL & ST. JOSEPH R. R. Co.*, 77 Mo. 508 (April Term, 1883), fireman having backed engine into stall in roundhouse, laying down between stalls and falling asleep, and while asleep his foot lay on rail of track of stall, and an engine which was being backed ran over his foot inflicting fatal injuries, judgment for plaintiff for \$5,000 in the Jackson Circuit Court was *reversed*, the deceased having knowledge of the danger. It was error to give instructions not warranted by the evidence or contradictory in their nature. Opinion by HENRY, J.

Collision with switch engine.

In *SMITH v. WABASH, ST. LOUIS & PACIFIC R'y Co.*, 92 Mo. 359 (April Term, 1887), fireman killed in collision with switch engine, the negligence alleged being that of the train dispatcher, judgment for plaintiff for \$5,000 in the Livingston Circuit Court was *affirmed*. The train dispatcher was a vice-principal and not a fellow-servant of the fireman and those operating trains, the latter being subject to the former's orders. Opinion by NORTON, Ch. J.

Derailment of engine — Track flooded.

IN *STOHER v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'Y Co.*, 105 Mo. 192 (Division 2, April Term, 1891), fireman killed by derailment of engine, caused by an accumulation of water on the track after a heavy storm, judgment for plaintiff in the St. Louis City Circuit Court was *affirmed*. It was held that the railroad company was required to keep its roadbed in good condition and to provide against storms and floods as could be reasonably anticipated. Where it was shown that on previous occasions water had overflowed the track, the evidence was sufficient to warrant a finding that defendant failed to keep track in good condition. The fact that the engineer and fireman ran their train, after a heavy storm, did not constitute negligence on their part. Opinion by MACFARLANE, J.

There was a former appeal in the *STOHER* case, in which the judgment for plaintiff was *reversed*. See 91 Mo. 511.

See, also, *MCPHERSON v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'Y Co.*, 97 Mo. 253, which affirmed judgment for plaintiff on the same evidence as in the *STOHER* case, *supra*. In the *McPherson* case the injured party was the engineer of the train which was derailed in the *STOHER* case.

Collision with cars.

IN *HENRY v. WABASH WESTERN R'Y Co.*, 109 Mo. 488 (Division 2, October Term, 1891), locomotive fireman injured in collision with a freight car standing on the track, judgment for plaintiff in the St. Louis City Circuit Court was *affirmed*. Opinion by MACFARLANE, J.

IN *RELYEA v. KANSAS CITY, FORT SCOTT & GULF R. R. Co.*, 112 Mo. 86 (October Term, 1892), fireman killed in collision with train, judgment of Jackson Circuit Court sustaining demurrer to plaintiff's evidence, was *affirmed*. The fourth paragraph of the syllabus to the report states the facts as follows: "The evidence showed that at one of the company's stations the conductor of one of its freight trains directed the rear brakeman to set out four front cars on the switch; that the latter before doing so set no brakes on the rear cars as it was his duty to do, so that when the front cars and locomotive were uncoupled the rear cars ran backwards down a long grade, and struck a freight train coming from the opposite direction, killing plaintiff's husband, who was fireman on the latter train. *Held*, that the conductor of the first train was not guilty of negligence in failing to see that the brakes were set on the rear cars." The cause of the accident was negligence of brakeman of forward train in failing to secure the rear cars. The brakeman of one freight train and the fireman of another freight train engaged in same common service on same section of road, held to be fellow-servants.

Parting of engine and tender — Defective appliance.

IN *GARDNER v. ST. LOUIS & SAN FRANCISCO R'Y Co.*, 135 Mo. 90 (April Term, 1896), judgment for defendant in the Lawrence Circuit Court was *affirmed*. The fourth paragraph of the syllabus to the official report states the case as follows: "In an action against a railroad by a locomotive fireman, injured in its service by the separation of the locomotive and tender, the kingbolt which fastened the couplings between them having broken,

and the safety chains having parted, there was no error in refusing to submit to the jury the question of the sufficiency of the safety chains, it appearing that they were not intended to hold the engine and tender together."

6. Section and track hands injured.

Section foreman killed — Collision between hand cars.

In *SHERRIN ET AL. v. ST. JOSEPH & ST. LOUIS R'y Co.*, 103 Mo. 378 (Division 2, October Term, 1890), foreman of sectionmen killed in collision between hand cars, judgment for defendant in the Clinton Circuit Court was *affirmed*. The ruling is stated in the syllabus to the report (opinion by GANTT, J.) as follows: "Two foremen of gangs of sectionmen working independently of each other, but under the same roadmaster of the railroad, are fellow-servants, and where a collision between their hand cars is caused by the negligence of one, and occasions an injury to the other, the company is not liable."

Sectionhand injured by fall of pole.

In *BOHN v. CHICAGO, ROCK ISLAND & PACIFIC R'y Co.*, 106 Mo. 429 (Division 2, October Term, 1891), where plaintiff, one of a gang of men employed by defendant in raising a broken turntable, was injured by a prize-pole breaking and falling upon him, defective appliance being alleged, judgment for plaintiff in the Clinton Circuit Court was *reversed*, the injury being one of the risks of employment. No inference of negligence can be drawn from the fact that the appliance broke, where there was no proof that it had any inherent defects whatever. Where the negligence alleged in the petition was the furnishing to the employee a defective appliance, recovery cannot be had upon the ground of foreman's alleged negligence in directing the work.

Sectionhand struck by hand car.

In *SCHROEDER v. CHICAGO & ALTON R. R. Co.*, 108 Mo. 322 (October Term, 1891), section hand injured by being struck by hand car which was thrown off track by engine of passenger train, judgment for plaintiff for \$4,000 in the Saline Circuit Court was *affirmed*. A section foreman directing work of section gang is not fellow-servant of one of the latter. Opinion by BARCLAY, J.

Sectionhand injured — Hand car thrown from track.

In *RUSS v. WABASH WESTERN R'y Co.*, 112 Mo. 45 (October Term, 1892), sectionhand injured by hand car being thrown from track, judgment for plaintiff in the St. Charles Circuit Court was *reversed* for erroneous admission of certain evidence. Opinion by BLACK, J. Section foreman having power to hire and discharge men under him is vice-principal of company. The sixth paragraph of the syllabus to the report states the case as follows: "Where such section foreman under whom plaintiff was employed directed a water keg to be placed on the front end of a hand car for his seat so that he could look ahead and observe the track, and while the car was in

motion got up and allowed the keg to fall off, thus causing the car to leave the track and injure plaintiff, the injury was occasioned by the negligence of the foreman in the line of his duty, and the company is responsible therefor."

Employee thrown from hand car — Defective handle.

In *SIELA v. HANNIBAL & ST. JOSEPH R. R. Co.*, 82 Mo. 430 (October Term, 1884), railroad employee thrown from hand car and run over by reason of breaking of handle of car, judgment for plaintiff for \$1,500 in the Buchanan Circuit Court was *affirmed*. Opinion by NORTON, J.

Sectionhand killed by train in switch yard.

In *LORING v. KANSAS CITY, FORT SCOTT & MEMPHIS R. R. Co.*, 128 Mo. 349 (April Term, 1895), section hand killed by train in defendant's switch yards, judgment for plaintiff in the Texas Circuit Court was *reversed*, on the ground of contributory negligence, the deceased having stepped on the track in front of a moving engine without looking for same before crossing.

Sectionhand jumping from push car to avoid collision.

In *YORK v. KANSAS CITY, CLINTON & SPRINGFIELD R. R. Co.*, 117 Mo. 405 (Division I, July, 1893), sectionhand directed by foreman to assist others in taking a "push car" down a siding, riding on the car, fatally injured by jumping from car to avoid injury from collision with some freight cars, the "push car" having ran onto a switch which was open on the wrong track, judgment for defendant in the Henry Circuit Court was *affirmed*, on the ground of contributory negligence in riding on the car, the men not being directed to ride nor did their duties require them to ride on the "push car."

Track repairer injured — Train striking hand car.

In *McDERMOTT v. HANNIBAL & ST. JOSEPH R. R. Co.*, 73 Mo. 516 (April Term, 1881), track repairer trying to remove hand car from track, by direction of foreman, injured by train striking hand car, judgment for plaintiff in the Clay Circuit Court was *reversed*, for erroneous admission of certain evidence as to incompetency of foreman. The question of admission in evidence of declarations of agents as part of the *res gestæ* fully discussed in the opinion by HENRY, J.

See, also, *McDERMOTT v. HANNIBAL & ST. JOSEPH R. R. Co.*, 87 Mo. 286 (October Term, 1885), an appeal from verdict and judgment for plaintiff on a second trial of the *McDERMOTT* case, where judgment was *reversed* for errors in admission of evidence and failure to give instructions on the fellow-servant rule. The case was tried on the theory that plaintiff and the foreman were fellow-servants. HENRY, Ch. J., reviewed the case at length, citing many authorities on the fellow-servant and vice-principal rules. *Moore v. Wabash, St. L. & P. R'y Co.*, 85 Mo. 588, 16 Am. Neg. Cas. 496, *ante*, was followed on the fellow-servant rule, it being held that a section foreman having control of workmen is not a fellow-servant of such workmen.

Track repairer injured — Train striking appliance in hand of employee.

In *STEPHENS v. HANNIBAL & ST. JOSEPH R. R. Co.*, 86 Mo. 221 (April Term, 1885), track repairer injured by passenger train rounding a curve striking the tamping bar in the plaintiff's hand, crushing his arm and throwing him against the engine, judgment for plaintiff in the Clay Circuit Court was *reversed* for erroneous instructions on issues not in pleading. Opinion by BLACK, J.

Another trial of the *STEPHENS* case resulted in verdict for plaintiff for \$8,000, but on appeal to the Supreme Court the judgment was *reversed* for erroneous admission of evidence as to number of children plaintiff had. See 96 Mo. 207 (October Term, 1888).

Track layer injured — Collapse of bridge.

In *BOWEN v. CHICAGO, BURLINGTON & KANSAS CITY R'y Co.*, 95 Mo. 268 (April Term, 1888), track layer injured by collapse of bridge, judgment for plaintiff in the Carroll Circuit Court was *affirmed*. BLACK, J., stated the facts as follows: "In the course of the construction of its road, the defendant built a temporary bridge, or false work, over Grand river, in Chariton county. This bridge was used for the erection of the permanent structure therefrom, and for the passage of construction trains. It had been so used for eleven days before the accident in question. Plaintiff and others, a gang of track layers, took the evening construction train for their lodging place on the east side of the river, and as the train was passing over the bridge, about a hundred feet of it gave way, the engine and several cars went down, and the plaintiff to save his life jumped from the car, landed in the river, and received the injuries of which he complains. It is not claimed that he was guilty of negligence. The charge of negligence against defendant is, that the bridge was not of sufficient strength to allow the train to pass over it in safety, and that it was insecure and in an unsafe condition at the time it gave way." * * *

Track repairer struck by train.

In *SULLIVAN v. MISSOURI PACIFIC R'y Co.*, 97 Mo. 113 (October Term, 1888), track walker struck and killed by passenger train, judgment for plaintiff for \$5,000 in the Jackson Circuit Court was *affirmed*. Track walker is not fellow-servant with engineer or fireman of passenger train. Opinion by BLACK, J.

Trackhand shoveling gravel from car thrown from car.

In *MILLER v. MISSOURI PACIFIC R'y Co.*, 109 Mo. 350 (Division I, October Term, 1891), trackhand engaged in shoveling gravel from cars, thrown down and run over and fatally injured while in the act of jumping or stepping from one car to another as the conductor gave the signal to engineer to move forward, but without warning to the deceased, judgment for plaintiff in the Johnson Circuit Court was *reversed* for erroneous instruction. Opinion by BLACK, J.

In the *MILLER* case, *supra*, it was held that "a conductor of a material train, having control of it and its movements, and the foreman over a crew of men engaged in repairing a railroad track, having power to direct them,

are vice-principals, and the railroad company is liable for the death of a member of the crew occasioned by their negligence."

Track repairer struck by train.

In *RING v. MISSOURI PACIFIC R'Y Co.*, 112 Mo. 220 (Division 2, November, 1892), track repairer struck by train, judgment for defendant in the Johnson Circuit Court was *affirmed*. Engineer not negligent in not stopping train where trackhand was standing away from track and out of danger from approaching trains.

Track repairer struck by engine.

In *SCHLERETH v. MISSOURI PACIFIC R'Y Co.*, 115 Mo. 87 (October Term, 1892), track repairer killed by engine, judgment for plaintiff for \$5,000 was *affirmed*. The syllabus to the official report states the case as follows:

"1. A railroad locomotive engineer and a track repairer in the service of the same company are not fellow-servants within the rule exempting masters from liability for injuries received through the negligence of a fellow-servant.

"2. The deceased, a track repairer in the company's service, while walking along its track to work, was killed by a locomotive going in the same direction. The track was level and the view unobstructed. The engine and tender had followed deceased a few moments after he started and had only gone about thirteen hundred feet when the accident occurred. *Held*, that while the deceased may have been guilty of contributory negligence in walking upon the track and in not seeing the engine, yet the case was properly submitted to the jury on the issue whether the engineer used proper care to see the danger in which deceased had placed himself and to avoid injuring him.

"3. Where the widow of deceased sues in such case to recover on account of his death, evidence of the number of her children and of the condition of her health is not error.

"4. The deceased and the engineer not being fellow-servants, the damages are the fixed statutory penalty of \$5,000 prescribed by Revised Statutes, 1879, § 2121." * * *

See, also, former appeal in the *SCHLERETH* case, reported in 96 Mo. 509 (October Term, 1888), where judgment for plaintiff was reversed for erroneous instructions as to measure of damages, etc.

Track repairer struck by car which jumped track.

In *SWADLEY v. MISSOURI PACIFIC R'Y Co.*, 118 Mo. 268 (October Term, 1893), track repairer walking on track with his foreman and other workmen after work hours to take a train for next working place, struck by car jumping from track which was defective, judgment for plaintiff in the Moniteau Circuit Court was *affirmed*.

7. Switchmen injured.

Switchman caught by loose rail on track.

In *HALL v. MISSOURI PACIFIC R'Y Co.*, 74 Mo. 298 (October Term, 1881), switchman stepping from caboose to adjust switch to signal engineer, injured

by foot being caught under loose iron rail lying in path near track and being thrown down embankment, judgment for plaintiff in the Osage Circuit Court was *affirmed*. A section foreman whose duty is to keep track in repair held not to be fellow-servant of switchman injured by defective track. Opinion by HENRY, J.

Switchman injured in collision.

In GRUBE *v.* MISSOURI PACIFIC R'Y Co., 98 Mo. 330 (April Term, 1889), employee, member of a switching crew, while sitting on pilot beam of engine in defendant's switching yards, fatally injured in collision with a train of cars which were being backed, the same being caused by alleged negligence of foreman of another switching crew, judgment in the Cass Circuit Court for plaintiff, widow of deceased, was *affirmed*.

Switchman coupling cars — Backing engine — Signal.

In THORPE *v.* MISSOURI PACIFIC R'Y Co., 89 Mo. 650 (October Term, 1886), switchman injured, judgment for plaintiff for \$2,500 in the Jackson Circuit Court was *affirmed*. Opinion by RAY, J. "In his amended petition plaintiff charges a failure of duty on the part of defendant to furnish a sufficient number of hands in conjunction with plaintiff to carry on the business of making up trains in defendant's yards, and in conveying signals with proper dispatch and safety; that defendant was duly notified of this; that about the time of the injury plaintiff had gone between two of the cars, and had attempted to couple them; that failing to do so he stepped out and gave a stop signal, and then went again between the cars to effect the coupling, but that owing to the insufficiency of help employed to assist him, said stop signal failed to reach the foreman of the work, or the engineer, in consequence of which the foreman gave the signal to the engineer to back the cars, which the engineer did, and that plaintiff's hand was caught between two of said cars, and thereby injured, and that the same was caused without any negligence on his part." * * *

Switchman uncoupling cars — Foot caught between rails.

In ALCORN *v.* CHICAGO & ALTON R. R. Co., 108 Mo. 81, 18 S. W. 188 (October Term, 1891), switchman while uncoupling cars injured by his foot being caught between switch rails at a point where the block between them was worn away by use, and being knocked down by train, judgment for plaintiff in the Jackson Circuit Court was *reversed* for contributory negligence in violating rules as to jumping on and off cars in motion to uncouple cars, etc. The case is very fully stated by SHERWOOD, Ch. J., in rendering the majority opinion; also by BARCLAY, J., in the dissenting opinion.

The ALCORN case was also argued in previous appeals. See 14 S. W. 943, and 16 S. W. 229 (1891).

Switchman struck by train.

In BLUEDORN *v.* MISSOURI PACIFIC R'Y Co., 108 Mo. 439 (October Term, 1891), night switchman while engaged in moving a train of cars from certain yards struck by passenger train running at prohibitive speed, run over and leg injured, judgment for plaintiff in the St. Louis City Circuit Court was

reversed for error in giving conflicting instructions. Servant may recover for injury caused by joint negligence of master and fellow-servant. Opinion by BLACK, J.

Another trial of the BLUEDORN case resulted in verdict and judgment for plaintiff, which, however, was *reversed* by the Supreme Court for erroneous instruction that unlawful speed of train raised a presumption of law that such speed caused the injury. See 121 Mo. 258 (1894).

Switchman coupling foreign cars.

In THOMAS v. MISSOURI PACIFIC R'y Co., 109 Mo. 187 (October Term, 1891), switchman fatally injured while coupling foreign cars, judgment for plaintiff for \$3,000 in the Vernon Circuit Court was *reversed*, on the ground of assumption of risk. The opinion was rendered by SHERWOOD, Ch. J., in which the court concurred, with the exception of BARCLAY, J., who dissented. The case was reargued before the entire bench *in banc*, all concurring with the original opinion, except BARCLAY, J.

Switchman coupling cars slipping on concealed object.

In WILLIAMS v. ST. LOUIS & SAN FRANCISCO R'y Co., 119 Mo. 316 (Division 1, December, 1893), switchman injured while coupling cars in defendant's yard, caused by slipping on concealed object whereby his right hand was crushed between moving cars, judgment of nonsuit was *affirmed*, as plaintiff having knowledge of the defect assumed the risk.

Switchman stepping on door left on inclined track.

In BURNES v. KANSAS CITY, FORT SCOTT & MEMPHIS R. R. Co., 129 Mo. 41 (Division 2, June, 1895), foreman of switching crew in defendant's yard injured by obstruction on track, he having stepped on a grain door which was left on an elevated incline whereby he was thrown to the ground and his leg broken, judgment for plaintiff in the Jackson Circuit Court was *reversed*. Railway company not liable in absence of proof of knowledge of obstruction, or that the door was placed there by some one for whose acts it would be liable.

8. Yardmen injured.

Yardman injured uncoupling cars — Foot caught in frog.

In STODDARD v. ST. LOUIS, KANSAS CITY & NORTHERN R. R. Co., 65 Mo. 514 (October Term, 1877), yardman while uncoupling cars at switching place, injured by foot catching in defective frog, and being struck by train which was negligently backed by engineer without signal, judgment for plaintiff in the Jackson Circuit Court was *affirmed*. Opinion by MORTON, J.

Yardman injured coupling Baldwin car — Extra-hazards.

In CRANE v. MISSOURI PACIFIC R'y Co., 87 Mo. 588 (October Term, 1885), railroad employee in defendant's yard engaged in making up a freight train injured while attempting to couple a Baldwin locomotive car to one of defendant's cars, his arm being caught owing to the dangerous character of the blocks attached to the drawhead of the Baldwin car, the work being done

in the night-time and the employee not being warned of the extra-hazards attending the coupling of such cars, judgment for plaintiff in the Pettis Circuit Court was *affirmed*. Opinion by NORTON, J.

Yardman coupling cars caught between engine and car.

In O'HARE *v.* CHICAGO & ALTON R. R. Co., 95 Mo. 662 (April Term, 1888), yardman injured while moving trains in yard, a train being backed suddenly while attempting to couple engine to car and plaintiff's arm being caught between bumpers and engine, judgment for plaintiff in the Jackson Circuit Court was *affirmed*. Opinion by NORTON, Ch. J., affirming judgment concurred in by BLACK and BRACE, JJ.; SHERWOOD, J., rendered a dissenting opinion.

9. Railroad employees injured — Miscellaneous.

Machinist injured by machinery.

In CAGNEY *v.* HANNIBAL & ST. JOSEPH R. R. Co., 69 Mo. 416 (April Term, 1879), machinist in railway car shops injured by shaping machine upon which he was working, judgment for plaintiff was *reversed*. Opinion by NORTON, J. Master not liable, notwithstanding failure to provide against danger from machinery by use of known appliances, where machinery is of kind in general use, and danger is obvious to the servant.

Carpenter injured falling from scaffold.

In COVEY *v.* HANNIBAL & ST. JOSEPH R. R. Co., 86 Mo. 635 (October Term, 1885), carpenter in defendant's employ engaged in repairing bridges injured while riding on hand car, the handle of which broke, judgment for plaintiff in the Macon Circuit Court was *reversed* for erroneous instructions as to knowledge of defect by defendant's superintendent of machine shops, where plaintiff was acting under direction of a foreman. See, also, 27 Mo. App. 170.

Carpenter injured by falling from scaffold.

In SULLIVAN *v.* HANNIBAL & ST. JOSEPH R. R. Co., 88 Mo. 169 (October Term, 1885), carpenter in defendant's employ, engaged with other carpenters under a foreman in taking down an ice house for defendant, injured by falling to the ground owing to the giving way of the scaffolding furnished by defendant, judgment for plaintiff for \$7,000 in the Jackson Special Law and Equity Court was *reversed* for erroneous charge hypothecating facts as to defendant's negligence and authorizing verdict for plaintiff without submitting the issue of contributory negligence made by the pleadings. Opinion by RAY, J. On rehearing the court affirmed its previous ruling of reversal of judgment.

On a new trial of the SULLIVAN case in the Jackson Circuit Court, plaintiff recovered judgment, which, on appeal by defendant, was *affirmed* by the Supreme Court. The foreman was held to be a vice-principal of defendant company, and not a fellow-servant of plaintiff and the laborers working under his direction, and the company is liable for the foreman's directions to the plaintiff to use the defective staging. Opinion by SHERWOOD, J. See 107 Mo. 66 (Division I, October Term, 1891).

Laborer on construction train killed — Defective appliance on car.

In *HOLMES v. HANNIBAL & ST. JOSEPH R. R. Co.*, 69 Mo. 536 (April Term, 1879), laborer on construction train killed by reason of a defective and broken hinge fastening a dump box to the framework of a car, judgment for plaintiff was *reversed* for erroneous instruction on damages, etc. NORTON, J., said: "It is insisted (by defendant) that § 3, and not § 2, of the Damage Act governs as to the measure of recovery, and that the jury should have been directed that if they found for plaintiff they should assess the damages at a sum not exceeding \$5,000. This precise question was presented to this court in the case of *ELLIOTT v. ST. LOUIS & IRON MOUNTAIN R. R. Co.*, 67 Mo. 272 (16 Am. Neg. Cas. 493, *ante*), and it was there held that the 'plaintiff's right to sue was derived from § 3 of the Damage Act, and in an action by one authorized to sue by that section, the jury may allow less than \$5,000.' That case is decisive of this, and necessarily leads to a reversal of the judgment."

Laborer injured loading cars — Defective appliance.

In *McGOWAN v. ST. LOUIS & IRON MOUNTAIN R. R. Co.*, 61 Mo. 528 (January Term, 1876), laborer injured while loading cars, judgment for defendant was *affirmed*. The syllabus to the report states the case (opinion by HOUGH, J.) as follows: "In action for damages against a railroad corporation by one injured by the giving way of a hoisting apparatus, used in connection with a train of the company, it appeared that plaintiff had reason to believe at the time that the apparatus was unsafe, but relied on the assurance of the conductor that it was 'all right,' and so was injured. But there was no proof that the conductor had the superintendence or control over the men or the work, or power to provide or replace machinery. *Held*, that the conductor was, *quoad* the casualty, a fellow-servant merely, and not a vice-principal, and his reassurance to plaintiff, and representation that there was no danger, would not bind the company and render it responsible. But, contrawise, when the facts showed that he represented the company in the premises, such assurance would amount to a guaranty on its part, and would bind it for any resulting damage. And so notice to him of danger would affect the corporation if he acted in that capacity, and not otherwise."

Laborer jumping from car to avoid collision.

In *DeBOLT v. KANSAS CITY, FORT SCOTT & MEMPHIS R'y Co.*, 123 Mo. 496 (In Banc, April Term, 1894), judgment of nonsuit was *affirmed* (BARCLAY, J., *dissenting*). The majority opinion was rendered by GANTT, J., who discussed the case at length, as did also BARCLAY, J., in Division 1. The facts are stated in the syllabus to the report as follows: "Plaintiff's husband, sent by his employers to superintend the unloading of stone from a flat car, climbed on the car to speak to the men engaged in the work. While they were talking, a switch engine took the stone car and four cars behind it out on the main track, there dropped a car, and shunted or 'kicked' the others back on the side track. The men on the stone car remained on it while it was moving, except deceased, and another who sat on the end board of a coal car next to the stone car and facing the latter. The 'kick' was somewhat more violent than usual and the brake on one of the cars 'kicked' would not work. As they were about to collide with some cars standing on the side

track one of the men on the stone car called to the rest to look out. The companion of deceased threw himself back on the coal car and was not hurt. Deceased, just as the collision occurred, jumped from the coal car to the stone car and, losing his balance by reason of the shock, fell back between the two cars and was injured and killed. Those on the stone car were not injured. *Held*, that the death resulted from the negligence of deceased in jumping from the coal car to the stone car at the moment of the collision, with full knowledge of all his surroundings, and that the company was not liable therefor."

Laborer struck by train.

In *CHURCH v. CHICAGO & ALTON R. R. Co.*, 119 Mo. 203 (Division 1, December, 1893), employee assisting in the operation of a rock crusher used in connection with defendant's rock quarry, being on the track for such purpose, struck and killed by a train which approached from behind him without giving signal, judgment for plaintiff in the Lafayette Circuit Court was *affirmed*. The deceased employee was not a fellow-servant with those running and operating the train.

Laborer struck by iron wedge — Incompetent employee.

In *MAXWELL v. HANNIBAL & ST. JOSEPH R. R. Co.*, 85 Mo. 95 (October Term, 1884), laborer in defendant's quarry injured by act of incompetent employee in striking a wedge with a sledge hammer, judgment for plaintiff for \$3,000 in the Livingston Circuit Court was *affirmed*. The facts were stated by HENRY, Ch. J., as follows: "The petition alleges that plaintiff was in the employ of defendant, working in a stone quarry, and that one Walker, who was defendant's foreman, directed him to hold an iron wedge which was to be driven into a rock, and, while plaintiff was so holding the wedge, Walker ordered the person driving the wedge to strike it, in an improper, negligent and unskilful manner, with a violent and heavy blow, and that said driver struck it a heavy, violent and unusual blow, which caused the wedge to rebound, striking plaintiff in the face, breaking his nose and putting out his left eye. It further alleged that Walker was incompetent, unskilful and unfit to perform the duties of foreman; that he was in the habit of becoming intoxicated, which was known to defendant long before the injuries herein complained of, or might have been known, etc., and that plaintiff did not know of his incompetency, or dissipated habits."

Laborer struck by engine.

In *DIXON v. CHICAGO & ALTON R. R. Co.*, 109 Mo. 413 (October Term, 1891), statutory action for negligent killing of plaintiff's husband, an employee of defendant, judgment for defendant in the Lafayette Circuit Court was *reversed* for erroneous rulings on the question of fellow-servants, etc. The opinion was rendered by BARCLAY, J., who cited numerous cases on the fellow-servant rule. All concurred except SHERWOOD, J., who dissented. On rehearing *in banc* the opinion was approved, SHERWOOD and GANTT, JJ., dissenting. The facts are set out in the syllabus to the official report as follows: "A quarryhand was working about a railroad track, near a curve at which locomotives were required, by defendant's rules, to whistle. His duties com-

pelled him to frequently stand on the track with his back towards the curve, and to attend to the movement of small cars carrying rock across the main track to an inclined plane leading to a rock crusher. He was hit and killed by an engine coming rapidly around the curve without the required signal. *Held*, in the circumstances stated in the opinion, that the question whether he used ordinary care to avoid danger was one of fact for the jury." "The omission of the warning signal was evidence of negligence in running the train." "A laborer working in defendant's quarry, under direction of a foreman having no connection with the train service, is not a fellow-servant of employees operating a passenger train on defendant's line."

Laborer thrown from construction train.

In *HIGGINS v. MISSOURI PACIFIC R'Y Co.*, 104 Mo. 413 (Division 2, April Term, 1891), laborer on construction train thrown from car by sudden start of train and killed, negligence of engineer being alleged, judgment in the St. Louis Circuit Court sustaining demurrer to plaintiff's petition was *affirmed*, the fellow-servant rule being applied.

Roustabout thrown from pilot of engine — Defective track.

In *MAHANEY v. ST. LOUIS & HANNIBAL R. R. Co.*, 108 Mo. 191 (October Term, 1891), laborer, a roustabout in defendant's employ, while riding on pilot of engine that was placing some cars on a fuel track, injured by being thrown from pilot and leg crushed by the engine, defective track being alleged, judgment for plaintiff for \$5,000 in the Hannibal Court of Common Pleas was *reversed* for erroneous admission of evidence as to number and ages of plaintiff's children, etc. Following the settled rule in Missouri in *Stephens v. R. R. Co.*, 96 Mo. 207; *Dayharsh v. R. R. Co.*, 103 Mo. 570. There was also error in admission of evidence as to subsequent repairs of track. *Hipsley v. R. R. Co.*, 88 Mo. 348; *Brennan v. St. Louis*, 92 Mo. 482; *Alcorn v. R. R. Co.*, 108 Mo. 81.

Hostler struck by backing engine in roundhouse.

In *DAYHARSH v. HANNIBAL & ST. JOSEPH R. R. Co.*, 103 Mo. 570 (Division 1, October Term, 1890), laborer working under direction of night hostler in defendant's roundhouse struck by backing engine as he was trying to get out of its way, and ankle injured, judgment for plaintiff for \$5,008.33 in the Linn Circuit Court, was *reversed* for erroneous admission of evidence of number and ages of plaintiff's children. Following *Stephens v. R. R. Co.*, 96 Mo. 207. The court, per *BARCLAY, J.*, on this point said: "Whatever remarks are found in other cases to the contrary (for example, in *Winters v. Hann. & St. J. R. R. Co.*, 39 Mo. 468, 9 Am. Neg. Cas. 536*n*, and *Conroy v. Vulcan Iron Works*, 75 Mo. 652, 16 Am. Neg. Cas. 377, *ante*), cannot longer be regarded as authoritative." The night hostler and the plaintiff held not to be fellow-servants.

Laborer walking through tunnel struck by train.

In *LOEFFLER v. MISSOURI PACIFIC R'Y Co.*, 96 Mo. 267 (October Term, 1888), railroad laborer while walking through tunnel on way to work struck by the baggage car of a train which was passing through the tunnel, judg-

ment for plaintiff for \$4,000 in the St. Louis County Circuit Court was *reversed* on the ground of contributory negligence, it appearing that plaintiff had no right to be in the tunnel at the time of the accident.

Pullman porter injured in collision — Not fellow-servant of railroad employees — Passenger.

In *JONES v. ST. LOUIS SOUTHWESTERN R'Y Co.*, 125 Mo. 666 (Division 1, December, 1894), Pullman porter injured in collision, judgment for plaintiff for \$3,000 in the St. Louis City Circuit Court was *affirmed*, the damages being for loss of one eye and impairment of the other. It was held that while the contract between plaintiff and his company and the contract between the palace car company and the defendant placed the plaintiff within the rules and regulations of the railroad company, he was not a fellow-servant of the engineer and conductor of the train of which the palace car was a part, but occupied the position of a passenger. The defendant, as a carrier of passengers, could not contract against its own negligence.

Employee of another struck by cars — Defective track.

In *RODDY v. MISSOURI PACIFIC R'Y Co.*, 104 Mo. 234 (Division 2, April Term, 1891), laborer in employ of another, owner of a quarry track on which defendant operated cars, injured while loading cars, being struck by a car, caused by defective brake, judgment for plaintiff for \$6,000 in the Johnson Circuit Court was *reversed*, on the ground of contributory negligence, plaintiff having knowledge of the defect. "An employer of a contractor is not responsible for the negligence of the contractor, or his servants, in case the contractor is given entire freedom in the use of means to accomplish the result. Where the employer, however, reserves the right to direct the manner of the performance in any particular, or where he undertakes to provide any of the instrumentalities, he owes to the contractor and his employees the duty of care in respect to such matters, over which he retains control, or undertakes to perform." Opinion by MACFARLANE, J.

Action by sub-contractor for loss of team — Cave-in — Superintendent — Fellow-servant — Damages — Railroad company liable.

In *COOK v. HANNIBAL & ST. JOSEPH R. R. Co.*, 63 Mo. 398 (October Term, 1876), loss of team of mules caused by cave-in of bank of earth, judgment for plaintiff for \$542.33 in the Jackson Circuit Court was *reversed*, the verdict being in excess of amount claimed in the petition (which was \$500). Cause remanded to Circuit Court with directions to enter judgment for sum claimed in petition, and costs, upon a remittitur being entered for the excess in the verdict. Opinion by NAPTON, J. The facts are stated in the syllabus to the report as follows: "It appeared that a railroad company was engaged in 'rip-rapping' the Missouri river at a point on its line; that some ten feet from the bank there was a crack or fissure in the earth, which had been filled up by dirt and sand; that teamsters hauling rock for the rip-raps were ordered, by the company's superintendent, to drive out between the fissure and the bank; that a teamster employed by a sub-contractor to haul rock, having expressed some apprehension, was assured by the superintendent that there was no danger — that the company was responsible, and while the

order was being obeyed, the earth caved in, and the team was precipitated into the river. In an action by the sub-contractor against the railroad for damages, it was held: 1, that as to the place where the rock was to be delivered, the teamster, although hired by plaintiff, was subject to the control of the superintendent; 2, that as to whether the earth which caved in was apparently dangerous, and known to be so by the superintendent, or was equally open to the observation of the teamster and the superintendent, there being evidence tending to show these facts, these questions were for the jury; 3, that the superintendent represented the company, and that the driver was not his fellow-servant." The rule in *Whalen v. Centennary Church*, 62 Mo. 326, 16 Am. Neg. Cas. 424, *ante*, followed.

FRIEL v. THE CITIZENS' RAILWAY.

Supreme Court, Missouri, Division 1, May, 1893.

[Reported in 115 Mo. 503.]

GRIPMAN INJURED — STRUCK BY GRIP CAR — DEFECTIVE APPLIANCE — STREET-RAILWAY COMPANY NOT LIABLE. — It is not the duty of the master to furnish the very best appliances that can be obtained, but only to use all reasonable care to see that appliances are reasonably safe and fit for their purpose. What is reasonable care in this respect depends much upon the danger to be apprehended from the use of appliances in the performance of their particular work. So held, in action for damages for injuries sustained by a gripman of a cable car belonging to defendant street-railway company who, while attending to the cable which had dropped from his grip, was knocked down by the grip car, which jumped forward on the grip catching the cable, a defective hook being the alleged cause of the accident. Defendant was held not liable.

APPEAL from St. Louis Circuit Court. The case is stated in the opinion. *Judgment affirmed.*

H. D. LAUGHLIN and GIBSON, BOND & GIBSON, for appellant.

SMITH P. GALT, for respondent.

Black, P. J. — The defendant is a corporation operating a street cable railroad in the city of St. Louis. While the plaintiff was in the employ of defendant and in the discharge of his duties as gripman, a car ran over his legs, injuring them so that it became necessary to amputate one, and the other was seriously injured; and this is a suit to recover damages for such injuries. The Circuit Court sustained a demurrer to the plaintiff's evidence, and the case is here to review that ruling.

The substance of the petition is that defendant furnished an improper grip appliance, because of which the train started with a jerk and at full speed; and that a hook provided for the purpose of raising the cable was too short.

The evidence of the plaintiff shows that he had been in the employ of the defendant in the capacity of gripman for about one year. At the time of the accident he had charge of a grip car. The cable dropped from his grip, and he signaled the conductor to come to his assistance. He then got down in front of the car with a hook in his hand provided for his use. He says he got down to raise the cable; that when he raised it the conductor clasped it with the grip; and that the grip car jumped forward and knocked him down. As to the hook, his evidence is to the effect that with a longer one the person using it could stand on the grip car and in that way raise the cable without getting in front of the car; that longer hooks were used on one or two cars; that the one he used was the same in length as those he had used for a year, and the same as used on the other cars, with one or two exceptions. His cross-examination shows that longer hooks had not been used on the cars at the time of the accident; that he had only seen them at the power-house. Indeed, it does not appear that long hooks were used on more than two cars after the accident. It seems the defendant had formerly used what are called compound dies, that is to say, dies made of a compound of metals, the dies being placed in the jaws of the grip appliance to catch the cable. At the time of the accident the company was using tempered steel dies, which were harder than the others.

The evidence of the plaintiff and that of the witness Tobin is to the effect that steel dies caught the cable quicker than the other kind, and sometimes started the car with a jerk. The witness Tobin, a policeman at the time of the trial, testified that he had been in the employ of the defendant; that before that he had had six years' experience on Kansas City cable roads; that before this accident he had a conversation with Mr. Brooks, the defendant's assistant superintendent, which conversation he relates as follows: "Brooks said the other dies were too slow, that they were going to get tempered steel dies for a trial. He asked me if I knew anything about them. He asked me if I used them on Ninth street, and I told him I had. He

asked me if I thought they were desirable or dangerous on the road. I told him I thought they were the best thing for the company in one way, and in another way they were dangerous. I thought they were more dangerous than a bottom-jaw grip, because they were liable to catch at any time."

There is other evidence to the effect that the defendant and the Kansas City roads had abandoned the use of steel dies.

As between master and servant, it is not the duty of the master to furnish the very best appliances that can be obtained. The duty of the master is to use all reasonable care and caution in seeing that the appliances are reasonably safe and fit for the designed use, and what is reasonable care in this respect must, of course, depend much upon the danger to be apprehended from the use of the appliance in the performance of the particular work. The question here is whether there is any evidence fairly tending to show a breach of this duty on the part of the defendant, and we think there is not.

As to the grip, there is certainly no evidence whatever tending to show that it was out of repair. The most that can be said of it is that for some purposes the steel dies, in use at the time of the accident, were in some respects better than the compound dies and not so good in other respects; that upon the whole the compound dies were the best, because the safest. It does not appear, nor is there any evidence tending to show, that the steel dies were unfit for use. The defendant was endeavoring to adopt the best grip appliance it could obtain, and the fact that these steel dies were subsequently discarded has nothing to do with this case. The question of negligence must be determined by the facts as they existed at the time of the accident. When this is done, we cannot see that there is any evidence of negligence on the part of the defendant in using the steel dies.

There is certainly no evidence of negligence in furnishing the hook used by the plaintiff. It was just such a hook as he and the other gripmen had used for a year or more, and that, too, without any complaint, so far as this record shows. It does not make out a case to show that a longer hook would have been better or safer.

This is one of those unfortunate accidents which often occur without culpable negligence on the part of the master and for which he is not liable.

There is much ground for the conclusion that the conductor

did not properly manipulate the grip in this, that he grasped the cable so tight that it could not slip through the grip, but this suit is not founded on his negligence.

Judgment affirmed. BARCLAY, J., absent. The other judges concur.

CARPENTER WORKING IN ELEVATOR SHAFT STRUCK BY ELEVATOR — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY — FELLOW-SERVANT — INCOMPETENCY OF FELLOW-SERVANT — ASSUMPTION OF RISK. — In **HUGHES v. FAGIN**, 46 Mo. App. 37 (*March Term, 1891*), judgment of nonsuit rendered in the St. Louis City Court was *reversed* and *remanded* (1), the syllabus to the official report (opinion by THOMPSON, J.), stating the case as follows:

“ 1. A carpenter while at work on an elevator shaft, and while the elevator was in use and above him, leaned a portion of his body

1. Among the numerous MASTER and SERVANT cases passed upon by the *Missouri Court of Appeals*, not reported or noted in this volume of AM. NEG. CAS., are the following (the space devoted to *Supreme Court* cases in this volume not permitting more than a mere reference to the *Appellate Court* cases):

Nolan v. Shickle, 3 Mo. App. 300 (affirmed, 69 Mo. 336); Lyon v. Manion, 3 Mo. App. 602; Devany v. Vulcan Iron Works, 4 Mo. App. 236; Wetjen v. Southern White Lead Co., 5 Mo. App. 598; McMillan v. U. P. B. Works, 6 Mo. App. 434; McDonald v. Crystal Plate-Glass Co., 9 Mo. App. 577; Fink v. Missouri Furnace Co., 10 Mo. App. 61 (reversed, 82 Mo. 276); Reber v. Tower, 11 Mo. App. 199; Daester v. Mechanics' Planing Mill Co., 11 Mo. App. 593; Devanney v. Peper, 12 Mo. App. 588; Bromley v. Smith, Beggs & Rankin Machine Co., 12 Mo. App. 594; Lynds v. Clark, 14 Mo. App. 74; Pettingrew v. St. Louis Ore & Steel Co., 14 Mo. App. 441; Wolter v. Harrison Wire Co., 14 Mo. App. 502; Dutzi v. Geisel, 23 Mo. App. 676; James v. Muehleback, 34 Mo. App. 572; O'Donnell v. Baum,

38 Mo. App. 245; Cox v. Syenite Granite Co., 39 Mo. App. 424; Flynn v. Union Bridge Co., 42 Mo. App. 529; Jones v. St. Louis, Naples & Peoria Packet Co., 43 Mo. App. 398; Wills v. Cape Girardeau S. W. R. Co., 44 Mo. App. 51; Smillie v. St. Bernard Dollar Store, 47 Mo. App. 402; Hall v. St. Joseph Water Co., 48 Mo. App. 356; Bartley v. Trorlicht, 49 Mo. App. 214; Breen v. St. Louis Cooperage Co., 50 Mo. App. 202; Reisert v. Williams, 51 Mo. App. 13; Reichla v. Grunsfelder, 52 Mo. App. 43; Watson v. Kansas & Texas Coal Co., 52 Mo. App. 366; Moore v. St. Louis Wire Mill Co., 55 Mo. App. 491; Sheehan v. Prosser, 55 Mo. App. 569; Berning v. Medart, 56 Mo. App. 443; Monohan v. Kansas City, C. & C. Co., 58 Mo. App. 68; Quigley v. Bambrick, 58 Mo. App. 192; Musick v. Dodd Packing Co., 58 Mo. App. 322; Krampe v. St. Louis Brewing Ass'n, 59 Mo. App. 277; Brown v. Hershey Land & Lumber Co., 65 Mo. App. 162; Benham v. Taylor, 66 Mo. App. 308; Meyer v. Gundlach-Nelson M'f'g Co., 67 Mo. App. 195; Ryan v. O'Brien Boiler Works, 68 Mo. App. 148.

inside of the shaft. The boy in charge of the elevator, though knowing that persons were at work in the shaft, lowered the elevator at full speed without giving the warning which he had been accustomed to give, and the carpenter, being absorbed in his work and in a poor position for observation, was struck by the elevator unawares and injured. *Held* (ROMBAUER, P. J., *not concurring*), that it was a question of fact for the jury, whether or not the carpenter was guilty of contributory negligence.

“2. At the time of such injury the building in which it occurred was in process of erection, and the carpenter was engaged at work in the course of its construction. The elevator was used at the time for the purpose of raising and lowering the workmen and their materials, and also persons desirous of inspecting rooms in the building. *Held*, that the carpenter and the elevator boy were fellow-servants in the same general employment.

“3. *Held* (ROMBAUER, P. J., *dissenting*), that where a servant continues in the service with knowledge of the incompetency of a fellow-servant without complaint, it is ordinarily a question for the jury whether he is to be deemed to have accepted the risk of injury through such incompetency; though, where the danger is so glaring that it is rash and foolhardy for him to continue in the service, the court can so pronounce as a matter of law.”

EMPLOYEE INJURED BY BREAKING OF AN AXE — FELLOW-SERVANT. — In **MORAN v. BROWN**, 27 Mo. App. 487 (*October, 1887*), coalheaver in defendant's employ injured by the breaking of the helve of an axe in the hands of another employee, the negligence alleged being a defective appliance, judgment for plaintiff for \$1,800 in the St. Louis Circuit Court was *reversed*, the fellow-servant rule being applied, and it also being held that: “A master is not liable for an injury caused by the servant's unauthorized use of an inappropriate tool, especially where the master has furnished proper tools for the work.” Opinion by THOMPSON, J. There was no evidence of negligence on part of defendant.

BRAKEMAN INJURED — FELLOW-SERVANT — INCOMPETENCY — KNOWLEDGE OF SERVANT — CONTRIBUTORY NEGLIGENCE. — In **WARMINGTON v. ATCHISON, TOPEKA & SANTA FE R. R. CO.**, 46 Mo. App. 159 (*March Term, 1891*), brakeman in switch gang injured by alleged incompetency of engineer in charge of switch engine (1), the case is stated in the syllabus to the official report as follows:

1. Among the numerous RAILROAD the *Missouri Court of Appeals*, not cases involving the relations of MASTER and SERVANT, reported or noted in this volume of AM. NEG. CAS., passed upon by are the following

" 1. The evidence in this case is reviewed and the case is held by SMITH, P. J., to fall within the rule that, after discovering the danger in which the plaintiff had placed himself, even by his own negligence, if the defendant could have avoided the injury by the exercise of reasonable care, the exercise of that care becomes a duty, for the neglect of which the defendant is liable. (ELLISON and GILL, JJ., *dissenting*, the former in a separate opinion.)

" 2. The master is not responsible to those engaged in his employment for injuries suffered by them as the result of the negligence, carelessness, or misconduct of other servants in his employ engaged in the same common service, unless the master himself had been in fault; and a brakeman in a switch gang is a fellow-servant with the engineer in charge of the switch engine.

" 3. If a servant discovers that a fellow-servant is careless or incompetent and continues in the employment of his master without protest or complaint, he is deemed to assume the risks of such danger and to waive any claim upon his master for damages in case of injury; and so a brakeman in a switch gang, who knows of the carelessness and incompetency of the engineer in charge of the switch engine, cannot recover for injuries inflicted through the carelessness of the latter.

(the space devoted to the *Supreme Court* cases not permitting more than a mere reference to the *Appellate Court* cases):

Bridges *v.* St. Louis, I. M. & S. R. Co., 6 Mo. App. 389; Cook *v.* St. Louis, I. M. & S. R. Co., 8 Mo. App. 573; Stoeckman *v.* Terre Haute & Ind. R. Co., 15 Mo. App. 583; Hyatt *v.* Hannibal & St. J. R. Co., 19 Mo. App. 287; Rowland *v.* Missouri Pacific R. Co., 20 Mo. App. 463; Clowers *v.* Wabash, St. L. & Pac. R. Co., 21 Mo. App. 213; Dedrick *v.* Missouri Pacific R. Co., 21 Mo. App. 433; Hickman *v.* Missouri Pacific R. Co., 22 Mo. App. 344; Soldanels *v.* Missouri Pacific R. Co., 23 Mo. App. 516; Conway *v.* Hannibal & St. J. R. Co., 24 Mo. App. 295; Corbett *v.* St. Louis, I. M. & S. R. Co., 26 Mo. App. 261; Herriman *v.* Chicago & Alton R. Co., 27 Mo. App. 435; Worheide *v.* Missouri Car & Foundry Co., 32 Mo. App. 367; Burton *v.* Missouri Pacific R. Co., 32 Mo. App. 455; Zumwalt *v.* Chicago & Alton R. Co.,

35 Mo. App. 661; Banks *v.* Wabash Western R. Co., 40 Mo. App. 458; Higgins *v.* Missouri Pacific R. Co., 43 Mo. App. 547; Goins *v.* Chicago, R. I. & P. R. Co., 47 Mo. App. 173, also 37 Mo. App. 675; Fogus *v.* Chicago & Alton R. Co., 50 Mo. App. 250; Huston *v.* Missouri Pacific R. Co., 50 Mo. App. 300; Ballard *v.* Chicago, R. I. & P. R. Co., 51 Mo. App. 453; Towner *v.* Missouri Pacific R. Co., 52 Mo. App. 648; McKenna *v.* Missouri Pacific R. Co., 54 Mo. App. 161; Craig *v.* Chicago & Alton R. Co., 54 Mo. App. 523; Claybaugh *v.* Kansas City, Ft. S. & M. R. Co., 56 Mo. App. 630; Loe *v.* Chicago, R. I. & P. R. Co., 57 Mo. App. 350; Haliburton *v.* Wabash R. Co., 58 Mo. App. 27; McIntosh *v.* Missouri Pacific R. Co., 58 Mo. App. 281; McMullen *v.* Missouri, K. & T. R. Co., 60 Mo. App. 231; Ellingson *v.* Chicago & Alton R. Co., 60 Mo. App. 679; Warner *v.* Chicago, R. I. & Pac. R. Co., 62 Mo. App. 184.

"4. When the inference of contributory negligence arises from the plaintiff's own testimony, the defendant may take advantage of it regardless of whether such special defense be pleaded or not; and when such contributory negligence is shown as defeats plaintiff's right of action and disproves his case, it is the duty of the court to declare the result to the jury as a matter of law."

KELLY V. CABLE COMPANY (1).

Supreme Court, Montana, October, 1893.

[Reported in 13 Mont. 411.]

BLASTING EXPLOSION — UNEXPLODED BLASTS AT TIME OF FIRING — FELLOW-SERVANT — INSTRUCTIONS. — Where plaintiff, an employee of a mining company, was injured by the explosion of two blasts which had been fired by other employees, but had not exploded at the time of firing, of which fact he had knowledge, and it was shown that it was the duty of employees to see that every blast exploded, but there was conflicting evidence whether it was the foreman's duty in respect to that duty, an instruction that a servant assumes the risk of negligence of a fellow-servant in the same common employment, and if the injury was caused by plaintiff's fellow-servants who were engaged in blasting, and defendant had no knowledge of incompetency or carelessness of the latter, then the verdict should be for defendant, unless it was the foreman's duty to attend to the blasting and warn employees of unexploded blasts, was proper (2).

1. See former decisions in this case, wherein the plaintiff's name is spelled Kelley. 7 Mont. 70, and 8 Mont. 440. The facts are fully stated in the former appeals, reference to which is made in the opinion in the case at bar.

2. *Employee injured by explosion of unexploded blast at time of firing — Case for jury.* — In *BERG v. BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING CO.*, 12 Mont. 212 (April, 1892), judgment of nonsuit in the Eighth Judicial District, Cascade County, was *reversed*, the case being stated in the syllabus to the official report as follows: "It appeared that plaintiff was working as a laborer under defendant's foreman in a quarry, and was handling rock

thrown down by blasting, but was not engaged in the blasting department of the labor, and was not chargeable with the duty of knowing matters connected therewith; that a fuse was fired to a charge of three kegs of powder, and plaintiff with the foreman and the rest of the crew retired to a place of safety, and after waiting ten or twelve minutes without an explosion the foreman said, 'I guess the blast is dead; we might as well turn out and go to work;' that plaintiff after starting to return to work was injured by an explosion of the blast. *Held*, that there was sufficient evidence of defendant's negligence to go to the jury, and the granting of a nonsuit was error." *Kelley v. Cable Co.*, 7 Mont. 70, cited. Opinion by DE WITT, J.

PLEADING AND PROOF—INSTRUCTIONS. — Where the complaint only charged negligence and carelessness of employees it was proper to charge that there was no claim that the employees were incompetent.

APPEAL from judgment for defendant in the Third Judicial District, Deer Lodge County. *Judgment affirmed.*

“The pleadings and contentions in this case are so fully set forth in the reports of the case on the former appeals that it is not now necessary to do more than refer to those reports. See 7 Mont. 70; 8 Mont. 440. What little distinction there is between the case as now and then before the court is noted in the opinion below. Upon this — the third — trial of the case, verdict and judgment were rendered for the defendant. A motion for a new trial by plaintiff was denied, and from that order, and from the judgment, the plaintiff appeals. In appellant's brief and argument he complains of instructions Nos. 3 and 21, and that portion of instruction No. 1 where the court says as follows: ‘It is not claimed by the plaintiff that the foreman or any of the agents or employees of defendant were incompetent.’ Instructions 3 and 21 are as follows: ‘3. Defendant also claims that the injury to plaintiff was not occasioned by any negligence of defendant, or of its foreman or agents, but by the negligence, if there was any, of the men who were engaged in blasting, and who were fellow-servants of plaintiff, and for whose negligence defendant is not liable. Defendant also claims that the accident by which plaintiff was injured was one incident to the employment in which he was engaged, and arose from a peril which plaintiff assumed from his employment, and which defendant could not, by any usual or reasonable means, guard him against.’ ‘21. One of the risks which a servant takes upon himself is the negligence of his fellow-servants in the same common employment; and in this case the men who were engaged in blasting in the Cable mine were, in law, fellow-servants with the plaintiff, engaged in the same common employment of knocking down and removing the ore from the said mine. If the jury find from the evidence that the injury to plaintiff was not occasioned by the negligence of the defendant, but by the negligence of the men engaged in blasting, in failing to ascertain whether or not there was a missed charge, and that defendant had no reason to believe that such men were incompetent or careless, or that they had failed to perform their duty in this respect, then the

jury will find for defendant, unless you find from the evidence that it was the duty of the foreman of the Cable mine to superintend the blasting, and see that all the blasts were exploded, and to warn the plaintiff of the same.' "

F. W. COLE and WILLIAM SCALLON, for appellant.

W. W. DIXON and FORBIS & FORBIS, for respondent.

De Witt, J. (after stating the facts). — As to instruction No. 21, it is to be observed that the testimony on this trial differed in some respects from that on the trial which resulted in the appeal reported in 7 Mont. 70. The record in this court on that appeal showed that Savery, the superintendent, testified that he instructed Showers, the foreman, "that as an extra precaution I wanted him at every blast, if possible, to be present to direct the men, and after the explosion to see that every hole had exploded." This court on the first appeal took the view, apparently, that the superintendent instructed the foreman, and that it was the foreman's duty to be personally present at every blast, and to personally oversee it. It was with this view, doubtless, that this court said on that appeal: "The instructions asked by the plaintiff virtually exclude the defense of the negligence of a fellow-servant from the consideration of the jury, and this view of the matter at issue seems to be borne out by the evidence." As we understand that opinion, the court considered that the defense of the negligence of fellow-servants was out of the case, for the reason that the evidence was that it was the foreman's duty to be personally present at every blast. Now, on the third trial, which resulted in this present appeal, Savery, the superintendent, testified: "I never gave Showers any such absurd instructions as to be present, if possible, at the discharge of every blast, and I never testified before to any such thing. I cannot recollect that I testified before that I had given Harvey Showers instructions, as an extra precaution, to be present at every blast." In this testimony Savery was contradicted by the stenographer who took the testimony on the first trial. The stenographer testified that Savery's evidence on the first trial, as to this point, was as above noted. This conflict between Savery and the stenographer went to the jury for their solution. Therefore, there was evidence on this trial, as there seems there was not on the first trial, that the foreman was not instructed to be present at every blast. Savery testified on this trial: "I

don't think it is possible that I ever gave Showers instructions, as an extra precaution, to be present at every shot, and see if it had been discharged, nor did I ever testify that I had done so. It is the duty of the foreman to oversee all the blasting, but not to the extent of informing himself as to what each man was doing." Furthermore, on this trial the testimony was that it was the duty of miners to see that the shots all exploded, and that the method of ascertaining this fact was to count the reports when the explosion took place. A witness, Owen McBride, testified that he was a miner, working, on the day of the accident, in the cross-cut where Kelly was injured. He put in the holes, loaded and fired them. He said that when he counted the reports, there were two reports short. He waited some little time, went in and examined, found the ground all broken, and could see no missed holes. The smoke was thick, and he could not see well. When he could look, he saw no signs of missed holes. This man was working on the day shift, and Kelly went on at night to clear up the debris from the day's work. This witness, McBride, says further: "I saw Kelly at supper time, between the mill and the boarding house. He asked me how I was getting along, and I said not good. I told him there were two reports short in the crescent, but I had found the ground all broke, and couldn't see any missed holes." It also appeared in evidence that sometimes a piece of loose powder gets into the debris by being dropped, or coming from a "cut-out hole," and that such a piece could be exploded by the blow of a pick. Under this testimony, we are of the opinion that instruction No. 21 was appropriate on this trial, however true it may have been that there was no evidence on the first trial which would allow a jury to consider the defense of the negligence of a fellow-servant. We think that the evidence on this trial did not shut out the consideration of such defense. There was evidence that it was not the foreman's duty to be personally present at every blast. There was evidence, to be sure, tending to contradict the witness testifying on this point, but that evidence and its contradiction were all before the jury. There was also evidence that it was the duty of the men to see that the holes all exploded. There was evidence that one of the miners who was doing this blasting thought there might be two missed charges, and informed Kelly of this. Under these facts, instruction No. 21

fairly states the law of the defense of the negligence of fellow-servants. The closing paragraph of that instruction leaves it to the jury that the accident was due to the negligence of the foreman, who was a representative of the principal (the defendant).

The appellant complains of instruction No. 3, that it is a direct statement by the court that the men engaged in blasting were fellow-servants of the plaintiff, and that for their negligence the defendant is not liable. This construction of the court's language might be correct if those two or three lines upon that subject were taken out of the instruction and stood alone; but, with the whole instruction before us, it is clear that the court simply stated to the jury what the defendant claimed.

As to instruction No. 1, appellant contends that this "misstates the plaintiff's position, in that it tells the jury that the plaintiff did not claim 'that the foreman, or any of the agents or employees of defendant, were incompetent;' whereas the evidence affirmatively shows that they were incompetent in the matter of examining for and discovering missed charges, and also that their manner of discharging blasts was incompetent, in that it tended to make it impossible, or very difficult, to discover missed charges." (Quoted from appellant's brief.)

In examining the complaint we do not find that there was any charge made that the foreman, agents or employees were incompetent. It is charged that they were negligent and careless. Those terms are not convertible. The same observation is true of evidence. The effort of plaintiff was not to prove that the defendant's agents were incompetent, but rather that they were careless and negligent. If persons were careless and negligent, that is not proof that they were incompetent. A competent person may be careless; an incompetent person may, as far as his knowledge or skill goes, be careful. We are therefore of the opinion that there was no error in this instruction.

Having reviewed the errors claimed by appellant, we conclude that none of them can be sustained, and the judgment is therefore affirmed. HARWOOD, J., concurred. (PEMBERTON, Ch. J., having been counsel in this case, did not participate in the hearing or determination thereof.)

CAVE IN OF TUNNEL IN MINE — FALL OF ROOF — MINER INJURED — SAFE PLACE TO WORK — CONTRIBUTORY NEGLIGENCE — PROMISE TO REMOVE SOURCE OF DANGER — VICE-PRINCIPAL — MINING COMPANY LIABLE. — In **KELLEY v. THE FOURTH OF JULY MINING CO.**, 16 Mont. 484 (*July, 1895*), miner injured by fall of rock, etc., from roof of tunnel which caved in while he was working therein (1), judgment for plaintiff in the First Judicial District, Lewis and Clarke county, was *affirmed*. The case and its rulings are set out in the syllabus to the official report as follows:

“It is the duty of the employer to use all reasonable means to provide a safe place in which the employee may perform his service, and therefore, a miner engaged in driving a tunnel, whose work is confined to drilling and blasting from its face, while assuming the risk naturally attendant upon such work, does not assume the risk of the failure of his employer to use reasonable precautions to prevent the roof of that part of the tunnel already created from caving upon him, or failure to keep the floor of the tunnel so free from debris as not to obstruct his escape in case of accident.

“A miner engaged in drilling and blasting in the face of a tunnel and who did not understand timbering a mine, is not guilty of contributory negligence in remaining at work in the tunnel where it appeared that the day before the caving in of a portion of the roof of the tunnel by which he was injured he had assisted in putting in a stull under it by direction of the foreman, and that afterwards upon noticing the dirt falling from the roof, he asked the foreman, who was an experienced timberman, if it was safe, and he was assured that it was, — it being a disputed question as to whether the stull was properly placed in the mine, and whether, if properly

1. *Cave-in of ditch.* — In **SOYER ET AL. v. GREAT FALLS WATER CO.**, 15 Mont. 1 (*September, 1894*), judgment of nonsuit in the Eighth Judicial District, Cascade County, was *reversed*. Plaintiff's intestate was a laborer in defendant's employ and his death was occasioned by the caving-in of a ditch in which he was working. The action was brought by decedent's wife and children. The trial court erred in refusing to permit plaintiffs to show the character and condition of the soil through which the ditch was being dug, as the same was admissible to determine defendant's negligence in failing to

prop or brace the walls of the ditch. On the question of damages plaintiffs should have been permitted to prove the age of their intestate at time of death. “Upon the age of the deceased largely depended the question of the measure of damages in this case. ‘The measure is the amount which the deceased would probably have earned during his life for their (plaintiffs’) benefit, taking into consideration his age, ability, and disposition to work, and his habits of living, and expenditures.’” Citing several authorities. Opinion by **PEMBERTON**, Ch. J.

put in, was sufficient to support the roof, and it not appearing that the danger of the mine caving at the time of the accident was obvious.

"Nor would the miner in such case be guilty of contributory negligence in remaining at work when the danger of working in the tunnel was increased by reason of an accumulation of debris behind him which would obstruct escape in case of accident, where on the afternoon before the mine caved in, he requested the foreman to have the same removed and received his promise that it would be removed the following morning, since he would be justified in continuing at work for a reasonably sufficient time for the performance of such promise, notwithstanding the increased danger, — there being no obvious or immediate danger of the mine caving at the time and the miner was relying upon the foreman's assurance of its safety. *McAndrews v. Montana Union R'y Co.*, 15 Mont. 290, distinguished (1).

"A foreman for a mining company who has full control of the property, employees, tools, materials and complete charge of the management and development of the mine, is a vice-principal of the corporation, and, when guilty of negligence in not sufficiently timbering a tunnel in which an employee was working and received his injuries, his negligence is the negligence of the corporation for whom it must respond in damages."

CARPENTER INJURED — EXPLOSION OF STEAM BOILER. — In *JOHNSON, Adm'r, v. BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING CO.*, 16 Mont. 164 (*May, 1895*), carpenter in defendant's employ working in boiler room, fatally injured by explosion of steam boiler, judgment for plaintiff

1. In *McANDREWS v. MONTANA UNION R'y Co.*, 15 Mont. 290 (February, 1895), the case is stated in the syllabus to the official report (opinion by PEMBERTON, Ch. J.) as follows: "In an action by an employee of a railway company for personal injuries sustained by reason of defects in a hand car on which he was riding, causing it to leave the tracks while crossing a bridge, it was shown that the plaintiff knew perfectly the defective condition of the car, that he remained in the defendant's service long after being informed by his superiors that a request merely had been made for a new car; that the

defendant's foreman told him to use the car with great care, and do the best he could until he could get a new one; that he never refused to use the car, and was never threatened to be discharged if he did not use it, and that he had full knowledge of the fact that the car had jumped the tracks going at a rate of speed much less than that acquired at the time of the accident. *Held*, that in view of this evidence, the plaintiff was not entitled to recover." Judgment for plaintiff for \$5,000 in the Second Judicial District, Silver Bow County, *reversed*.

for \$2,500 in the Second Judicial District, Silver Bow county, was *affirmed*. The opinion was delivered by HUNT, J., who discussed defendant's specifications of errors as follows: "1. Was the boiler which exploded and killed plaintiff's intestate defective and unsafe for the uses and purposes to which it was put by defendant? 2. If it was unsafe or defective, was such condition patent or latent, and did defendant know of such defect or unsafety, or ought it, in the exercise of ordinary care and prudence to have known of such defect or unsafe conditon? 3. Did defendant use that degree of care required in furnishing and using the boiler for its concentrating works, or was defendant guilty of such negligence in these matters as render it liable in this action for the death of its employee, plaintiff's intestate?" The court held that the boiler was not such a reasonably safe appliance as defendant ought to have furnished for the use of employees, that the defects were patent and known to defendant. As to "ordinary care" the court said: "In discussing the definition of 'ordinary care,' the courts recognize that no fixed arbitrary rule can be laid down, but that the degree of care and vigilance required varies according to the exigencies which require attention and vigilance, conforming in amount and degree to the particular circumstances under which they are to be exercised. The care and attention necessary on an employer's part in furnishing a steam boiler is relative to the work to be done by the boiler, and the capacity of such an instrument for harm as well as good." (Citing Grand Trunk R'y Co. v. Ives, 144 U. S. 408, 12 Am. Neg. Cas. 659, on definition of ordinary care.) A similar instruction as in Kennon v. Gilmer, 5 Mont. 257, 4 Am. Neg. Cas. 823, on the duty of an employer to furnish safe and suitable machinery for use of employees cited and approved.

CARPENTER FALLING FROM FLOOR OF BUILDING — INCOMPETENCY OF FELLOW-SERVANT — UNSKILLFUL TREATMENT BY SURGEON — DEFENDANT NOT LIABLE. — In **JORGENSEN v. BUTTE AND MONTANA COMMERCIAL CO.**, 13 Mont. 288 (*September, 1893*), an action by an employee of defendant, a carpenter, who, while working on defendant's mill, engaged in handling heavy plank on the third story of said mill, fell to the floor below, breaking his leg, the injury being alleged to be due to the incompetency of a fellow-employee of which defendant knew, but plaintiff did not, and unskillful treatment by the surgeon employed to attend to plaintiff was also alleged, judgment on verdict directed for defendant in the Eighth Judicial District, Cascade county, was *affirmed*, the evidence failing to support either of the allegations in the complaint. Opinion by PEMBERTON, Ch. J.

BRAKEMAN INJURED — SWITCH ENGINE RUNNING INTO TRAIN — FELLOW-SERVANT — STATUTE CONSTRUED. — In **CRISWELL v. MONTANA CENTRAL R'Y CO.**, 17 Mont. 189 (*November, 1895*), head brakeman on freight train injured by switch engine running at high speed crashing into train on which he was employed, the train being run into yard limits without a headlight and without sending a flagman ahead to see if track was clear, judgment for plaintiff in the Eighth Judicial District, Cascade county, was *affirmed*. Opinion by PEMBERTON, Ch. J. The statute, section 697, p. 817, Comp. St. 1887, was before the court for the first time for judicial interpretation, and the learned chief justice reviewed the same, and the questions arising therein, at length. The ruling is thus stated in the syllabus to the official report:

“By the enactment of section 697, Fifth Division of the Compiled Statutes, providing that ‘the liability of the corporation to a servant or employee acting under the orders of his superior shall be the same in the case of injury sustained by default, or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger,’ it was the legislative intent to modify the common-law rule of nonliability of the master to his servant for consequences of the negligence of a fellow-servant in a common employment, and, by establishing the principle of a difference in the grade of employees engaged in a common employment, to give a right of action to an employee, who, without fault or negligence himself, is injured by the wrongful act of a superior servant, and whether acting at the time under the orders of the negligent superior or not.”

A subsequent decision in the Criswell case, a rehearing having been granted on a question of constitutional law, *reversed* the judgment of the Supreme Court (17 Mont. 189), which affirmed the judgment of the District Court, and the judgment for plaintiff in the latter court and order denying new trial were *reversed*. See **CRISWELL v. MONTANA CENTRAL R'Y CO.**, 18 Mont. 167 (April, 1896), where the constitutional point is discussed by HUNT, J., and the ruling is stated in the syllabus to the official report as follows:

“Section 697, Fifth Division of the Compiled Statutes, declaring the liability of the corporation to an employee injured through the negligence of his superior to be the same as if the employee were a passenger, being originally part of an Act for the incorporation of railroad companies in the Territory, and having application only to corporations created under such Act, imposes upon domestic railroad companies a burden not imposed upon foreign railroad companies operating within the State and was therefore annulled by

the adoption of the State Constitution, in which (section 11, article 15) foreign corporations are prohibited from enjoying within the State any greater privileges than enjoyed by like corporations created under the laws of the State.

"Section 11, article 15 of the Constitution, declaring in effect that domestic corporations shall not be discriminated against in the enjoyment or possession of rights and privileges that may be accorded to foreign corporations of like character, is self-executing as a prohibition, but not as an affirmative imposition upon, or securement to foreign companies of the rights or privileges only accorded by State laws to domestic companies."

RAILROAD EMPLOYEES INJURED — MONTANA CASES.

Brakeman switching cars.

In *PROSSER v. MONTANA CENTRAL R. R. Co.*, 17 Mont. 372 (December, 1895), plaintiff, a brakeman and switchman in defendant's employ, injured while switching cars, judgment for plaintiff for \$2,500 in the Eighth Judicial District, Cascade County, was *affirmed*. Opinion by DE WITT, J. From the facts, as gathered from the opinion and the syllabus to the report, "it appeared that in order to use a road engine for switching purposes, a flat car with a brake was placed in front of it so that the switchman could mount the brake beam and hold by the brake staff while moving about the yard." This was sufficient evidence of "negligence to go to the jury that the brake staff was bent so that when plaintiff grasped it in mounting the beam it swung around, causing him to lose his hold and fall under the trucks." The question of contributory negligence was for the jury "where it appeared that the brake staff was bent directly away from the plaintiff so that in mounting, so far as he could see, it was apparently straight and in a safe condition to be used."

Foreman of switching crew killed — Flying switch.

In *THOMPSON, ADM'X, v. MONTANA CENTRAL R'y Co.*, 17 Mont. 426 (January, 1896), judgment for defendant in the First Judicial district, Lewis and Clarke County, was *affirmed*. The syllabus to the report states the case as follows: "In an action against a railroad company for damages for the death of the deceased, who was foreman of a switching crew in the defendant's yard, a verdict for the defendant is amply supported by evidence that the decedent was switching cars with a road engine, the use of which was more hazardous than the use of a yard engine equipped for that purpose; that the deceased, though he had full authority to do so, had not taken the precaution of placing a flat car in front of the road engine, which would have decreased the danger; that while in the act of uncoupling the engine from a box car in order to make a flying switch he stood in an unusual position, and when the engine drew away from the car fell to the track and was killed; that it was not only unnecessary to make flying switches or to uncouple while moving at that point, owing to the grade of the track, but the deceased had

by special order been prohibited from so doing." *Prosser v. Montana Central R'y Co.*, 17 Mont. 372 (preceding paragraph), cited. Opinion by DE WITT, J.

Track repairer — Foreman — Fellow-servant — Statute.

In *GOODWELL v. MONTANA CENTRAL R'y Co.*, 18 Mont. 293 (May, 1896), railroad employee injured while engaged in repairing a railroad, judgment for plaintiff was *reversed* on the ground of negligence of a fellow-servant. The syllabus to the official report states the case as follows: "The foreman or boss of a small extra gang of six men engaged in repairing the defendant's railroad is not clothed with the control and management of a district department, but of a mere separate piece of work in one of the branches of service in a department, and, therefore, negligence of the foreman in not giving warning before ordering the men to bear down on a rail which broke and injured the plaintiff, a laborer in the gang, was not the neglect of a duty which the defendant company was bound to perform, but was the negligence of a fellow-servant for which the company was not liable." Citing *Criswell v. Montana Central R'y Co.*, 18 Mont. 167, which announced that since the statute of the Territory of Montana modifying the common-law liability of a master for injuries to his employees caused by negligence of a superior was repealed by the adoption of the State Constitution, the question as to fellow-servant was to be determined by the general law. Opinion by HUNT, J.

In *HASTINGS, ADM'R, v. MONTANA UNION R'y Co.*, 18 Mont. 493 (October, 1896), day laborer employed under section foreman to keep railroad track in repair run over and fatally injured by locomotive which struck him as he was crossing track with other employees with push car, judgment for plaintiff in the Second Judicial District, Silver Bow County, was *reversed*, the fellow-servant rule being applied. Opinion by HUNT, J. The syllabus to the official report states the case as follows: "A laborer employed by and acting under the orders of a section foreman on a railroad, who is injured by the negligence of the foreman in not warning him of the approach of a yard engine, and the negligence of the engineer of the yard engine in operating his engine at dusk without using the whistle or bell, and without a headlight, is a fellow-servant with such foreman and engineer, and therefore the railroad company is not liable for the injuries resulting from their negligence. Citing *Goodwell v. Montana Central R'y Co.*, 18 Mont. 293." (See preceding paragraph.)

Jumping from hand car to avoid collision — Fellow-servant — Superior servant.

In *SCHMIDT v. MONTANA CENTRAL R'y Co.*, 15 Mont. 106 (November, 1894), judgment for defendant on demurrer to complaint in the First Judicial District, Lewis and Clarke County, was *reversed*. Opinion by HARWOOD, J. The syllabus to the official report states the case as follows: "A complaint in an action for personal injuries which alleges that plaintiff was acting, when injured, pursuant to the orders of his foreman, and that defendant, disregarding its duty toward plaintiff to operate its locomotives and trains in a careful manner, did run a train around a sharp curve at a high rate of speed toward plaintiff on the same track upon which he was approaching on a hand car, without a warning signal, whereby plaintiff, being in imminent danger and

acting as a reasonable man, jumped from the hand car and sustained the injuries complained of, is not demurrable, in that it shows that plaintiff received his injuries through the negligence of the engineer and fireman of the train who were his fellow-servants, since § 697, fifth division, of the Compiled Statutes, provides that the liability of a railroad corporation to an employee acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior as if such employee were a passenger."

Infant riding on platform of street car — Invitation of driver — Independent contractor.

In *JENSON v. BARBOUR*, 15 Mont. 582 (March Term, 1895), judgment for defendant in the Eighth Judicial District, Cascade County, was *reversed*, the rulings by DE WITT, J., being stated in the syllabus to the official report as follows:

"Where, in an action for personal injuries, it is shown that the defendant's servant, the driver of a horse car, permitted the plaintiff, a boy of five years of age, to ride on the front platform of the car, from which he was thrown by the jolting of the car, thereby receiving the injuries complained of, the evidence of the defendant's negligence is sufficient to go to the jury.

"One who is employed by the agent of the owner of a street railway, at a fixed monthly compensation, to run a car over the line and employ a driver, the agent having the whole control of the operation of the road, is not an independent contractor, and the owner of the railway is liable for the negligence of a car driver employed by him.

"An independent contractor is one who renders service in the course of an occupation, and represents the will of his employer only as to the result of his work, and not as to the means whereby it is accomplished, and is usually paid by the job."

**SIoux CITY AND PACIFIC RAILROAD COMPANY
v. FINLAYSON.**

Supreme Court, Nebraska, July Term, 1884.

[Reported in 16 Neb. 578.]

1. INSTRUCTIONS — PRACTICE. — It is the duty of the District Court upon the trial of a cause to a jury, to inform the jury by its instructions of the issues in the case on trial. But if on such trial the issues are imperfectly stated, the party desiring a more specific instruction must call the attention of the court thereto by a request for a correct instruction in order to secure a review of such failure by the Supreme Court.
2. CITATIONS ON MARGIN OF INSTRUCTIONS. — A judgment will not be reversed for the reason that the successful party in the district court, in preparing and submitting to the court instructions to the jury, enters on the margin thereof references to the authorities supposed to

sustain the instructions, unless it be shown that the opposite party was prejudiced thereby. But such practice should not be permitted by the courts, and such references should be obliterated before sending the instructions to the jury.

3. INSTRUCTIONS — CONSTRUCTION. — Instructions given to a jury must be construed together, and if, when considered as a whole, they properly state the law, it is sufficient.
4. ENGINEER INJURED BY EXPLOSION OF BOILER OF LOCOMOTIVE — INSTRUCTIONS. — An instruction as follows: "Before plaintiff can recover, you must be satisfied by a preponderance of evidence that the defendant owned and was operating the locomotive boiler and engine thereto attached at the time of the alleged explosion; that there was an explosion of said boiler by reason of negligence on the part of defendant, and that this plaintiff was damaged by reason of said explosion:" *Held*, not erroneous when taken in connection with other instructions given to the jury.
5. DEFECTIVE MACHINERY — LIABILITY. — If an employer knowingly furnishes an employee defective machinery with which to work, and which machinery, though dangerous is not of such character that it may not be reasonably used by the use of care, skill and diligence, and the employee, in obedience to the requirements of the employer, uses and operates such dangerous machinery carefully and skilfully, believing there is no immediate danger, and when it is reasonably probable it can be safely operated with such care, the employee does not assume the risk, and if he is injured by such machinery without fault or negligence on his part, the employer will be held liable for the damages resulting from such injury.
6. ERRONEOUS INSTRUCTIONS — WHEN NOT PREJUDICIAL. — The following instruction was given to the jury: "If the engine furnished by defendant for the use of plaintiff in its service had been in service as long as it could with safety be used without examination and overhauling, and defects existed in the boiler, which could have been ascertained by the exercise of reasonable and ordinary care and prudence, it was the duty of the defendant to have ascertained and remedied such defects, instead of suffering the plaintiff to be exposed to the peril of an explosion, and if the defendant failed to perform such duty it is liable to the plaintiff for the damages which are the direct result of such failure, unless the plaintiff contributed thereto by negligence on his part." *Held*, that the words "instead of suffering the plaintiff to be exposed to the peril of an explosion," while quite unnecessary, were not prejudicial.
7. INSTRUCTIONS — NOTICE TO AGENTS. — The following instruction was given to the jury on the trial: "Even if the agents of the defendant who had charge of the engines on defendant's road and the duty of their repair did not positively know that the engine was unsafe, yet if it was in fact unsafe and they had received such reports in regard to it as ought to have put them on their guard and to have led by the use of proper diligence to knowledge of the facts, the defendant must be held to the same liability as if their agents had actual knowledge." *Held*, not erroneous as not designating particularly the agents by whose

knowledge the defendant would be held liable, as, when applied to the evidence, there could be no mistake as to the agents referred to.

8. EVIDENCE — EXPERTS. — Witnesses who show scientific, or practical skill and knowledge and experience as to matters of which they testify, are competent as experts. The weight to be given to their testimony is for the jury to determine.
9. DEPOSITIONS — OBJECTIONS — PRACTICE. — Objections to depositions, except upon the grounds of incompetency or irrelevancy, must be reduced to writing and filed before the commencement of the trial, or they must be disregarded by the court. Sec. 390, Civil Code.
10. BOOKS OF SCIENCE — EVIDENCE. — Books of science or art are competent evidence when shown to be reputable or standard works.
11. PHYSICAL EXAMINATION OF PLAINTIFF SUING FOR INJURIES. — It is not error for the court during the progress of a trial to refuse to order the plaintiff, who sues for injuries to his person, to submit to an examination of his person by physicians who are witnesses for the defendant, in the absence of any showing whatever that justice would be promoted thereby, and especially so when the plaintiff submits to an examination by such witnesses in the presence of the jury.
12. VERDICT. — The verdict is sustained by sufficient evidence.
13. DAMAGES EXCESSIVE. — The case examined and the verdict *held* to be excessive, and a new trial ordered unless a remittitur of \$3,000 is filed, in which case the judgment for \$6,250 will be affirmed.
(*Syllabus by the court.*)

ERROR to the District Court for Washington County. The case is stated in the opinion. *Affirmed conditionally.*

JOY, WRIGHT & HUDSON, and L. W. OSBORN, for plaintiff in error.

GEORGE W. DOANE and BALLARD & WALTON, for defendant in error.

Reese, J. — This is an action against the plaintiff in error, the Sioux City & Pacific Railroad Company, for damages resulting from a personal injury caused by the explosion of an engine of said company, and on which defendant in error was at the time engaged and employed as an engineer. The petition alleges that the engine became and remained defective and dangerous through the negligence of the plaintiff in error. The answer of plaintiff in error admitted the explosion of the boiler on the engine, but denied all negligence or carelessness of the company; denied that the plaintiff had received the injuries as stated, and averred that the explosion was caused by the contributory negligence of the defendant in error. There was a jury trial, which resulted in a verdict of \$9,250 in favor of defendant in error.

The first error assigned by the plaintiff in error is, that there was a failure on the part of the trial court to properly state to the jury the issues in the case in its instructions, and in this connection our attention is specially called to the first instruction given by the court. This instruction is as follows: "The plaintiff sues in this case for damages alleged to be sustained by reason of the explosion of a locomotive boiler owned and operated by the defendant." It is, perhaps, hardly fair to say that by this instruction the trial court intended to state the issues involved in the case or any part thereof, but rather that he intended to give to the jury a short but general idea of the character or nature of the action. However that may be, it is clear that by the whole instructions given to the jury by the court the issues were virtually stated, though not particularly stated as such. The law bearing upon every issue in the case was carefully given, and the jury were informed that if they found the facts as alleged by plaintiff in error in its answer without referring to it, they must find for the defendant, plaintiff in error. It is true that as a matter of practice it would be better for the trial court to state the issues by an instruction given for that particular purpose. Yet it is not always done, and in the absence of any effort on the part of the parties to have it done, we do not think a judgment should, for that reason, be reversed. It has been decided by this court, and we take it to be now settled in this State, that before the complaint that an instruction is not sufficiently explicit will be regarded, the matter must have been brought to the attention of the trial court by a request for a satisfactory instruction which was refused. *Burlington & M. R. Co. v. Schluntz*, 14 Neb. 421, 425; *Sioux City R. Co. v. Brown*, 13 Neb. 317.

The next question presented is, that "the instructions given to the jury at the request of the plaintiff had, indorsed on the margin, citations and references to authorities, stated in the presence of the jury to be in support of the instructions asked." Our attention has not been called to any part of the record which shows what was stated in the presence of the jury, nor that any objection was made thereto and an adverse ruling made. But passing that question, and giving the plaintiff in error the full benefit of it, we fail to see prejudicial error. Again, we say that as a matter of practice we do not approve of such marginal references. They were evidently intended

as a memorandum for the benefit of the court and for no other purpose; so that if the court should doubt the correctness of the law as stated in the instruction he could turn to the authorities cited and verify their correctness. When that was accomplished those references should, perhaps, have been obliterated. The practice ought not to be encouraged by the courts. But we fail to see the prejudice resulting to either party. It was argued that it might, and naturally would, have a tendency to more fully impress upon the minds of the jury the soundness of the law as stated in the instructions. How could it? It was the duty of the jury to accept the law as given by all the instructions as the law of the case, and that without question. The court is the sole judge of the law; the jury of the facts. Again, what harm could possibly result from the statement in the presence of the jury that the authorities cited supported the instruction. This statement was evidently made to the court. If the authorities thus cited had been read to the court and commented on, by way of argument, by the counsel presenting the instructions, no objection could have been made thereto, and, in fact, this is a very common custom, approved by courts and the bar in general. If this is allowable we can see no reason why a reference to the authorities under the same circumstances may not be.

Each instruction given by the court upon its own motion was excepted to by the plaintiff in error, but as some of them seem to us to be more in its favor than against it, we will not examine those which are apparently open to this criticism.

Instruction No. 2 is as follows: "Before plaintiff can recover you must be satisfied by a preponderance of evidence that the defendant owned and was operating the locomotive boiler and engine thereto attached at the time of the alleged explosion; that there was an explosion of said boiler by reason of negligence on the part of defendant, and that this plaintiff was damaged by reason of such explosion." Complaint is made of this instruction for the reason that "it practically told the jury that plaintiff could recover if the defendant was negligent, and left out of view the plaintiff's contributory negligence." Whatever objection of this kind might be urged against this instruction if taken alone, we are convinced that instruction No. 3, which follows the one complained of, and instruction No. 4 of those asked by the plaintiff in error (de-

fendant below) and given by the court, would remove all objection. No. 3 is as follows: "Ordinarily, a plaintiff in an action of this character for damages cannot recover where he is guilty of contributory negligence, as contributory negligence may be of various degrees." What is meant by the latter clause of this instruction is explained in instruction No. 5. The fourth instruction above referred to is, as modified by the court, as follows: "If the jury find from the testimony that plaintiff, prior to the explosion of the boiler upon engine No. 2, had been the engineer in charge of said engine, and was such engineer at the time of said explosion, and if you further find that the said plaintiff knew of the defects in the throat-sheet of said engine, and with such knowledge continued in the employment of said defendant, and run and operated said engine without objection, plaintiff cannot recover for any injury he may have sustained by reason of the explosion of the boiler of said engine." When we reflect that the only contributory negligence alleged against the defendant in error consisted in the fact that he continued to operate said engine after indications of the weakness of the iron was discovered by him and the attention of the proper agents and servants of the plaintiff in error called to the fact, with the request by him that another engine be furnished him, it becomes quite clear that these instructions are, when taken together, unobjectionable.

The facts in this case may be briefly stated to be that the defendant in error had, for about two years, been in the employ of the plaintiff in error as a locomotive engineer on its railroad. That he had had charge of this particular engine for a considerable part of this time. Toward the latter part of this employment he noticed what he conceived to be evidence of weakness in that part of the locomotive known as the throat-sheet. He called the attention of the proper officers and agents of the plaintiff in error to this fact, and upon examination it was thought there was no immediate danger, and he was instructed to continue with the engine until such time, in the near future, as they could effect an exchange and cause the necessary repairs to be made. Afterward, seeing, as he thought, increasing signs of weakness in that part of the boiler, he again, and on several occasions, called attention to the fact, when he was informed that another engine would be furnished

him in a given time, and requested to continue with the one in question until that time, which he did, and for two days longer, when the accident occurred. During this time he was careful to keep the steam at a comparatively low pressure, and supposed that with this precaution there was no immediate danger. It is not claimed, and cannot be, that the explosion was caused or brought about by any negligent act of his. Under these circumstances it seems to us that the true rule might be stated to be, that if the defective machinery, though dangerous, is not of such a character that they may not be reasonably used by the exercise of care, skill and diligence, the servant does not assume the risk. If the servant, in obedience to the requirement of the master, makes use of machinery which, though dangerous, is not so much so as to threaten immediate injury, or where it is reasonably probable it may be safely used by extraordinary caution or skill, the master would be liable for a resulting accident. As least such a rule is as favorable to the plaintiff in error as could, in our opinion, be reasonably required by it, and especially would this be true when it is shown that the master was fully informed of the apparent danger and the machinery used upon his request and judgment. *Snow v. Housatonic R. Co.*, 8 Allen, 441, 15 Am. Neg. Cas. 417; *Colo. Cent. R. Co. v. Ogden*, 3 Colo. 499, 13 Am. Neg. Cas. 523; *Patterson v. Pittsburg, etc., R. Co.*, 76 Pa. St. 389; 2 *Thompson Negligence*, 967; *Keegan v. Western R. R. Corp.*, 8 N. Y. 175. Applying this rule to the instructions, we think they correctly state the law.

Complaint is made of instruction No. 2 asked by the defendant in error and given by the court. This instruction is as follows: "If the engine furnished by the defendant for the use of the plaintiff in its service had been in service as long as it could with safety be used without examination and overhauling, and defects existed in the boiler which could have been ascertained by the exercise of reasonable and ordinary care and prudence, it was the duty of the defendant to have ascertained and remedied such defects instead of suffering the plaintiff to be exposed to the peril of an explosion, and if the defendant failed to perform such duty it is liable to the plaintiff for the damages which are the direct result of such failure, unless the plaintiff contributed thereto by negligence on his part." The objection to this instruction is in reference to the words: "Instead of suffering the plaintiff to be exposed to the peril

of an explosion," which are found in the body of the instruction. It is quite difficult for us to see the functions of those words, why they were placed there, or what good purpose they can accomplish. It is equally as difficult for us to see what harm they can possibly do. Plaintiff contends they are "argument" and "could have no other effect than to arouse the feelings of the jury and enhance the amount of their verdict without any just cause for it." While we can see no particular necessity for the language, as the instruction without it has the same meaning and purport, yet we fail to see anything more in that language than a conclusion, or rather a comparison, which naturally and irresistibly arises in the mind from the instruction as it would be without it. If the plaintiff in error had ascertained "and remedied the defect" instead of doing as it did, it would not have been liable. But failing to do so, "unless the plaintiff (defendant in error) contributed thereto by negligence on his part," the plaintiff in error would be liable. The error is not prejudicial and the judgment will not for that reason be reversed.

The third instruction asked by defendant in error and given by the court is as follows: "Even if the agents of the defendant who had charge of the engines on defendant's road, and the duty of their repair, did not positively know that the engine was unsafe, yet if it was in fact unsafe, and they had received such reports in regard to it as ought to have put them on their guard, and to have led, by the use of proper diligence, to knowledge of the facts, the defendant must be held to the same liability as if their agents had actual knowledge." The complaint as to this instruction is, that "it holds the defendant liable regardless of who of its agents had knowledge of defects of the engine, or to whom reports of such defects were made." This position cannot be maintained. The instruction is intended to apply to the testimony introduced on the trial. The defendant in error claimed that the proper officers and agents had knowledge of the defects of the engine. That knowledge was denied by some of them, but the proof showed that the engine had been reported to them as unsafe. If they could have ascertained as to the truth of those reports, made to them directly by those whose duty it was to make such reports, it was their duty to do so. If they declined or refused to know the facts which by "proper diligence" would have led to an

absolute knowledge of those facts, the liability would be the same as if they knew. As to what agents are referred to by this instruction was clearly set forth by the instructions as well as by the whole case.

It is insisted by the plaintiff in error that the testimony of certain witnesses, whose occupation was that of boiler-makers, was improperly received, as by their own testimony they were incompetent to testify as experts. They all showed that for a long time they had been engaged in making boilers, and some of them showed experience in testing boilers. They testified to their knowledge and experience as to the matters inquired of. Their testimony was clearly competent. The amount of weight to which their testimony was entitled was a question for the jury to determine. Courts cannot establish a standard by which to measure expert witnesses. If they show that they have practical skill or scientific knowledge and experience as to matters under investigation, they are competent to testify.

The deposition of the witness De Haven was taken by plaintiff in error, but read to the jury by defendant in error. Objection was made to the reading of a part of his answer to one of its interrogatories, for the reason that the same was not responsive to the interrogatory. But as the objection was not made and filed before the commencement of the trial, as required by section 390 of the Civil Code, the court was justified in disregarding it. See, also, Weeks on Depositions, § 404.

The next objection urged by plaintiff in error is to the admission in evidence of a selection from a book entitled "A Catechism of a Locomotive," by "Forney."

Section 342 of the Civil Code provides that "historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are presumptive evidence of facts of general notoriety or interest." This book was sufficiently shown by the testimony of the witness Teal, who was one of the expert witnesses of plaintiff in error, to be a standard work, to admit it in evidence. While it is perhaps true that evidence of that character was required before the book could be admissible, yet the testimony offered being uncontradicted there was enough *prima facie* to admit it.

Much is said by counsel on both sides upon the subject of "comparative negligence," and the relative degrees of care and diligence exercised by the parties to the action. We have failed to find any proof of negligence on the part of defendant in error, and will dismiss that subject without further remark.

The record shows that after the defendant in error had introduced all his testimony on the trial, and had rested his case, the "defendant (plaintiff in error) moved the court to direct the plaintiff to allow the physicians called on the part of the defense to make an examination of his person with reference to his alleged injuries, for which he now seeks to recover. The court ruled that it had no power to make such an order, to which ruling defendant excepts." Error is assigned in this court based upon this record.

If such examination was proper to be made, and if the defendant in error upon application had refused to allow it to be done, we are inclined to believe the court had the power to make and enforce such an order. It is fundamental that if a decision or ruling of a court is correct, the fact that the reason assigned therefor by the court, when making it, is not sufficient to sustain the order, the fact of such deficient reason being given will not vitiate the ruling or order. The question now before us is, did the court err in its refusal to make the order requested? We think not. It is not the province of courts to make useless and unnecessary orders, simply because they are so requested. There was no showing made to the court that permission to make the examination had been refused by defendant in error, nor that any such permission had been requested. There is no showing of any kind that such examination was necessary in order to aid plaintiff in error in making its defense,—indeed there was no intimation made that any good could possibly result or benefit be derived from such an examination. The request was made in the midst of the trial. The court was asked to stop the trial and send out the plaintiff in the suit for examination. Again, this request hardly possessed all the elements of fairness. The court was asked to virtually place the defendant in error in the hands of the defense. It was not sought to have the examination made by disinterested and unbiased surgeons whom the parties might select or the court appoint, but by

the "physicians called upon the part of the defense." Again, the record shows that when the witnesses on the part of the defense were placed upon the stand to testify upon the question of the alleged injury, the defendant in error was asked to "step forward and allow the witness to examine him," which he did. The record further shows that the defendant in error was "asked to remove his coat and vest, which he does, and the witness examines the back, sides, and other portions of the body of the plaintiff; also as to his breathing; also the condition of the eyes, the muscles of the leg, the condition of the tongue and of the pulse." From this it must seem that even if the court had erred by its refusal to make the order, that error was cured by the examination made by consent of defendant in error. The only case cited by plaintiff in error in support of its position is *Schroeder v. Chicago, R. I. & P. R. Co.*, 47 Iowa, 375, 14 Am. Neg. Cas. 643. But there is a wide distinction between that case and this. In that case the request was made after the jury was impaneled, but before any of the testimony was heard. The application was in writing, and requested the examination to be made by a "proper number of physicians, to be selected, in equal numbers, by plaintiff and defendant, and it was proposed by defendant that its own medical officer should not be one of the number, and in support of this application the affidavit of a surgeon and physician in the employment of defendant was filed, stating that he had professionally attended plaintiff immediately after he was injured, and had made personal observation of plaintiff's condition, and had heard his testimony at the former trial, and it was his belief, based upon these means of knowledge, that his injuries were not of the character claimed by him and that the truth of the matter could be ascertained by a proper personal examination of the plaintiff." It also appears in that case that an effort was made to procure an examination of plaintiff in the presence of the jury, as was done in this case, but the plaintiff refused to submit to it and the court would not order it, and that, too, after the plaintiff had testified that his back and internal organs were affected by the injury, and that "one of his legs was disabled to an extent that deprived him of its full use, and that he thought it appeared to be smaller and somewhat shrunken." Our attention has been called to no other case upon this sub-

ject, and we know of no other holding as the Iowa case. As to the soundness of the position taken by that court we have nothing to say. The question is not before us. It is enough to say that under the authority of that case it cannot be made to appear that the ruling of the court in this case was erroneous, or that it abused its discretion in refusing to make the order sought.

The next question presented by plaintiff in error is that the verdict of the jury is not sustained by sufficient evidence. With the exception hereafter noticed we cannot agree with the counsel for plaintiff in error. We have already, in some degree, discussed the evidence and facts of the case, and the length of the record must prevent any further discussion thereof. We have carefully examined the record, and conclude the evidence will sustain a verdict for defendant in error.

The last matter presented for consideration is that the verdict is excessive. To this proposition we assent. The testimony shows that at the time he received the injury the defendant in error was about twenty-five years of age. While the testimony of the physicians leave it in doubt as to his final and complete recovery it appears that at the time of the trial he had so far recovered from his injury as to be engaged in business, and to be able to devote most if not all of his time thereto. The injury is defined and described by the physicians as concussion of the spinal cord, by which a diseased or abnormal condition of the nervous system is produced, affecting his general health to some extent, and depriving him of the ability to engage in active physical labor, and perhaps rendering him unfit to engage in his business as railroad engineer. He has retained his mental faculties to their full extent. At times he is free from pain; at others he has a soreness and pain in his back. There was no laceration of any part of his body, no fracture of any bones. There is supposed to be no injury to the bones of his spinal column. The physical or visible evidences have disappeared, and some of the physicians give it as their opinion that there will ultimately be a substantial but perhaps not a complete recovery.

Believing that the verdict is excessive, the judgment and decision of this court is, that the judgment of the district court be set aside and a new trial granted, unless the defendant in

error enter a remittitur of the sum of three thousand dollars (\$3,000) within thirty days from this date. If such remittitur is filed, the judgment to the extent of six thousand two hundred and fifty dollars (\$6,250) will be affirmed.

Judgment accordingly. All concur.

OMAHA AND REPUBLICAN VALLEY RAILWAY COMPANY v. MORGAN.

Supreme Court, Nebraska, May, 1894.

[Reported in 40 Neb. 604.]

1. JOINT OCCUPANCY OF GROUNDS BY RAILROAD COMPANIES — LIABILITY FOR DAMAGES. — Where two railroad companies jointly occupy the same property, such as depot grounds, switch yards, and tracks, each company is bound to exercise ordinary care to prevent injuring the employees of the other; and if an employee of one company, while in the discharge of his duties on such grounds and without negligence on his part, is injured by the negligence of the employee of the other company, such company is liable therefor.
2. QUESTIONS OF NEGLIGENCE FOR JURY. — Issues as to the existence of negligence and contributory negligence, and as to the proximate cause of an injury, are for the jury to determine, when the evidence as to the facts is conflicting and where different minds might reasonably draw different conclusions as to these questions from the facts established. *American Water-Works Co. v. Dougherty*, 37 Neb. 373, *followed*.
3. INSTRUCTIONS. — The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper to state to the jury a circumstance or group of circumstances as to which there had been evidence on the trial and instruct that such fact or group of facts amounts to negligence *per se*. At most, a jury should duly be instructed that such circumstances, if established by a preponderance of the evidence, are proper to be considered in determining the existence of negligence. *Mo. Pac. R. Co. v. Baier*, 37 Neb. 235, 4 Am. Neg. Cas. 874, *followed*.
4. TRESPASSER — LICENSEE — INFANT INJURED — QUESTIONS FOR JURY. — Two companies, the "Omaha Company" and the "St. Paul Company," jointly used and occupied a station with its switch yard and tracks in the city of Norfolk. A boy twelve years of age and his father were in the employ of the St. Paul Company as car cleaners. Opposite where the boy was engaged in cleaning a car and beyond a long side track, filled at the time with cars, stood a tool house in which the employees of the St. Paul Company kept their tools. The cars standing on the side track were no part of any train, nor were the cars

at the time being switched on or off the side track. The boy was directed by his father to take some oil cans to the tool house, to which it was necessary for him to cross the side track. He obeyed, crawling under the cars on the side track, left the cans at the tool house, and started to return to his work and father, crawling as before on his hands and knees, under the cars on the side track, and while thus under the cars the employees of the Omaha Company, without giving any signal or warning thereof, suddenly and with great force backed an engine and freight train against the cars standing on the side track, and injured the boy. *Held*: 1. That the boy, being an employee of the St. Paul Company, was not a trespasser or mere licensee on the railroad grounds, but was rightfully there; 2, that the backing of the freight train and engine without any signal or warning, against the cars standing on the side track was evidence of negligence on the part of the Omaha Company, but whether such act was or was not negligence, the time, place, and all the circumstances considered, was a conclusion for the jury; 3, that the boy's crawling under the cars standing on the side track was evidence of negligence on his part, but whether by such act, the time, place and all the circumstances considered, he was guilty or not of contributory negligence, was a conclusion for the jury.

5. NEGLIGENCE — INFANTS — DEGREE OF CARE REQUIRED. —

The law does not require a child of tender years to exercise the same degree of prudence and care for its safety that is required of a person of mature age and discretion. If such a child exercises the ordinary care and caution reasonable for one of its age and discretion it satisfies the requirements of the law.

(*Syllabus by the court.*)

ERROR from the District Court of Madison County. The case is stated in the opinion. *Judgment affirmed.*

JOHN M. THURSTON, W. R. KELLY and L. S. WILSON, for plaintiff in error.

WIGTON & WHITHAM, for defendant in error.

Ragan, C. — George W. Morgan, a boy about twelve years of age, by his next friend, sued the Omaha & Republican Valley Railway Company (hereinafter called the "Omaha Company") in the District Court of Madison county for damages for a permanent injury which he alleges he sustained through the negligence of said Omaha Company's agents and employees. Morgan had a verdict and judgment, and the Omaha Company brings the case here for review.

The evidence in the record establishes, and tends to establish the following facts: The Omaha Company and the Chicago, St. Paul, Minneapolis & Omaha Railroad Company (hereinafter called the "St. Paul Company"), at the date of the injury to Morgan, owned and used jointly and in com-

mon a station, yards, and tracks in the city of Norfolk, the main track of said companies making one continuous line. This main line passed northeast and southwest on a curve through a portion of the city of Norfolk and on the northwest side of the passenger station at that place. Parallel to this main track, and a few feet north and west thereof, was a side or switch track, and parallel thereto was still another side track. These side tracks were 1,630 feet in length. At the time young Morgan was injured, about 7:30 o'clock in the afternoon of the 20th of June, 1890, these side tracks were filled with cars; but the cars were no part of any train. At this time a train of the St. Paul Company occupied the main line near the east end of the station platform. Nearly opposite this St. Paul train, northwest from it and beyond the two side tracks, stood a tool house of the St. Paul Company's in which the car cleaners and repairers of that company kept their tools, oil cans, etc. Some distance to the southwest of the station stood the engine house used by the Omaha and St. Paul Companies for the storing and cleaning of their engines. There was an engine of the Omaha Company in the yards at this time; it was hauling a freight train, and just prior to the accident occupied with its train the main track between the station and the engine house. It was necessary to remove this engine and freight train from its position on the main track between the engine house and station in order that the engine of the St. Paul Company, which was standing near the station on the main track, might be taken to the engine house. The cars standing on the middle side track extended some six hundred feet, or twenty car lengths, southwest from a line drawn from the tool house to the coaches of the St. Paul Company standing on the main track, and about the same distance north and east of such line. Young Morgan and his father were at that time, and had been for some three years, in the employ of the St. Paul Company as car cleaners in the city of Norfolk. It was, amongst other things, their duty on the arrival of a train to dust and sweep and clean the coaches, to see that they were supplied with coal, and the lamps filled with oil, etc. Immediately prior to the accident young Morgan and his father were engaged in cleaning out the coaches of the St. Paul Company, which had just arrived and were standing, as stated above, near the station

on the main track. Young Morgan was assisting his father and working under his directions, but was in the pay and employ of the St. Paul Company. The father directed his boy to take some oil cans to the tool house mentioned above. The boy went across the side tracks, crawling under the cars thereon to the tool house, left his oil cans there, and attempted to return to his work, and while on his hands and knees crawling under the drawbar or coupler of two of the freight cars standing on the middle track, the trainmen of the Omaha Company, having pulled the freight train off the main track, backed it up from the southwest towards the northeast against the cars standing on the middle track, and young Morgan was caught by the wheels and had both his legs broken. It was usual and customary, and even necessary, for the employees in the yard, while engaged in car cleaning, oiling, and coaling cars, and such like duties, to pass under cars standing on the tracks. The employees of the Omaha Company were aware of this. Although the rules of the Omaha Company required the engine bell to be rung while switching, it was not done at the time of this accident. The engine and freight train were backed with unusual force against the cars on this middle track, in violation of the Omaha Company's rules. The engine at the time was not in charge of the engineer, but of a fireman. The trainmen of the Omaha Company were in a hurry, endeavoring to clear the main track. The object of backing the freight train onto the middle track was to not take any of the cars standing on that track therefrom. It was unnecessary for the freight train to be backed on the middle track, as it could have been pulled out on the main track beyond the engine house. No signal of any kind was given before backing this freight train against the cars on the middle track. Young Morgan had been trained and instructed to listen for signals before going under cars. At the point he passed under the cars he could not see the engine backing up the middle track southwest of him because of the curve, the distance, and the cars on the track. The first intimation he had that the cars on the middle track were to be moved was the noise of their bumping together while he was under them. The freight engine and train struck the cars standing on the middle track with sufficient force to drive them back northeast half a car's length.

The engineer and fireman of the Omaha Company, on the subject of a signal being given prior to the backing of the freight train against the cars on the side track, testified as follows:

THE FIREMAN: "Q. What was done about the ringing of the bell while that train was in motion and while that switching was going on? A. Well, I always ring the bell and did that night. I ring the bell whenever the cars are moving. Q. How do you know? Do you recollect doing that? A. Because it is my business. Q. That is what makes you so sure then? A. Yes, sir."

THE ENGINEER: "Q. Do you know whether there was any signal by the ringing of the bell or the whistle while the train was in motion? A. We always ring the bell. We don't blow the whistle; it would scare teams. Q. In a location like that you never use the whistle? A. No, sir; only when there is something standing on the track. Q. What did you say about the bell being rung? A. It was rung going over the crossing."

CROSS-EXAMINATION: "Q. You don't remember that night in particular, only because it was the custom? A. No, sir. Q. You rang the bell when you went down there to make the coupling, and you rang the bell when you pulled out of the middle of the track? A. Yes, sir. Q. The only reason that you know that is because it is the custom? A. Yes, sir."

Four contentions are relied on here for a reversal of this judgment.

1. That the verdict of the jury in finding the Omaha Company guilty of negligence is not supported by the evidence. The negligence charged to the Omaha Company was that while Morgan was in the act of passing under the cars on the middle track, the Omaha Company negligently backed with great and unnecessary force its freight engine and train against the cars standing on the middle track. It is not disputed by the Omaha Company that it pulled its freight train and engine off the main track and pushed it back against the cars standing on the middle track at the time that Morgan was passing under said cars on said middle track. The dispute relates chiefly to the force with which the freight train was driven back against the cars and as to whether any signal was given before such movement took place. We think the evidence

sustains the findings of the jury that the freight train and engine were driven back against the cars standing on the middle track with great force and without any signal of any kind being given prior thereto. But it is said by counsel for the Omaha Company that "the accident occurred upon the private grounds of the company and upon the track where Morgan had no right except at least as a mere licensee." The undisputed evidence is that this station, and the yards and tracks, were jointly owned or used by both the Omaha and St. Paul Companies and that young Morgan, at the time he was injured, and for some years prior thereto, was an employee of the St. Paul Company. Morgan then was neither a trespasser nor a licensee on these railroad grounds. He had the same rights there that the employees of the Omaha Company had, and this brings us to the consideration of another question. As an employee of the St. Paul Company, what duty did the Omaha Company and its employees owe to young Morgan?

In *Penn. R. Co. v. Gallagher*, 15 Am. & Eng. R. Cas. 341 [40 Ohio St. 637], one Gallagher was in the employ of the Baltimore & Ohio Railroad Company as a car inspector and repairer. The Pennsylvania Company's railroad track crossed the Baltimore and Ohio railroad track at Mansfield, Ohio, at which place there was a track called a transfer track. Gallagher was repairing a car belonging to the Baltimore & Ohio Railroad Company, standing on this transfer track. His minor son, eleven years of age, brought him his dinner, and Gallagher, while repairing the car, requested his boy to assist him, which the boy did, and while he was assisting him, and while both the father and son were under the car being repaired, the Pennsylvania Company, without signal of any kind, backed some cars with great force on this transfer track, striking the car under which Gallagher and his son were, and injuring the boy. He then, by his next friend, sued the Pennsylvania Company for damages, and one of the defenses was that the boy had no right upon the grounds. But the Supreme Court of Ohio overruled this defense, saying: "The father did not exceed his powers in calling upon his son for temporary assistance, and though a contingency might have been possible in which the Baltimore and Ohio Company might have raised a question as to the son's right to recover of it in an action for injuries received through his father's carelessness, such pos-

sible contingency would not excuse a want of due care on the part of the Pennsylvania Company. Charles Gallagher was not a trespasser, nor wrongfully on the premises where he was injured, and we cannot reach the conclusion that he bore such a relation to the Baltimore and Ohio Railroad Company that while rendering needed assistance to that company, in compliance with the directions of its agent with such implied authority, he was placed beyond the pale of protection against the carelessness of the plaintiff in error.

In *Ill. Cent. R. Co. v. Frelka*, 110 Ill. 498, 11 Am. Neg. Cas. 430*m*, the facts were: The Illinois Central Railroad Company and the Michigan Central Railroad Company jointly occupied certain depot grounds on which each maintained its separate railroad tracks in the city of Chicago. Frelka was in the employ of the Michigan Central Railroad Company. His duties were to be performed at the stock yards. He was necessarily crossing the tracks of the Illinois Central Railroad Company for the purpose of boarding a caboose standing upon a track of the Michigan Central Railroad Company to take him to the stock yards, and while crossing the tracks, an engine of the Illinois Central Railroad Company running in the yard, without the ringing of a bell or the sounding of a whistle, struck him and he was injured, and for which he sued that company for damages. One argument of the counsel for the Illinois Central Railroad Company, as appears from the reported opinion, was that Frelka was not in the employ of the Illinois Central Railroad Company; that he was not intending to enter any caboose of that company; that the company held out no inducement for him to cross its tracks; that he was not upon their grounds upon any license, express or implied. The Supreme Court of Illinois answering this argument said: "When these two companies agreed * * * to a joint occupancy of the depot and depot grounds, and located their tracks as we now find them, they were bound to know their business could not be successfully carried on without their respective servants, in the discharge of their duties, having to pass over each other's tracks, and hence it is but reasonable to conclude they impliedly consented this might be done, and the fact that this was done * * * without objection affords the strongest evidence this was the understanding of the parties. * * * Under the facts as the jury

must have found, the appellant owed the same duty to the servants of the Michigan Central Railroad Company when crossing the former's tracks in the regular discharge of their duties that it did to its own servants when crossing the same tracks."

In *Watson v. Wabash, St. L. & P. R. Co.*, 19 Am. & Eng. R. Cas. (Iowa) 114, Watson was in the employ of a lumber company and was sent with his wagon and team to haul lumber from a car standing on a side track of the railroad. Watson was on the car loading lumber into his wagon backed up against the end of the car. He was warned of the approach of an engine, and fearing for the safety of his horses attempted to step down from the car, using the coupling link to rest his foot upon. While in that position another car was kicked and thrown violently against the car he was unloading, by which he was injured. No warning was given Watson that cars were being switched or thrown onto this track. The defense of the railroad company was that the evidence failed to show any negligence on its part. The Supreme Court of Iowa overruled this objection, deciding that "a railroad company that allows cars, without warning, to be thrown violently back against other detached cars that are being unloaded, whereby a teamster engaged in unloading the cars is injured, is guilty of negligence, and, in the absence of contributory negligence on the part of the party injured, is liable therefor." The court said: "If the plaintiff was rightfully there, the company owed him the duty of such care as is necessary for the safety of all persons engaged as he was; and it is not for the company's employees to close their eyes and excuse themselves by saying that they did not know that any one was being imperiled. That the plaintiff was in fact rightfully there appears to us to be clear. The car had been placed where it was for the purpose of being unloaded by the owner of the lumber, and the owner of the lumber had sent the plaintiff to unload it."

These authorities establish the rule that where two railroad companies occupy the same property jointly, such as depot grounds, switch yards, and tracks, each company must exercise ordinary care to prevent injuring the employees of the other, and that if an employee of one company while on such grounds in the discharge of his duty, without negligence

on his part, is injured by the negligence of the employees of the other company, such company will be liable therefor.

2. It is next urged that young Morgan was guilty of such contributory negligence as precludes his recovery. In *American Water Works Co. v. Dougherty*, 37 Neb. 373, the doctrine of this court on the subject of contributory negligence is thus stated: "Issues as to the existence of negligence and contributory negligence and as to the proximate cause of an injury are for the jury to determine when the evidence as to the facts is conflicting, and where different minds might reasonably draw different inferences as to these questions from the facts established" (1). The same rule is also laid down in *Chicago, B. & Q. R. Co. v. Landauer*, 36 Neb. 642, 4 Am. Neg. Cas. 849; *Omaha Street R. Co. v. Craig*, 39 Neb. 601, 9 Am. Neg. Cas. 547, and cases there cited.

The evidence in the case at bar shows that young Morgan was, at the time he was injured, in the discharge of his duty as an employee of the St. Paul Company; that it was necessary for him to cross the middle track in the performance of the duties about which he was engaged; that this track was filled with cars; that these cars formed at the time he was injured no part of any train. No cars were being taken from this track for the purpose of making up a train, and no cars were being switched for the purpose of storing them onto this track. He had been in the employ of the St. Paul Company in and about these yards for some three years. He had been trained and cautioned to listen for signals, and not to pass under or between cars when in motion or when he might apprehend danger. The fact that he crawled under the cars was evidence of negligence on his part, but we cannot say that by so doing he was guilty of such negligence as precludes his right to recover. That was a question properly submitted to the jury, and we cannot say that their conclusion is unsupported by the evidence. Had the cars under which young Morgan crawled been a part of a train standing upon a track, or had the cars been in motion, or had he gone under the cars after the ring-

1. *AMERICAN WATERWORKS COMPANY v. DOUGHERTY*, 37 Neb. 373 (1893), was an appeal from judgment for plaintiff in the District Court of Douglas County, in an action for damages sustained by plaintiff, while

driving at night, by being thrown into a trench which had been excavated by defendant in a city street and, as alleged, was left without proper guards or precautions against accident.

ing of a bell or the sounding of a whistle, it might be different. Whether he was guilty of negligence in crawling under these cars at the time and place and under the circumstances that he did, and while engaged in performing the duties of his employment, is a question about which reasonable men might honestly differ.

In *Goodfellow v. Boston, H. & E. R. Co.*, 106 Mass., 461, 15 Am. Neg. Cas. 712, Goodfellow was in the employ of a contractor who was building a supporting wall for the railroad company. While engaged in this work Goodfellow stood on a side track of the railroad holding a guy rope, and while thus engaged an engine of the railroad company, without giving any signal of its approach, backed down on the side track and injured Goodfellow, who sued the company for damages. The *nisi prius* court directed a verdict for the railroad company on the ground that the evidence showed that Goodfellow was injured through his own negligence by standing upon the side track of the railroad. The Supreme Court of Massachusetts reversed this ruling, holding that on the evidence a jury would be warranted in finding that Goodfellow at the time he was injured was in the exercise of due care.

In *Christman v. Phila. & R. R. Co.*, 21 Atl. Rep. 738 [141 Pa. St. 604], Christman was in the employ of a rolling mill on whose grounds were some tracks of the railroad company. The company had unloaded a car of iron on the grounds and Christman was engaged in carrying this iron into the mill. In doing this he had to cross a track of the railroad company's between the pile of iron and the mill. On this track were standing some freight cars. To facilitate his work he uncoupled two of these cars and passed between them in going to and fro between the iron pile and the mill. While engaged in his work he saw a switch engine pass up the track, and surmising that the cars which he had uncoupled might be moved he replaced the coupling and started back after another piece of iron. Just at that moment the cars were jammed together and he was injured. The defense was that he was guilty of contributory negligence, but the Supreme Court of Pennsylvania overruled the defense and said: "Was the plaintiff so clearly guilty of contributory negligence that the court was bound to say so as a matter of law? Plaintiff was there in the prosecution of his work. The iron was between the

tracks and he necessarily had to cross one of them to go to the mill. * * * To facilitate his work he widened the passage between the cars by taking out the coupling. * * * Much stress is laid by appellant on the fact that plaintiff had been employed on or about the switch for several months and had knowledge of the danger during the operation of shifting. * * * It was * * * relevant, as showing knowledge which bore upon the question of negligence; but this knowledge had a double edge. While conveying notice of danger, it also conveyed notice of the time likely to lapse and the warning customarily given before the danger became imminent. It was in evidence that, after the plaintiff saw the engine go up, fifteen or twenty minutes were occupied in coupling the cars to be taken out and getting the train together. It is also in evidence that the two cars between which the injury occurred were not defendant's cars and not to be taken out. Under these circumstances it certainly was not plaintiff's duty immediately on seeing the engine go up to cease work and stand idle for the fifteen or twenty minutes required in the operation of shifting. How long he might prudently continue work, and what amount of observation he was bound to give to the progress of coupling the cars and approaching his locality depended upon too many elements to enable the court to say there was any fixed standard of prudent conduct to which he was bound to conform. That, under the circumstances in evidence, was a question for the jury."

3. That the court erred in instructing the jury on its own motion. One instruction objected to is as follows: "And if you believe from the evidence in this case that the defendant, by its agents, servants, or employees in charge of its engine and cars, or on or about the 20th of June, 1890, at its yards in Norfolk, unnecessarily, negligently, and carelessly backed said engine and cars upon one of the switches in said yards, and at a time when the plaintiff was crossing the said switch, and in consequence of which the plaintiff was run over by the cars then standing on said switch, and injured, as alleged, you should then determine from all the evidence the place where said accident occurred, the nature and character of the work the defendant was engaged in at the time, the character and condition of the yards at the time, and from these, and all

the other facts, circumstances, and evidence before you, say whether the said acts of the defendant were necessary in the operation of said railway, or whether they were unnecessarily, carelessly, and negligently done; and if you believe from the evidence before you that the said acts of defendant were unnecessary and negligent, then you should inquire whether, from the evidence, the plaintiff, at the time of the said injury complained of, in view of the work he was engaged in and the manner of performing it, the place where the injury occurred, his knowledge of the condition of the yards at the time, the plaintiff's position at the time the accident occurred, and from these, and all the other facts and circumstances in evidence in the case, say whether plaintiff was guilty of negligence that contributed to the injury complained of; and if you find the plaintiff was guilty of no negligence, nor of any act that contributed to the injuries, then the plaintiff is entitled to recover; but if you find from the evidence that the plaintiff was guilty of any negligent act or omission on his part that contributed to the injury complained of, then he cannot recover, and you should find for the defendant." The criticism on this instruction is that it directed the jury to consider as an element of the railroad company's liability whether the backing of the freight train and engine against the cars on the middle track was a necessary act. We think that the evidence is sufficient to sustain the finding that this act of the company was wholly unnecessary; but the criticism on the instruction is not a fair one, as the instruction tells the jury that the backing of the freight train on the middle track must not only have been unnecessarily done, but must have been negligently and carelessly done as well. We do not think that the plaintiff in error was prejudiced by this instruction.

Another instruction complained of by the plaintiff in error is as follows: "The defendant alleges that plaintiff's injuries were the result of his own negligence, and not the negligence of the defendant. In determining whether or not the plaintiff's injuries were caused by his own negligence you are instructed that the same degree of care is not required of a child of tender years and limited experience that is required of an ordinary grown person. Unless you find from the evidence that the plaintiff, at the time he was injured, failed to exercise that degree of care for his own safety which a person of his age,

development, and experience would naturally and ordinarily use in the same situation and under the same circumstances, then you will find that the plaintiff has not been guilty of any such negligence as will defeat his recovery on that ground." This instruction stated the law correctly. In *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90, 12 Am. Neg. Cas. 239ⁿ, the company was sued for the killing of a child asleep on its track. The District Court instructed the jury that if they believed from the evidence that Samuel Grablin, by reason of his being so young, was incapable of exercising any more care or discretion than he did exercise at the time of the accident, then contributory negligence was not imputable to him. Grablin was, at the time he was killed, a child about eight years of age. This court approved of that instruction. In *Rauch v. Lloyd*, 31 Pa. St. 358, 12 Am. Neg. Cas. 531, the Supreme Court of Pennsylvania, in discussing the question of charging a child with negligence, said: "He acted like a child, and he is not to be judged as a man."

Complaint is also made because of the refusal of the trial court to instruct the jury as follows:

"The court instructs the jury that if a person attempts to pass under cars standing upon a crowded side track at the station, and using the roads and tracks for railroad purposes, and in and about the making up of trains, such conduct is negligence; and that if you shall find from the evidence there had been a custom on plaintiff's part grown up by plaintiff's practice to pass under the cars at such times, such custom will not relieve him of the consequences of such negligence, and if you believe from the evidence that under such circumstances the plaintiff was injured, he cannot recover, even if you shall further find from the evidence that the cars were suddenly started up or moved without giving the usual signal therefor. Under such circumstances you should find for the defendant.

"The jury is instructed that if they believe from the evidence that the plaintiff attempted to crawl under the bumpers of the freight cars at the time of the accident, he did not exercise ordinary care and caution, and his failure to exercise such care and caution, and voluntarily putting himself in a known dangerous position, is not excused by proof that plaintiff or other persons had been in the habit of going under cars

in the same manner, and the jury is further instructed that no question of expediency or convenience warranted the plaintiff in incurring such known danger.

“The testimony being uncontradicted that the plaintiff attempted to crawl under the freight cars standing on the track in the yard of the defendant without taking the precaution to ascertain with reasonable certainty that there was no probable or impending danger in so doing, such action on the part of the plaintiff was negligent and contributed directly to the accident, and therefore the jury must so find.”

Neither of these instructions should have been given. In *Mo. Pac. R. Co. v. Baier*, 37 Neb. 235, 4 Am. Neg. Cas. 874, it was held: “The existence of negligence should be proved and passed upon by the jury as any other fact. It is improper to state to the jury a circumstance or group of circumstances as to which there has been evidence on the trial, and instruct that such fact or group of facts amounts to negligence *per se*. At most, the jury should duly be instructed that such circumstances, if established by a preponderance of the evidence, are properly to be considered in determining the existence of negligence. (*Omaha Street R. Co. v. Craig*, 39 Neb. 601, 9 Am. Neg. Cas. 547, and cases there cited.) By these instructions, and each of them, the court was requested to charge the jury, in effect, that young Morgan, in crawling under the cars at the time and place that he did, was guilty of negligence. A trial court may instruct a jury that a certain act or omission is evidence of negligence, but it is for the jury to find the conclusion. There was no error in refusing to give these instructions.

The judgment of the District Court is affirmed.

MISSOURI PACIFIC RAILWAY COMPANY v. BAXTER, ADM’X.

Supreme Court, Nebraska, September Term, 1894.

[Reported in 42 Neb. 793.]

1. ASSUMPTION OF RISK. — A servant by his contract of employment assumes the ordinary risks and dangers incident thereto.
2. KNOWLEDGE OF DEFECT — CONTINUING IN SERVICE — PROMISE TO REPAIR. — If the machinery, tools, or appliances furnished the servant by his master are obviously defective and dangerous,

and the servant, notwithstanding, continues in the service, he thereby assumes the risks of any injury which he may sustain by reason of such defective appliances, unless he is induced to continue in such service by the promise of the master to remedy such defect.

3. **SAFE MACHINERY AND APPLIANCES.** — The law does not require that an employer should furnish his servants the newest or the safest tools, machinery, or appliances for the performance of the work for which they are hired. If the master furnishes such machinery, appliances, or tools to the servant as are reasonably safe and fit for the performance of the work in hand, and which the servant, in the execution of his work, by the exercise of ordinary care on his part, may use with reasonable safety to himself, the master has discharged his duty in that respect.
4. **BRAKEMAN KILLED COUPLING CARS — DEFECTIVE TRACK — PLEADING INSUFFICIENT.** — A railroad brakeman, a part of whose duty it was to couple cars upon tracks known by him to be unblocked and dangerous, while so engaged caught his foot in an unblocked guard rail and was killed. His administratrix sued the railway company for damages, alleging that its failure to block the guard rails was negligence which caused her intestate's death. The petition did not allege that the deceased was inexperienced when he entered the employ of the railway company; that he was ignorant at the time he entered the service of the company; that the guard rails and rails of its main track were unblocked; that he did not know that the guard rail was unblocked, at which he was killed; that he remained in the service of the company, relying upon a promise made by it to block its guard rails; nor that guard rails blocked were less dangerous than unblocked. *Held*, that the petition did not contain averments of fact which negatived the presumption of law that the injury received by the deceased was one of the risks which he assumed by virtue of his employment, and, therefore, did not state a cause of action.

(Syllabus by the court.)

ERROR from the District Court of Saline County. The case is stated in the opinion. *Judgment reversed.*

W. H. MORRIS, JAMES W. ORR, D. MARTIN, and B. P. WAGGENER, for plaintiff in error.

F. I. FOSS and E. E. MCGINTIE, for defendant in error.

Ragan, C. — Margaret E. Baxter, administratrix of the estate of George Edward Baxter, deceased, brought this suit in the District Court of Saline county against the Missouri Pacific Railway Company (hereinafter called the "Railway Company") for damages, under chapter 21, Compiled Statutes, 1893, for the death of her intestate, her husband, alleged to have been caused by the negligence of the Railway Company. The administratrix had a verdict and judgment and the Railway Company brings the case here for review.

There are many errors assigned and argued in the brief of counsel for the plaintiff in error; but as we have reached the conclusion that the petition of the administratrix filed in the court below does not state facts sufficient to constitute a cause of action, and that the judgment of the District Court must, therefore, be reversed, it becomes unnecessary to consider any question in the record except the sufficiency of such petition. The petition of the administratrix alleged the death of George Edward Baxter; her appointment as administratrix of his estate; that he was her husband, and at the time of his death left the administratrix, his widow, and two minor children him surviving. The petition further alleged:

“ 4. That the defendant had so negligently, carelessly, and unskillfully constructed its railroad track at Talmage, both upon the main track, side tracks, and spur tracks, that any one who was an employee of said company, using due diligence, care, and skill in transacting the business of said company, was liable to be injured, hurt and damaged on account of the negligent, careless, and unskillful manner in which the said track of the defendant was constructed at Talmage; that the said George Edward Baxter, while employed by the defendant at a reasonable salary as a compensation for his services, in the exercise of due care and skill upon his part in coupling the cars upon the side track of the defendant at Talmage, did, without any negligence upon his part, but on account of the negligence, carelessness, and unskillfulness of the defendant in the construction of its railroad bed, side tracks, and spur tracks, in not properly blocking and filling up the space between the outside rail and guard rail, have his left ankle caught just above the heel, between the guard rail and outside rail of said track, which threw him under the trucks of said cars, and he was thereby killed, which said killing was on account of the carelessness, negligence and unskillfulness on the part of the defendant in the construction of their railroad, and while the said George Edward Baxter, the employee of the said Railway Company, was acting directly under the orders of the conductor of said train of which he was brakeman, and while he was using due care, diligence, and skill in the transaction of the business of the said Railway Company.”

The administratrix also alleged in her petition that her husband, at the time of his death, was thirty-three years old. At

that time he was employed by the Railway Company as a brakeman on a train running between the stations of Crete and Talmage in Nebraska, "including the main line of road at Talmage, the side tracks, spurs and other tracks necessary to be used and operated by said Railway Company at said place in connection with their business to and from Crete in Saline county, Nebraska."

A railroad brakeman, a part of whose duty it was to couple cars upon tracks known by him to be unblocked and dangerous, while so engaged caught his foot in a frog and was injured. Held, that he took upon himself the risk involved in the non-blocking of the frogs, and could not maintain an action against his employer for the injury sustained. *Wood v. Locke*, 147 Mass. 604, 15 Am. Neg. Cas. 487n.

In *Tuttle v. Detroit, G. H. & M. R. Co.*, 122 U. S. 189, it is said: "When a servant, in the execution of his master's business, receives an injury which befalls him from one of risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself."

A switchman employed in a railway company's yards, in helping to make up and distribute trains, while engaged in his employment, "caught his foot in a frog" which connected two converging tracks and was used to effect the transfer of cars from one track to the other, and before he could release himself he was run over and killed. His administratrix sued the company for damages, alleging that it had been guilty of negligence in not "blocking its frogs." The switchman had been in the employ of the company for some years, and employed in and about the yard in which he was injured for quite a length of time prior thereto, and was acquainted with the frog and knew that it was not blocked. It was held that the switchman, in accepting and continuing in the employment, assumed the hazard of all known and obvious dangers, and that he was charged with notice of the difficulty of removing the foot when caught in the frog, and of the danger to be apprehended therefrom, and that, therefore, he could not recover. *Appel v. Buffalo, N. Y. & P. R. Co.*, 111 N. Y. 550.

In *Mayes v. Chicago, R. I. & P. R. Co.*, 63 Iowa, 562, 14 Am. Neg. Cas. 665n, it was held: "Where defects in a railway are obvious to all employees, one who knows of such defects, or by the exercise of ordinary care might know of them,

but, without objection or promise of amendment, continues in the company's employment, thereby waives his right to recover for injuries received by reason of such defects."

In *Rush v. Mo. Pac. R. Co.*, 36 Kan. 129, 15 Am. Neg. Cas. 112*n*, the facts were: The railway company in the construction of its railway did not use any blocking or other protection between the main rails of its track and the guard rails. A servant of the railway company was employed as a switchman for about two and one-half months in one of the railway company's yards, and while in the discharge of his duty he stepped between the main rail and the guard rail of one of the tracks and was killed. His administratrix sued the railway company for damages. The court held "that the condition of the railway tracks and the danger must have been known to the employee, and, therefore, that he assumed the risk."

In *Sweeney v. Berlin & Jones Envelope Co.*, 101 N. Y. 520, it is said: "A servant accepts the service subject to the risks incident to it; and where, when he enters into the employment, the machinery and implements used in the master's business are of a certain kind or condition, and the servant knows it, he voluntarily takes the risk resulting from their use, and can make no claim upon the master to furnish other or different safeguards."

In *Chicago, R. I. & P. R. Co. v. Lonergan*, 118 Ill. 41, 14 Am. Neg. Cas. 362*n*, it was held: "A person who engages in the service of a railroad company in the running of its trains is presumed to do so with a knowledge of the dangers incident to such service, and he assumes the risks of its ordinary hazards. An employer is not bound to furnish for his workmen the safest machinery, nor to provide the best methods for its operation in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character, and such as can, with reasonable care, be used without danger to the employee, it is all that can be required from the employer."

In *McGinnis v. Canada Southern Bridge Co.*, 45 Mich. 466, 16 Am. Neg. Cas. 127, *ante*, it was held: "An employer is not bound to make use of the newest mechanical appliances for the purpose of insuring the safety of his employees, especially if it does not appear that on the whole it would be advantageous to them. So, a railway company is not bound to

block its frogs, particularly if it does not appear that in doing so it would not entail greater dangers than it would avert."

In *Smith v. St. Louis, K. C. & N. R. Co.*, 69 Mo. 32, 16 Am. Neg. Cas. 474, *ante*, it is said: "Railroad companies are bound to use appliances which are not defective in construction; but as between them and their employees they are not bound to use such as are of the very best or most improved description. * * * A brakeman who continues in the service of a railroad company with knowledge that the guard of a switch is made of T rail, cannot recover for injuries sustained in consequence of his foot being caught between the guard and the frog, notwithstanding it may appear that if the guard had been made of a different rail it would have been less dangerous."

In *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind. 440, 14 Am. Neg. Cas. 554*n*, it is held: "An employee, when he enters the service of an employer, impliedly agrees to assume all risks ordinarily and naturally incident to the particular service; and the employer impliedly agrees that he will not subject the employee, through fraud, negligence, or malice, to greater risks than those which fairly and properly belong to the particular service in which the employee is to be engaged. The employer's obligation is not to supply the employee with absolutely safe machinery, or with any particular kind of machinery, but to use ordinary and reasonable care not to subject the employee to extraordinary or unreasonable danger."

These authorities establish three general rules:

1. That a servant by his contract of service assumes the ordinary risks incident to such employment.

2. That if the machinery, tools, or appliances furnished him by the master are obviously defective and dangerous, and he nevertheless continues in the service of the master, he thereby assumes the risks of all injury which he may sustain by reason of such defective machinery or appliances, unless he continues in the service by reason of a promise of the master to remedy such defects.

3. That a master is not bound to adopt the newest or the safest machinery, tools, or appliances for the safety of his servants.

It will be observed that the only ground of negligence charged against the Railway Company in this case in the petition of the administratrix is the failure of the Railway

Company to block the spaces between the guard rail and the rail of its main track. The petition does not allege when Baxter entered the service of the Railway Company; that he was inexperienced when he entered its employ; how long he was in its service before he was killed; that he did not know at the time he entered the service of the Railway Company that the spaces between the guard rails and rails of its main track were unblocked; that he did not know the guard rail was unblocked at which he was injured; that the Railway Company promised him, in consideration of his remaining in its service, to block its guard rails; nor that guard rails blocked are less dangerous than unblocked. In other words, this petition does not contain averments of fact which negative the presumption that the injury received by Baxter was one of the risks which he assumed by virtue of his employment. We have no doubt but that the failure of the Railway Company to block its guard rails is an evidence of negligence on its part; and if this were a suit by a passenger of this Railway Company for injuries such passenger had sustained by reason of such default on the part of the Railway Company it might be liable. But this is not the case before us. If this were a suit by one not a passenger and not an employee of the company, who had been injured by reason of the default of the Railway Company to block its guard rail, such failure of the Railway Company might be evidence of negligence on its part. But this is not the case before us. The question with which we have to deal is this: Assuming that the Railway Company was guilty of negligence in not blocking its guard rail, we must assume, because of the want of averments in the petition to the contrary, that Baxter actually knew at the time he entered the company's service, and while he was in its service, that the guard rails were unblocked; that he continued in the service of the Railway Company without any promise on its part to block these guard rails; that he was not inexperienced; that he was not unacquainted with the condition of the guard rail where he was injured; and that, therefore, he assumed, by continuing in the service of the railway company, the risk of being injured by reason of these guard rails being unblocked. An employer is not an insurer of the safety of his employees. In the very nature of things a railway company cannot guarantee that those who enter its service are to be engaged in under-

takings which are safe. Common sense and observation teach all men that railroad operation is extremely hazardous. Danger lurks on every rail and tie, and death stands watch at every bridge and switch. One who enters the employment of a railway company as a brakeman knows this fact quite as well as his employer, and assumes this risk and hazard and danger when he enters upon the service. Nor does the law require that an employer should furnish his servants the newest or the safest tools, machinery, or appliances for the performance of the work for which they are hired. If the master furnishes such machinery, appliances, or tools to the servant as are reasonably safe and fit for the performance of the work in hand, and which the servant, in the execution of his work, by the exercise of ordinary care on his part, may use with reasonable safety to himself, the master has discharged his duty in that respect. Doubtless employees of a railway company engaged in the operation of the road are exposed to less danger if the train be run at a speed of ten miles an hour instead of fifty, if in the construction of the road oak ties be used instead of cedar or pine, if eighty-five pound steel rails be used instead of fifty-six, if the road be constructed entirely without curves, and if the bridges and culverts be constructed of solid masonry instead of wood, and it is possible for a railway company to so construct and operate its road; but its failure to so construct and operate its road and trains, while possibly evidence of negligence, such evidence alone is not sufficient to support a verdict against it for damages for an injury received by one of its employees.

The judgment of the District Court is reversed.

BRAKEMAN KILLED COUPLING CARS — DEFECTIVE SWITCH — EVIDENCE — ADMINISTRATION OF ESTATE — JURISDICTION — STATUTE. — In **MISSOURI PACIFIC R'Y CO. v. LEWIS**, 24 Neb. 848 (*July Term, 1888*), brakeman killed while coupling cars, judgment for plaintiff in the District Court for Lancaster county was *reversed*. The case is stated in the official syllabus (opinion by COBB, J.), as follows:

“ 1. Lewis died in Kansas, from injuries received there, for which it is claimed that if death had not ensued the Missouri Pacific R. R. Co., the party inflicting them, would have been liable to an action for damages. The statute of that State provides that an action may be brought against the party by the personal representative of the

deceased. The widow, appointed under the laws of Nebraska, administratrix of Lewis, brought in the District Court of the State a suit against the railway company. *Held*: That the suit can be maintained, the right of action not being limited by the statute to a personal representative of the deceased appointed in Kansas, and amenable to her jurisdiction. See *Dennick v. R. R. Co.*, 103 U. S. 11.

" 2. The distribution of money, if recovered by the widow from the railroad company, might be enforced by the courts of this State in the manner prescribed by the statute of Kansas. *Id.*

" 3. The judgment of the County Court of Washington county, Nebraska, granting letters of administration to the widow, the sole assets of the estate consisting of the claim against the railroad company: *Held, coram judice*, and upheld.

" 4. The construction and operating of a railroad without blocking its frogs and switches is not negligence *per se*, of which a court will take judicial action upon proof of the fact of such construction and operating, and failure to block the frogs and switches, only.

" 5. In an action by an administratrix against a railroad company for damages for the death of her husband, where it was alleged in the petition that in constructing its line of railroad the defendant negligently failed to block its switches and frogs, by means of which the deceased, a brakeman employed by defendant, in coupling cars, stepped his foot between the rails of the switch and became fastened there, by reason of which he was run over by the cars and killed: *Held*: That the plaintiff could not recover without the evidence of practical men that unprotected frogs and switches are inherently unsafe and dangerous when prudently and carefully worked and managed, and that blocking them materially lessens the danger of their use and management, and that such was generally recognized by those engaged in the construction and operating of railroads in the country or vicinity by the adoption and use of such improvement, or of evidence equivalent."

BRAKEMAN FOUND DEAD ON TRACK — EVIDENCE — ACCIDENT — RAILROAD NOT LIABLE. — In **CHICAGO, BURLINGTON & QUINCY R. R. CO. v. BARNARD**, Adm'r, 32 Neb. 306 (*June, 1891*), brakeman on stock train fatally injured, judgment for plaintiff for \$5,000 in the District Court for Gage county, was *reversed*, the evidence failing to show negligence of defendant. In stating the facts, the Supreme Court (per NORVAL, J.), said:

" The principal question we are called to pass upon is, whether there was any testimony in the case tending to sustain the verdict and judgment. It appears from the record that on the night of

December 9, 1888, James Persinger left Lincoln on his trip as a brakeman on the plaintiff in error's stock train, running between that place and Omaha. The train was pulled by two engines, and arrived at the station house near South Omaha on the morning of December 10, about six o'clock. At this place there is a side track which was used for setting out cars, and for running cars to the South Omaha stock yards. East of the station house, 385 feet, is a bridge built over the Belt Line railroad. This bridge is 422 feet long, eighteen feet above the ground at one end and thirty feet at the other, and is a part of the company's main line. The bridge was not floored between the tracks and had no railings or protection of any kind for a person standing or walking thereon. Persinger was the head brakeman, whose place was upon top of cars near the front of the train, to give signals to the engineer and help set the brakes. J. W. Moore was the rear brakeman, whose duty it was, after uncoupling the way car and the other cars that were not to go to the stock yards, to throw the switch so that the balance of the train could be backed in on the side track. Just before the rear of the train reached the station house, the caboose and the two rear cars were cut off by Moore from the balance of the train and left on the main track. The front portion of the train was stopped on the bridge. Moore gave the signal to Persinger, who was then on top of the cars, to pull ahead so as to clear the switch, and on Persinger repeating the signal to the engineer, the engines started. Moore discovered that the rear part of the train did not move, so he walked along the side of the cars to the bridge, where he climbed on top of one of the cars, and on walking forward he found that the train was broken in two. Persinger was standing on the third car from the break when Moore walked up to him and said, "We are broken in two." Persinger replied, "I guess not," and signalled the engineers to go ahead. They both walked forward to the break in the train, which was over the bridge. Moore climbed down onto the bridge, when he discovered that the coupling pin was broken. He left Persinger standing on the car and went to the engine to get another pin. When he reached the engine, Taylor, one of the engineers, inquired of him where Persinger was; he replied, that he left him on the cars; and Taylor said, "I am afraid he is down over the bridge." Moore, on returning to the car where he left Persinger, discovered his body on the ground. He and the fireman went down to where Persinger was lying and found that he was dead. The body was lying partly under the outer line of the bridge, and the lantern he carried was found two or three feet from his body." * * *

After setting out the evidence of Taylor and Collier, the engineers

of the train, who were the only witnesses who testified as to the manner of the accident, the court said:

"In the petition and in the brief of counsel for defendant in error, the defendant company's liability for the death of Persinger is placed upon the ground that the defendant was guilty of negligence in not flooring the bridge and erecting railings on the sides, and in having failed to warn the deceased before he started on the trip of the condition of the bridge, he being wholly unacquainted with it. It appears from the evidence that Persinger was carrying his lantern at the time the accident happened, and could plainly see the bridge. The company had a right to expect that he would use reasonable care and would know, what was easily to be seen by his own observation, that the bridge had no floor nor railings, and the danger attending the climbing down a ladder on the side of a car at that place. The duties of his employment did not require him to climb down onto the bridge, nor was he requested so to do by any one, and if he made the attempt it was at his own peril. The bridge was constructed in the usual manner for the passage of trains, and was not intended to be, nor was it ever used by brakemen in coupling and uncoupling cars. While it was usual for the engines of freight trains to pull onto the bridge, in order to set out cars onto the stock-yards track, no coupling or uncoupling of cars was required to be done on the bridge. That work was always performed by the brakeman on the ground west of the bridge. Had the train not broken in two there would have been no necessity for a brakeman going onto the bridge. It could not be anticipated that the coupling would break when it did, so as to require an employee to leave the train and walk over the bridge. The defendant was not required to have it planked and barriers erected, in order to guard against every possible accident. It is only responsible when it fails to exercise ordinary care to prevent accidents which are liable to occur. The defendant must have failed to perform some obligation it owed the deceased, before there can be a recovery. The rule which we recognize is applied and illustrated in *Illick v. Flint & P. M. R. Co.*, 67 Mich. 632, 16 Am. Neg. Cas. 126, *ante*; *Koontz v. C., R. I. & P. R. Co.*, 65 Iowa, 224, 14 Am. Neg. Cas. 671*n*; *Morrison v. Phillips & Colby Construction Co.*, 44 Wis. 405; *Schultz v. C. & N. W. R. Co.*, 28 Am. & Eng. R. R. Cas. [Wis.] 407.

"The case of *Koontz v. C., R. I. & P. R. Co.*, *supra*, is quite similar in its facts to the one before us. Mr. Justice Seibers in the opinion says: 'The bridge in question was sufficient for trains to pass over it with safety. For this purpose due care did not require the bridge should be planked. If, however, it was necessary for employees to pass over the bridge in the performance of their duties, ordinary care would seem to require that barriers should be erected

or other precautions against accident used; the rule being, as we understand, when employees are required to use appliances in the performance of their duties that such appliances should be kept in suitable repair, and be reasonably sufficient for the purpose intended. Several authorities are cited in support of this proposition, and we do not understand the rule to be controverted by counsel for the defendant. Their contention is that it could not be anticipated something would occur which would render it necessary for an employee to stop the train at the place it did, and that it would be necessary for an employee to pass along the track and over the bridge, for the purpose of ascertaining what was the matter; and we think this is so. If this is not true, then every bridge must be erected at every cattle-guard; for it is impossible to tell where it may become necessary or prudent for a train to be stopped and an employee required, in the performance of his duty, to pass alongside of the train for some necessary purpose. There is no evidence tending to show that this bridge is an exception to those constructed at other places on the line of the road. Ordinarily it is not expected that employees will be required to walk across bridges, and they are not ordinarily constructed so that this can be done with entire safety, at least during the night. Ordinary care does not require that every possible contingency must be anticipated and guarded against, but only such as are likely to occur. That a railroad company should anticipate that a train may, for some necessary purpose, be stopped at a place other than the usual stopping place is possibly true, but at what place cannot be anticipated, and therefore they, in the exercise of ordinary diligence, are not required, as we have said, to plank every bridge or cattle-guard and have the whole track so guarded as to prevent accident to employees. The hazardous nature of the business is such that accidents occur for which the company is not responsible, and this is one of them.'

"We have carefully examined and considered the authorities cited in the brief of counsel for the defendant in error. Of the cases brought to our attention, *Franklin v. Winona & St. P. R. Co.*, 37 Minn. 409, 16 Am. Neg. Cas. 349, *ante*, is claimed by his counsel to be the most analogous to the one at bar. In that case, a brakeman on defendant's road, while making a coupling near a switch, fell into an open culvert and received injuries of which he died. The court, in speaking of the duty of a railway company to cover culverts and bridges on the line of its road, say: 'The general rule governing the duty of the defendant in the premises cannot perhaps be better stated than by adopting the language of one of the witnesses, viz., "to cover bridges and culverts on the line of their road within their yards and within a reasonable distance of switches, wherever brakemen would be apt to go in switching and coupling

cars." This is custom as well as duty, for the reason that an uncovered culvert would be a sure death-trap to brakemen while engaged in such work. By reason of some unforeseen accident or extraordinary occurrence a coupling might in instances have to be made any place on the line of the road, far distant from any yard or switch. But the company is not bound to anticipate such unusual occurrence; neither is it bound to take steps to guard its employees against the consequences of their own negligence. But whenever in the proper performance of their duties it would naturally and reasonably be anticipated that they would be apt to have to make these couplings it is the duty of the company to cover their culverts and bridges.'

"We see nothing in the Minnesota case that conflicts with the views we have expressed in this opinion.

"We have thus far, in the consideration of this case, assumed that Persinger climbed down the ladder on the side of the car, and on account of the bridge not having a floor and railings, he fell and lost his life. There is no conflict in the testimony bearing upon the question as to how the accident occurred; nor is there a single fact or circumstance disclosed by the evidence which tends to show that the deceased attempted to climb down off the car onto the bridge. No such inference can be properly drawn from the evidence. While, on the other hand, the testimony of the engineers — which is all the evidence given on that branch of the case — tends to show that he fell from the car. What caused him to fall no one knows. That part of the train on which he was standing was not moving, nor was an engine attached to it. It is plain to us that Persinger's death was the result of an unaccountable accident, for which no person was to blame. It was one of the perils usually incident to that kind of employment which the deceased assumed, and for which the law affords no remedy." * * *

BRAKEMAN COUPLING CARS CAUGHT BETWEEN PROJECTING TIMBER AND BOX CAR AND KILLED — NOMINAL DAMAGES. — In **ANDERSON, Adm'r, v. CHICAGO, BURLINGTON & QUINCY R. R. CO.**, 35 Neb. 95 (*June, 1892*), brakeman on freight train fatally injured, judgment for plaintiff for nominal damages, one dollar, in the District Court of Nuckolls county, was *affirmed*. The facts are stated in the opinion by NORVAL, J., as follows: "It appears that the intestate was, on November 7, 1887, in the employment of the defendant as brakeman on a freight train on the line of road from Wymore to Superior. At Wymore the train was made up, and contained, among others, a flat car loaded with long bridge timbers, some of which on one side projected over the ends of the car a sufficient distance to strike against the end of the box

car next to it. When the train reached Strang some of the cars were uncoupled and set out and others were taken in. Mossholder, while attempting to couple the flat car before mentioned to a box car, was caught between the projecting timbers and the box car and killed. Plaintiff insists that the car was loaded in such a manner as to endanger the lives of the employees, and that the defendant was negligent in placing it in the train and requiring the deceased to make the coupling. Defendant admits the accident and death of the intestate, but denies that its employees were negligent, and alleges that Mossholder was guilty of contributory negligence.

"Complaint is made of the giving of certain instructions, and that the damages assessed by the jury are inadequate." * * *

The rulings of the court are set out in the official syllabus to the report as follows:

"Where, in an action for damages against a railroad company for wrongfully causing the death of plaintiff's intestate, the plaintiff proves his case without disclosing any negligence on the part of his intestate, contributory negligence is a matter of defense, and the burden of establishing it is on the defendant.

"A verdict against the defendant in such an action will not be reversed on application of plaintiff, because of the giving of an erroneous instruction to the jury on the question of contributory negligence, its giving being error without prejudice.

"In case of a verdict in favor of the plaintiff, he is entitled to recover such a sum as the jury may deem from the evidence a fair and just compensation to the next of kin, for the pecuniary loss sustained by them, resulting from the death which is made the basis of the suit, not exceeding the statutory amount.

"*Held*: The evidence sustained the verdict for nominal damages."

BRAKEMAN INJURED TRYING TO BOARD "KICKED" CAR — FELLOW-SERVANT — EVIDENCE — RAILROAD NOT LIABLE. — In **ERB (Receiver of Kansas City, Wyandotte & Northwestern R. R. Co.) v. EGGLESTON**, 41 Neb. 860 (*September, 1894*), rear brakeman injured while trying to board caboose while car was being "kicked," judgment for plaintiff for \$16,000 in the District Court of Sage County was *reversed*, it being held that evidence was insufficient to establish negligence on the part of defendant, and that negligence, if any, was that of a fellow-servant. The operation of "kicking" cars, as shown by the evidence, is stated in the opinion by IRVINE, C., as follows: "The car to be kicked standing between the engine and the switch, the switch is thrown to the proper position, the car uncoupled from the engine and the engine started, shoving the uncoupled car as it moves. When suffi-

cient momentum has been given the car to move it to the desired point, the movement of the engine is stopped and the car allowed to move on, some one riding upon the car for the purpose of applying the brakes at the proper place for stopping. By this process caboose 408 had been kicked back upon the main line, Eggleston riding upon it and applying the brakes. Having brought caboose 408 to a stop, Eggleston alighted and, proceeding towards where the engine and caboose 409 were, he gave the signal to the other brakeman to pull the pin which connected caboose 409 with the engine. This signal is described in the testimony as a signal to kick and also as a signal indicating that Eggleston was ready to leap upon caboose 409 for the purpose of stopping it. The pin was accordingly pulled, the caboose thus disconnected with the engine, and the kicking process begun. As the car and engine approached Eggleston he gave a signal to "stop kicking." He testifies that the engine was at that time 100 feet east of him and was moving at the rate of twelve to fifteen miles per hour. As the caboose passed him he seized the hand-holds and endeavored to mount. According to his testimony, the speed of the engine had been checked to such an extent that there was a space of from eight to ten feet between the caboose and the engine. Eggleston's hands were wrenched loose from the hand-holds and he fell upon the track behind the caboose and in front of the moving engine, which passed over him, mangling both arms so that amputation was necessary, and inflicted other severe injuries. Eggleston, when he gave the signal to stop, was so situated that the side of the locomotive cab nearest him was that occupied by the fireman. The signal to stop was, therefore, received by the fireman and communicated by him to the engineer." * * *

BRAKEMAN INJURED — DEFECTIVE APPLIANCE — NEGLIGENT ACT OF ANOTHER BRAKEMAN — FELLOW-SERVANT — EMPLOYMENT OF SURGEON. — In CHICAGO, BURLINGTON & QUINCY R. R. CO. v. HOWARD, 45 Neb. 570 (June, 1895), brakeman injured, judgment for plaintiff in the District Court of Adams county for \$6,000 was reversed, the official syllabus (opinion by RYAN, C.) stating the case as follows:

" 1. A brakeman is a fellow-servant of another brakeman when both are employed upon the same train; and an accident which happens to one solely by reason of the negligence of the other does not render liable for consequent damages the common employer of both.

" 2. The happening of an accident through the displacement of a drawbar or coupler of a designated kind or design, is not sufficient proof that such kind or design of appliance is defective, when the displacement complained of is clearly shown to have been caused by the negligent and reckless manner in which the car equipped with such coupler or drawbar was violently pushed against another car.

"3. A surgeon is required in the exercise of his profession to employ only that degree of knowledge and skill ordinarily possessed by members of the same profession (1). Where one as a volunteer undertakes to provide necessary surgical services for another, he cannot be held liable in damages for the negligence or malpractice of such surgeon as he summons, provided such surgeon possesses the knowledge and skill ordinarily possessed by other surgeons, and the employer had no reason to suspect that such surgeon would neglect or fail to use his knowledge and skill to the advantages of his patient." Citing *Hewitt v. Eisenbart*, 36 Neb. 794.

CAR REPAIRER KILLED — FELLOW-SERVANT — VICE-PRINCIPAL — INSTRUCTION. — In **CHICAGO, BURLINGTON & QUINCY R. R. CO. v. SULLIVAN**, Adm'x, 27 Neb. 673 (1889), car repairer killed, judgment for plaintiff for \$1,500 in the District Court for Richardson County, was *reversed* for erroneous instruction. Opinion by MAXWELL, J., in which COBB, J., concurred; REESE, Ch. J., dissented. The official syllabus states the case as follows: "In an action by an administratrix to recover damages for the death of the decedent, a charge to the jury that if they believe from the evidence that the deceased, James Sullivan, came to his death through the wrongful act, default or negligence of defendant or its servants or employees, and not through his own wrongful act or negligence, then they will find for plaintiff and assess her damages at such sum as they believe from the evidence she should recover, not exceeding the sum claimed in her petition," is too broad and indefinite, and fails to distinguish between acts of a vice-principal and fellow-servant." "A person who is clothed by a corporation with the control and management of a distinct department in which his duty is that of direction and superintendence is a vice-principal."

1. In **OMAHA & REPUBLICAN VALLEY R'y Co. v. HALL**, 33 Neb. 229 (1891), an action by a railroad employee for damages for negligent treatment of injuries by the defendant's surgeon, judgment for plaintiff for \$500 was *reversed*, the general verdict being clearly inconsistent and in conflict with a special finding of fact submitted to the jury, and the verdict should have been set aside.

"It is the duty of a jury to find its verdict in accordance with the law as given in the instructions of the court. When they clearly violate this duty, the court should set aside their verdict. The refusal of the court to do so upon proper application is reversible error. See *Aultman v. Reams*, 9 Neb. 487; *Meyer v. M. P. R. Co.*, 2 Neb. 342." Opinion by COBB, Ch. J.

SUPERIOR SERVANT — VICE-PRINCIPAL. — In **SMITH v. SIOUX CITY & PACIFIC R. R. CO.**, 15 Neb. 583 (1884), the appeal was on questions of practice, and judgment for defendant in the District Court for Madison county was *reversed*. The opinion was by REESE, J. "The action is brought upon the theory that the plaintiff was employed by the defendant and placed under a superior who held to plaintiff the relation of vice-principal. That this superior, although a servant of the defendant, was, so far as this plaintiff was concerned, the employer, authorized to hire and discharge other employees at his own pleasure and to exercise authority over their movements." The court held that the evidence tended to support this theory and that the case should have been submitted to the jury.

SECTION FOREMAN CLEARING SNOW FROM RAILROAD CUT KILLED BY RAPIDLY MOVING TRAIN WHILE TRYING TO REMOVE HAND CAR FROM TRACK TO AVOID COLLISION — SIGNALS — INSTRUCTIONS. — In **OMAHA & REPUBLICAN VALLEY R'Y CO. v. KRAYENBUHL**, 48 Neb. 553 (May, 1896), section foreman killed, judgment for plaintiff in the District Court of Butler county, was *reversed* for erroneous instruction as to signals. The opinion by IRVINE, C., states the facts as follows:

"John Krayenbuhl, the deceased, was a section foreman in the employ of the railway company. During the forenoon of January 18, 1892, he was proceeding westward along the track of the railway track on a hand car carrying a railway rail, and accompanied by one man under his direction and control. Snow was falling and a wind prevailed. The depth of snow and the velocity and direction of the wind are matters concerning which the evidence is conflicting; but these facts are not very material to the questions of law presented. The track, after pursuing a straight course to the westward for some distance, crossed a highway, and soon thereafter curved to the south, following in a general way the meanderings of a stream. In its course it passed through some cuts. Krayenbuhl and his companion, Martin, upon entering these cuts, found that the track was obstructed by snow. Krayenbuhl sent Martin back toward the east with a flag to warn approaching trains, and proceeded to shovel snow from the track ahead of the hand car, pushing the hand car on as he progressed. When Martin, carrying the flag, had gone something over a hundred yards east of the hand car, a train consisting of a locomotive and way car, running at a speed estimated by different witnesses at from eighteen to forty-five miles per hour, approached from the east. Martin signaled the train to stop, and Krayenbuhl, evidently on hearing the train approach, removed the

rail from the hand car and was in the act of removing the hand car from the track, when the train struck him, breaking his neck and killing him. The negligence alleged was in running the train at a dangerous rate of speed, in failing to give warning of its approach, and in disregarding the signal given by Martin." * * *

"There is a conflict in the evidence as to whether the statutory signals were given of the approach of the train to the highway east of the point where the accident occurred. Several witnesses testifying on behalf of the plaintiff say that they heard no such signals. The engineer and conductor both testify, however, that the statutory signal was given. The court instructed the jury in effect that the highway signals were for the benefit of persons traveling upon the highway, and that the failure to give them would not tend to charge the railway company in this case. In view of the decision, rendered since the trial, in *Chicago, B. & Q. R. Co. v. Metcalf*, 44 Neb. 849, 12 Am. Neg. Cas. 237n, these instructions were too broad, but the error was prejudicial to the plaintiff rather than to the railway company. But the court followed these instructions by the following: "However, if you find from the evidence that the law governing railway trains on their approaching highway crossings was not complied with in this case, and that the whistle was not blown or the bell rung on the train in question, approaching Foxe's crossing, then such fact should be considered by you as affecting or touching the credibility of the witnesses for the defendant who testified on this point, and also in considering by you whether or not said train was being run and operated in a careful and proper manner or otherwise." This instruction was prejudicially erroneous as to the railway company in two respects: In the first place, it was a distinct direction to the jury to consider whether or not the signals had been given as affecting the general credibility of the witnesses for the defendant who testified on this point. Both engineer and conductor had testified that the signals were given. The engineer testified that it was a stormy day, with a strong wind, while other witnesses testified that it was reasonably clear and the wind not strong. The engineer testified that the engine was covered with snow; that snow was banked up against the front windows of the cab, and that the only lookout that he could maintain was through a side window; that in keeping such lookout his face had been frozen; that the train passed from time to time through snow-banks which completely obstructed his view and compelled him to withdraw his head; that he had passed through such a snow-bank immediately before seeing Martin with the flag; that he saw Martin when the latter was not more than thirty feet from him, and immediately took all available steps to stop the train. Witnesses for the plaintiff had testified that no attention whatever was paid to Martin's signal, and that the train

proceeded without apparent check until the accident occurred. The effect of giving the instruction complained of was that the jury should examine into the question whether a signal had been given on approaching Foxe's crossing, and upon that fact to determine the engineer's credibility upon all other facts in the case; and this without regard to whether the engineer's testimony as to having given the signal was wilfully false or otherwise. The maxim, *falsus in uno, falsus in omnibus*, applies only where a witness has knowingly and wilfully testified falsely as to a matter of fact. *Buffalo County v. Van Sickle*, 16 Neb. 363; *Stoppert v. Nierle*, 45 Neb. 105. In the second place, the instruction was erroneous because by its last clause it directed the jury that they should consider whether or not the highway signal had been given, as determining whether or not the train was generally run and operated in a careful manner. As already indicated, under the circumstances the failure to give the highway signal may have been important in determining whether the railroad company's negligence in not giving it caused the injury; but it could have no possible effect in determining whether or not the railroad company had been negligent in other respects. The jury would have no right to infer a negligent operation of the train in other particulars from a failure to give this signal, but the instruction was that it might do so. For the error in this instruction the judgment must be reversed." * * *

The official syllabus to the report of the KRAYENBUHL case, *supra*, states the rulings as follows:

" 1. In the operation of a railway train outside of towns and villages, no rate of speed, however great, is alone sufficient evidence to establish negligence. *Burlington & M. R. R. Co. v. Wendt*, 12 Neb. 76, *followed*. See, also, *Chicago, B. & Q. R. Co. v. Grablin*, 38 Neb. 90, 12 Am. Neg. Cas. 239n; *Mo. Pac. R'y Co. v. Hansen*, 48 Neb. 232, 12 Am. Neg. Cas. 239n.

" 2. The foreman of a section crew and an engineer in charge of a locomotive drawing a train not connected with the work of the sectionmen are not fellow-servants within the meaning of the rule forbidding a recovery for injuries caused by the negligence of a fellow-servant. *Union Pac. R. Co. v. Erickson*, 41 Neb. 1 [case next reported herein], *followed*.

" 3. The maxim, *falsus in uno, falsus in omnibus*, applies only where a witness has knowingly and wilfully testified falsely as to a matter of fact. *Buffalo County v. Van Sickle*, 16 Neb. 363; *Stoppert v. Nierle*, 45 Neb. 105, *followed*.

" 4. It is error to instruct a jury that it may consider whether or not statutory highway signals were given by an approaching train in determining whether the train was in other respects negligently operated.

“ 5. A sectionman cannot be charged with contributory negligence because he remained upon the track for the purpose of removing an obstruction endangering an approaching train, when he might have saved himself by abandoning the track and leaving the train to its fate.”

SECTION HAND INJURED BY PIECE OF COAL WHICH FELL FROM PASSING TRAIN — FELLOW-SERVANT RULE — RAILROAD COMPANY LIABLE. — In **UNION PACIFIC R. R. CO. v. ERICKSON**, 41 Neb. 1 (*June, 1894*), judgment for plaintiff in the District Court of Dodge county for \$1,625 (leg being injured) was *affirmed*. The official syllabus (per opinion by IRVINE, C.) states the case as follows:

“ 1. The plaintiff was a sectionman employed by the defendant. He was engaged in repairing the roadway and stepped away from the track to permit a fast passenger train to pass. He stood about twelve feet from the track. As the train passed him a large piece of coal fell from the tender, struck the ground, and, being shattered, a fragment rebounded and struck the plaintiff, injuring him. The evidence showed that it required the full capacity of the tender to store enough coal to supply the engine during its run, and that the tender had been loaded to its full capacity from a chute without any precautions as to the safe disposition of the coal in the tender; that it was the fireman's duty to place in safety any coal found in a dangerous position. *Held*, that under these facts it was proper to submit the case to the jury as to whether the company had been negligent in loading the coal.

“ 2. While the facts justifying an inference of negligence must be established by the evidence, and their existence must not be left to the conjecture of a jury, and while, ordinarily, negligence cannot be presumed merely from the happening of an accident, still facts may be established by circumstances, and the same facts which prove the accident may be circumstances from which the facts justifying an inference of negligence may be found to exist.

“ 3. In such a case evidence tending to show that it was practicable to place railings about the top of the tenders to safely increase their capacity, and that this tender was not provided with such a railing, held, to be admissible.

“ 4. Employment in the service of a common master is not alone sufficient to constitute two men fellow-servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other. To make the rule applicable there must be some consociation in the same department of duty or line of employment.”

RAILROAD EMPLOYEE INJURED WHILE REMOVING AND REPLACING SIGNAL POSTS — DEFECTIVE APPLIANCE — CONTRIBUTORY NEGLIGENCE — INSTRUCTION. — In **UNION PACIFIC R. R. CO. v. O'HERN**, 24 Neb. 775 (*July Term, 1878*), railroad employee injured, judgment for plaintiff in the District Court for Douglas county was *affirmed*, the official syllabus (opinion by REESE, Ch. J.) stating the ruling as follows:

“ 1. Upon an examination of the evidence, it was *held* that the verdict of the jury was sustained thereby.

“ 2. In an action for damages resulting from a personal injury, where the court instructed the jury, in substance, that if they found from the evidence that the labor in which the plaintiff was engaged for defendant under employment was of a dangerous character, and of which the plaintiff had knowledge, that he could not recover, but the testimony of the witnesses was contradictory as to whether the employment was dangerous or not, it was *held*, that the verdict of the jury finding in favor of the plaintiff was sustained by sufficient evidence, and would not be molested.”

The facts in the O'HERN case, *supra*, are stated by REESE, Ch. J., as follows:

“ It appears from the evidence that defendant in error was employed by the proper employing agent of plaintiff in error to assist in removing signal posts from along the line of the railroad track, and when necessary replace those removed with new ones. The method of removing the posts was by removing the earth in which they were planted with a spade or shovel, and lifting the post from the ground by hand. About one week after he had commenced the work assigned him in his employment, the person under whom he was placed changed the method of removing the posts, by which a rope or cable sixty or seventy feet in length was made fast to one of the cars in the train with which they were connected, and as the train approached the post its speed was slackened so that one of the hands could get off, seize the detached end of the rope which was thrown out of the car by a fellow-workman, run to the post, wrap it around it, and then hold to the outer end of the rope to prevent it from slipping, and upon the rope being made taut by the motion of the train, the post was pulled out of the ground or broken off, when the person holding the end of the rope would relax his hold and allow the post and rope to fall to the ground. Sometimes the rope would become detached from the post and the train would pass on, the rope being drawn by the person remaining in the car. At other times the rope would not become detached from the post, and the train would stop, when it could be removed. It was while engaged in this kind of labor that defendant in error received his

injury. He placed the rope around the post and held it, but when the post fell the rope did not become detached, when he ran up to it to unloose the rope as the post was being dragged upon the ground. While thus engaged the forward end of the post met with an obstruction by which it was thrown around violently, striking him and injuring him. In their efforts to remove the post by the method last named no part of the earth was removed. The post was generally planted about three feet deep in the earth. When the rope was made taut the movement of the train was with such momentum that the post was jerked from the ground or broken, or the rope was broken.

"Upon the branch of the case that the verdict is not supported by sufficient evidence, we can only say that, while the evidence on the part of defendant in error was not as clear as might be desired upon some of the leading features of the case, yet there was sufficient to sustain the verdict." * * *

LABORER INJURED BY DEFECTIVE CROWBAR — RAILROAD LIABLE. — In **UNION PACIFIC RY CO. v. BRODERICK**, 30 Neb. 735 (*November, 1890*), judgment for plaintiff in the District Court for Douglas County for \$1,995 was *affirmed*. It was held (per NORVAL, J.) that: "Where an employer negligently provides his workmen with improper and unsafe apparatus with which to perform the work, and a workman, without any fault on his part, is injured owing to the employer's neglect to provide suitable, safe and proper appliances, the employer is liable for the injury." The facts of the case are stated in the opinion by NORVAL, J., as follows:

"The plaintiff below, Patrick Broderick, brought suit against the defendant to recover \$1,995 damages sustained from an injury received while in the employ of the defendant, alleging that on October 15, 1886, he was so employed as a laborer, attending the masons of defendant in building the stone piers of its bridge over South Thirteenth street, in the city of Omaha; that he was acting under the direction and control of the defendant's foreman, and without fault or negligence on his own part, while so acting with other workmen, he moved a large stone, by means of rollers, onto two planks, placed over a hole, six feet square, intended to receive the stone; that the planks were provided by the defendant's foreman, and while obeying his orders, and performing his labor as directed, he was in the act of lifting up one side of the stone by means of a crowbar in order to slide the stone down into the hole on the opposite side, and while so lifting, one of the planks on which the stone rested, being of insufficient strength, broke in two and gave way, thereby throwing the crowbar out of his hands, and throwing him backwards into a hole of like dimensions behind him and thereby

breaking his arm, by reason of which he has suffered great bodily pain, has been unable to labor for a long time, and that his disability therefrom is permanent; that such injury was caused by the negligence of the defendant in selecting and directing to be used as a means of labor and construction insufficient, unsafe and defective planks for the purpose of lowering and placing the stone in the abutment of the bridge, without contributory negligence on the plaintiff's part." * * *

RAILROAD EMPLOYEE INJURED BY FALL OF PILE-DRIVER — RAILROAD COMPANY LIABLE. — In **FREMONT, ELKHORN & MISSOURI VALLEY R. R. CO. v. LESLIE**, 41 Neb. 159 (*January Term, 1894*), railroad employee injured, judgment for plaintiff in the District Court of Holt county was *affirmed conditionally*. The verdict rendered was for \$5,000, but the trial court required plaintiff to remit \$2,350 or to have verdict set aside. Remittitur was entered and judgment rendered for \$2,650. Defendant argued that the damages were still excessive and the Supreme Court upheld that view. On condition that \$1,450 was remitted from the judgment, the Supreme Court affirmed the judgment for plaintiff for \$1,200, otherwise the judgment of District Court would be reversed. The facts of the case are stated in the opinion rendered by RAGAN, C., as follows: "The undisputed evidence is that on December 5, 1887, Leslie and some eight other men were in the employ of the company and under the charge of a foreman named Howlett. This force of men was on that date engaged in constructing an ice-break to protect a bridge of the company across the Cheyenne river by driving piles in said stream; that in said work they used a pile-driver, some thirty feet high, and a hammer weighing some 2,600 pounds. To elevate this hammer a team of horses was hitched to the end of a rope and this passed over a wheel or pulley at the top of the pile-driver. The pile-driver was stayed by means of three guy-ropes. Early in the morning on the date above mentioned, while Leslie was on or near the top of this pile-driver oiling the aforesaid wheel or pulley, the pile-driver fell and Leslie was injured" (1). * * * On the subject of damages the court

1. *Fall of bank of earth — Railroad employee injured.* — In **BURLINGTON & MISSOURI R. R. CO., IN NEBRASKA v. CROCKETT**, ADM'X, 17 Neb. 570 (1885), foreman of a gang of men at work on a gravel train, while assisting in shoveling gravel and earth from a pit into the cars, fatally injured by the falling upon him of a

large quantity of gravel and earth from the bank, judgment of the District Court for Lancaster County was *reversed* and cause remanded with directions to District Court to permit plaintiff below to amend her petition. The appeal was on questions of pleading and practice.

said the judgment was too large. After discussing the evidence as to plaintiff's injuries the court said: "The evidence does not show that by reason of the fall and injury on December 5, 1887, Leslie has lost any considerable time; nor does the record show that he has undergone any severe suffering or pain. If Leslie, by reason of his injury, has been put to any expense for medical services or nurses, the record does not show it. The evidence in the record does support the jury's finding that Leslie was injured; that he was injured through the negligence of the employees of the company; and that his injury was not the result of his own contributory negligence. At the time of his injury he was a young man about twenty-six years of age and earning about \$50 a month, and the evidence, to give it the most liberal construction in Leslie's favor, does not disclose that his ability to labor and to earn money is materially different from what it was before the date of the accident. The evidence does not disclose that from the time of the accident until the date of this trial, a period of about three years, that he was idle more than one-third of the time from all causes, and as a result of the injury sustained not more than a few months." * * * Plaintiff's testimony tended to show that his shoulder was dislocated and his ankles sprained or bruised.

INDEPENDENT CONTRACTOR — WORKMEN CONSTRUCTING TRACK INJURED — COLLISION OF TRAIN WITH CATTLE ON TRACK — LIABILITY OF RAILROAD COMPANY — EVIDENCE — EXPERT — SPEED OF TRAIN — CONDITION OF TRACK — ERRONEOUS INSTRUCTION. — In **CHICAGO, BURLINGTON & QUINCY R. R. CO. v. CLARK**, and the **SAME COMPANY v. HENKLE, DUNKEE, THOMAS, JORDAN, AND STANLEY** (six actions against the railroad company and others), 26 Neb. 645 (*May, 1889*), appeal by the C., B. & Q. R. Co. from judgment for plaintiffs in the District Court for Lancaster county, judgment was *reversed*. The opinion was delivered by REESE, Ch. J., who stated the case as follows:

"These several causes were instituted in the District Court of Lancaster county against plaintiff in error. The issues were formed separately, but when they were called for trial they were consolidated and tried as one case, the jury returning separate verdicts in each case, which were all in favor of defendants in error, and assessing to each the damages found due them. A motion for a new trial was filed, and upon the same being overruled, judgment was rendered. The causes were substantially the same in all the cases, and may be briefly stated as follows:

"The actions were all against the Nebraska & Colorado R. R. Co. and John Fitzgerald, and the Chicago, Burlington & Quincy

R Co. as defendants. It was alleged in the petition that the Nebraska & Colorado R. R. Co. was a corporation duly organized and existing under and by virtue of the laws of the State of Nebraska, and that the defendant, John Fitzgerald, was a railroad contractor, and a resident and citizen of the State of Nebraska; and that the Chicago, Burlington & Quincy R. R. Co. was a corporation duly organized and existing under the laws of the State of Illinois; that said defendants were, on October 19, 1886, in the course of the construction and completion of a railroad, and about two miles from the station of Deweese, in this State; that the plaintiff was employed by the defendant Fitzgerald at an agreed price of \$1.75 per day in laying track from the terminus mentioned into the station of Laurence; that the said defendants were possessed of the locomotive, tender and train of cars thereto attached of about sixteen in number; and at the time of the injuries complained of the railroad company referred to had in their employ, and in charge and control of its train of cars, a conductor, engineer, fireman and two brakemen, who were running the train from about one mile from the said station of Laurence to the said station of Deweese, at a high and dangerous rate of speed, and at not less than thirty miles per hour. Some of the cars were flat, some of them box cars, and one water car, one engine and tender, and the train was carelessly and negligently made up for that trip by said agents, servants and employees of the said railroad company by running the engine backwards and by placing the said engine in the middle of the train, with about ten cars in front of said engine, and about six cars in the rear thereof, and with a box car in front, towards the said station Deweese, with no cowcatcher on in front of the train; and while carelessly and negligently running the train at the great rate of speed mentioned, by the wrongful act, neglect and fault of defendants while they were engaged in managing and conducting the business of the said defendant, and without fault on the part of the plaintiff, the train ran into a herd of cattle near a high bridge and the cars and all thereon in front of the engine were thrown down upon the ground below a distance of about twenty feet, by reason of which the plaintiff was greatly injured, etc." * * *

The appeal was taken by the C., B. & Q. R. R. Co. alone. The learned judge discussed the points at length and his rulings are set out in the syllabus to the official report as follows:

"Where a petition charged several defendants jointly with operating a railroad construction train in a negligent and careless manner, by negligently running it at a high rate of speed through and by a herd of cattle, which were near the track over which the train was passing, whereby a part of the cattle came onto the track, and by which the plaintiff, who was riding thereon, was injured, it was

held, that the District Court did not err in overruling a motion to require a more specific statement in the petition by showing which one of the defendants was operating the road, if either one; or if all, whether jointly or severally; which one employed the trainmen, and which was charged with the alleged negligence.

"It is not necessary to the admissibility of the testimony of a witness as to the rate of speed a train of cars was running at the time of an accident, that such witness should be an expert in the matter of the speed of trains. Any person of sound mind and judgment, who has observed trains running or other objects in motion, and who has an opinion thereon based upon seeing the train at the time in question, is a competent witness upon the subject, the jury being the judges of the weight of his testimony.

"In such action it was *held* not to be error for the trial court to permit the introduction of evidence tending to show the unsafe condition of the track at the place where the accident occurred, as tending to prove negligence on the part of those in charge of the train.

"An instruction in a case of the kind referred to that it was negligence on the part of those in charge of the train to run it at full speed over any part of the track known by them to be frequented by cattle, unless that part of the track was guarded, *held*, error.

"Where a contractor undertook to lay the track upon a newly-constructed railroad for the railroad company owning or leasing the same, the company to furnish the construction train and the men necessary to operate it, they to be employed and paid by the company, to whom alone they were responsible while running the train, the contractor having no authority to control them in that behalf, it was *held*, that if by the carelessness of those in charge of the train while passing over the track, an employee of the contractor lawfully on the train, and without fault or negligence on his part, was injured, the railroad company owning and controlling the movement of the train would be liable for the damages sustained."

INDEPENDENT CONTRACTOR — EMPLOYEE INJURED — NEGLIGENCE OF ENGINEER — RAILROAD LIABLE. — In **UNION PACIFIC R. R. CO. v. BILLETER**, 28 Neb. 422 (1890), judgment for plaintiff in the District Court for Dodge county was *affirmed*. The case is stated in the syllabus to the official report (opinion by REESE, Ch. J.) as follows: "Plaintiff in error (defendant below) was engaged in operating a railroad in this State, and for the purpose of securing the removal of its coal from the coal pockets, in its coal sheds, into the tenders attached to the engines by which its trains were moved, gave an independent

contract to one H. to place the coal in the proper pocket prepared by plaintiff in error and from which to load the tender of the locomotives by which the line was operated. He hired his own assistants, paying them out of his own means, by whom alone they were employed and discharged, and to whom alone they looked for their compensation. Defendant in error (plaintiff below) was employed by him to assist in this work, his duty being to notify the engineers as to the proper position in which their engines should be placed for receiving the coal, and to place the coal in the tender, but in which the engineer rendered no assistance. It was the duty of the engineer to place the engine in its proper place, leaving it stationary until the coal was loaded, but in the discharge of which he received no assistance from defendant in error. It was held that the engineer and defendant in error were not fellow-servants under the rule exempting the railroad company from damages resulting from the negligent acts of fellow-servants."

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY V. BELL.

Supreme Court, Nebraska, February, 1895.

[Reported in 44 Neb. 44.]

1. RAILROAD RELIEF FUND ASSOCIATION — RAILROAD CHARTER — *ULTRA VIRES*. — The scheme of the Burlington Relief Department, organized and conducted by the Chicago, Burlington and Quincy Railroad Company and its employees, examined and set out in the opinion, and *held*: 1. As said railroad company is a corporation and no part of its charter is set out in the pleadings or evidence in the record, the court is unable to determine whether the act of the railroad company in participating in the organization and conduct of the Relief Department is within or without the express or implied powers conferred by its charter. 2. In the absence of all evidence on the subject, the court cannot presume such act of the railroad company is *ultra vires*.
2. RELIEF FUND — RAILROAD EMPLOYEE — CONTRACT — RELEASE. — The contract signed by an employee of said railroad company on becoming a member of said Relief Department, to the effect that if he should be injured and receive moneys from the relief fund of said Relief Department on account thereof, that the acceptance of such relief fund should operate as a release of such employee's claim against said railroad company for damages because of such injury, construed, and *held*: 1. That such contract of an employee did not lack consideration to support it. 2. That the promise made by the employee to the Relief Department for the benefit of the railroad company was available to the latter as a cause of action or defense. 3. That such

contract was not contrary to public policy. 4. That the effect of such contract was not to enable the railroad company to exonerate itself by contract from liability, for the negligence of itself or servants. 5. That the employee did not waive his right of action against the railroad company, in case he should be injured by its negligence, by the execution of the contract. 6. That it is not the execution of the contract that estops the injured employee, but his acceptance of moneys from the Relief Department on account of his injury after his cause of action against the railroad company on account thereof arises.

3. RELIEF FUND — EMPLOYEE INJURED — ACCEPTANCE OF BENEFIT — RELEASE. — An employee of said railroad company and a member of said Relief Department was injured through the negligence of the railroad company. After his injury there was paid to him from the funds of the Relief Department \$60 on account of such injury. The employee accepted this money and then sued the railroad company for damages for negligently injuring him. There was no showing that such employee was induced to become a member of said Relief Department, or execute said contract of release, or accept the money paid to him by said Relief Department, through fraud or mistake. *Held*, that the employee could not recover.

(Syllabus by the court.)

ERROR from the District Court of Lancaster county. The case is stated in the opinion. *Judgment reversed*.

T. M. MARQUETTE and J. W. DEWEESE, for plaintiff in error.

SAWYER & SNELL, and CAPPS & STEVENS, for defendant in error.

Ragan, C.—Joseph Bell sued the Chicago, Burlington & Quincy Railroad Company (hereinafter called the "Railroad Company") in the District Court of Lancaster county for damages. As a cause of action he alleged that on December 13, 1890, he was a switchman in the employ of the Railroad Company at New Castle, in the State of Wyoming; that as such switchman it was his duty to couple freight and passenger cars with the locomotive engines of the Railroad Company, and in order to do so to step inside the rails and between the engine and the car to which it was to be coupled; that it had been the custom and it was the duty of the Railroad Company to furnish for switching purposes a switching engine so constructed as to enable a switchman to safely pass between such engine and the car to which it was to be attached; that on the date aforesaid the switch engine of the Railroad Company at New Castle was disabled; that there was in the yard at New Castle at that time belonging to the Railroad Company an ordinary road engine used between the

towns of New Castle and Cambria for the purpose of hauling heavy freight trains over the grades between said towns; that said road engine had attached to the rear end of its tender two large sand boxes which extended cut to the rear of the tender a distance of some twelve or eighteen inches; that by reason of said sand boxes being attached thereto said road engine was wholly unsafe for switching purposes and especially for switching of passenger coaches, all of which was unknown to Bell; that on said date the yardmaster of the Railroad Company, whose orders Bell was obliged to obey, directed him, Bell, to couple a passenger coach on said road engine; that to obey said order it was necessary for Bell to go inside the rails between said coach and said road engine; that Bell, without any negligence on his part, went between said coach and road engine for the purpose of coupling the two together, and while in the act of making such coupling the coach and road engine were pushed together and he was crushed between the coach and one of the sand boxes attached to said engine, and injured.

Among other defenses the Railroad Company pleaded: "Further answering the said petition, the defendant says that prior to the time of this accident, the defendant and its employees organized an association for the relief of employees of said company injured while in the service of the said defendant, known as the Burlington Voluntary Relief Department; that said association thus formed was a department for the protection and relief of employees injured in the service of the said company, providing for the payment of certain sums of money for injuries received in the service of said company, and for maintenance and support under certain specifications and terms and conditions, as provided for in the organization and rules of the said Burlington Voluntary Relief Department; that at and prior to the time of said injury the plaintiff was a member of said association, and when injured, and subsequent thereto on account of being such member, the said plaintiff received and accepted the benefits due to him by reason of his membership in said Relief Department, and the defendant company paid to the plaintiff the amount of the benefits due to him by reason of his membership in said Relief Department on account of said injury, and the plaintiff received and receipted for the said amounts of money thus paid to the

plaintiff as benefits accruing to him by reason of said injury on account of his membership in said association, and in consideration therefor duly released the defendant from any and all liability on account of the said accident, other than the benefits accruing to him by reason of his membership in said Burlington Voluntary Relief Department. The defendant furthermore alleges that it is discharged and released from any and all liability that might exist in favor of the plaintiff on account of the said injury, and the plaintiff is barred and estopped from claiming any damages from this defendant by reason of his membership in the said Relief Department and the acceptance by him of the benefits thereof paid as hereinbefore stated."

Bell replied to this defense as follows: "And plaintiff further replying admits that prior to the time of the accident complained of there had been created an organization known as the Burlington Voluntary Relief Department, and that he had become a member of said organization by paying the usual initiation fee, and ever thereafter maintained his membership therein by paying all regular dues and charges imposed upon him by said association, and that by reason of his membership and continued good standing in said association he did by the terms thereof become and was, upon the happening of the injury complained of, entitled to certain benefits, amounting to the sum of \$60, which he received at the hands of said association, but plaintiff says that said benefits so received were not, nor was it ever intended or contemplated that they should be, in settlement or compensation of the injuries most wrongfully and negligently inflicted upon him by defendant. And further replying plaintiff expressly denies that said dues were paid him as a contribution for his releasing defendant from its liability for its wrongs and injuries to him, or that he ever in any way executed to defendant a release for the injury complained of."

Bell had a verdict and judgment and the Railroad Company brings the case here on error.

It appears from the evidence in the record that the Burlington Voluntary Relief Department, mentioned in the answer of the Railroad Company quoted above, and hereinafter called the "Relief Department," is a department of the Railroad Company's service. The object in establishing the Relief De-

partment is declared to be "the establishment and management of a fund to be known as the relief fund, for the payment of definite amounts to employees contributing thereto who are to be known as members of the relief fund, when under the regulations they are entitled to such payment by reason of accident or sickness, or in the event of their death, to the relatives or other beneficiaries designated by them." The relief fund consists of voluntary contributions from employees of the Railroad Company, income derived from investments, and interest paid and appropriations made by the Railroad Company. The Railroad Company has general charge of the Relief Department, guarantees the fulfilment of its obligations, takes charge of all moneys belonging to the relief fund, makes itself responsible for the safe keeping of such moneys, and pays to the Relief Department interest at the rate of four per cent. per annum on monthly balances in its hands, supplies the necessary facilities for conducting the business of the Relief Department, and pays all the operating expenses thereof. There is also an advisory committee, which has general supervision of the operations of the Relief Department. This committee is composed of five members of the board of directors of the Railroad Company, and the contributing employees on each division of the Railroad Company furnish one member of the committee, and the general manager of the Railroad Company is *ex officio* a member and chairman of such committee. The moneys received for the relief fund are held by the company in trust for the Relief Department, and any money not required for immediate use is invested under direction of the advisory committee. All employees of the Railroad Company who are contributors to the relief fund are designated as members of the relief fund. No employee of the Railroad Company is required to become a member of the Relief Department. All employees of the Railroad Company who volunteer to and do become members of the Relief Department are divided into classes according to the monthly wages received. Those receiving the highest wages per month make the highest contribution to the Relief Department. Each member contributes monthly a specified sum according to the wages received. All employees of the Railroad Company who pass a satisfactory medical examination and are possessed of good

noral characters are eligible for membership in the Relief Department. If a contributing member is under disability, that is, if he is unable to work, whether such disability arises from an injury received while at work or arises from sickness, he is entitled to be paid from the relief fund a certain sum per day. This amount varies according to the wages which the employee is receiving at the time his disability occurs. And in case of the death of the employee the beneficiary designated by him is entitled to be paid a specified sum according to the class of employees to which the deceased belonged. The employees of the Railroad Company, in order to become members of the Relief Department, make an application to it in writing, and in this application among other things they agree: "I also agree that in consideration of the amounts paid and to be paid by said [Railroad] Company for the maintenance of the Relief Department, the acceptance of benefits from said relief fund for injury or death, shall operate as a release and satisfaction of all claims for damages against said company arising from such injury or death which could be made by me or my legal representatives."

The evidence shows that this Relief Department was organized on June 1, 1889, and from that day to December 31, 1891, the employees of the Railroad Company had paid into the Relief Department or relief fund \$359,639.96; that the Railroad Company in the time aforesaid had paid to the relief fund, interest on the monthly balances of its money, \$1,040.34; that there had been paid during said time to members of the Relief Department on account of sickness and death from sickness \$187,885.50; during said time there had been paid to members of the Relief Department on account of accidents and deaths from accidents \$193,070.35; that the Railroad Company during said time had paid the entire expenses of the Relief Department; that no part of the relief fund moneys paid in by the employees had been used for defraying the expenses of the Relief Department; that from the organization of the Relief Department to December 31, 1891, the Railroad Company had paid out of its treasury for expenses of the Relief Department, for interest on monthly balances, and to make up deficiencies under its guaranty, \$114,012.08. The undisputed evidence in the record is that Bell was an employee of the Railroad Company; that on October 27, 1890,

he applied to the Relief Department for membership therein, such membership to take effect on the 18th of said month; that his application was approved and he became a member of the Relief Department on November 10, 1890; that he was a member in good standing in said Relief Department at the time he was injured; that he was paid during the time he was disabled by said injury the following sums:

December 15 to 31, 1890, 17 days.....	\$17.00
January 1 to 31, 1891, 31 days.....	31.00
February 1 to 11, 1891, 11 days.....	11.00
	<hr/>
Or a total of	\$59.00
	<hr/>

That these payments were made to Bell and received by him in accordance with the Rules and Regulations of the Relief Department, of which he was a member, and were paid to him on account of the injury for which he brings this action. Bell does not deny that he voluntarily became a member of the Relief Department; that he signed the application containing the agreement on his part that in case he was injured while in the employ of the company and accepted benefits from the relief fund on account thereof, that the acceptance of such benefits should be in settlement and discharge of the Railroad Company's liability to him for such injury; nor does he deny that during the time he was disabled from the injury sued for there was paid to him from the relief fund of the Relief Department on account of such injury the sums of money above stated, and that he accepted said money. It is not argued here, nor attempted to be shown either by pleading or evidence, that Bell did not voluntarily become a member of the Relief Department; nor that he did not execute the contract in question with full knowledge of its terms and effect. Nor is it claimed that he was induced to become a member of the Relief Department or to accept benefits paid him during his disability by any fraud, coercion, or mistake.

Counsel, for the purpose of overthrowing this defense, argue: 1. That Bell's agreement, that his acceptance of the benefits from the relief fund on account of his injury should operate as a release of his claim for damages against the Railroad Company for such injury, is without consideration; 2, that the act of the Railroad Company in participating in the

organization of the Relief Department and conducting it is *ultra vires*; 3, that to enforce Bell's contract or release would be contrary to public policy.

If the contract of Bell is without consideration it must be because he received no consideration for the contract, or that the Railroad Company parted with no consideration by reason thereof. By reason of Bell's membership in the Relief Department, if he was disabled by sickness he became entitled to certain sums of money out of the relief fund; if he was injured and thus disabled he became entitled to certain sums of money out of the relief fund; and if he died from any cause while in the service of the company and a member of the Relief Department, it became liable to a beneficiary designated by him for a specific sum of money. Here, then, was a consideration moving to Bell for the contract and promises he made and the contributions made by him to the Relief Department. The Railroad Company's guaranty of the obligations of the Relief Department and its assumption of the expenses of conducting the Relief Department constitute a consideration moving from it sufficient to support the promises of Bell and every other member of the Relief Department. *Homan v. Steele*, 18 Neb. 652; *Pryor v. Hunter*, 31 Neb. 678. If Bell had not been a member of the Relief Department, and after he had received the injury sued for herein had accepted from the Railroad Company the amount of money which he received from the Relief Department, or other sum of money, by virtue of his promise that the payment and acceptance of such money should be in settlement and discharge of his claims against the Railroad Company for damages for his injury, can it be doubted that the payment to and acceptance by Bell of such money, in the absence of fraud or mistake, would bar this action? The fact that Bell contracted and promised the Relief Department that if it paid him the money it did from its relief fund and he accepted such payments that then such payment and acceptance should be in settlement and discharge of the Railroad Company's liability for the injury, does not change the principle. "Where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though the consideration does not move directly from him." *Shamp v. Meyer*, 20 Neb. 223.

The *ultra vires* argument.—For an act of a corporation to be

ultra vires such act must be beyond the express and implied powers given such corporation by its charter. The Railroad Company is a corporation. Bell in his replication to the defense under consideration has not set out the Railroad Company's charter, nor any part of it; nor is there any evidence in the record on the subject. We are therefore unable to say whether the act of the Railroad Company in participating in the organization and conduct of this Relief Department is within or without its express and implied powers as fixed by its charter. We certainly cannot presume, in the absence of all pleading and evidence, that the part taken by this Railroad Company in the organization and conduct of the Relief Department confessedly organized from amongst its own employees and for their benefit, is a power neither granted nor permitted by its charter.

Should this release of Bell's be held void as against public policy? A contract or release similar to the one under consideration was considered and held not to be void as against public policy in *Johnson v. Phila. & R. R. Co. (Pa.)*, 29 Atl. Rep. 854; *Owens v. Balt. & O. R. Co.*, 35 Fed. Rep. 715; *State v. Balt. & O. R. Co.*, 36 Fed. Rep. 655. The argument at the bar is that the effect of Bell's release is to enable the Railroad Company to exonerate itself from liability for the negligence of itself and servants. This is not a fair construction of the contract. Nothing in the rules and regulations of the Relief Department, nor in Bell's contract or release, released or attempted to release the Railroad Company from liability to Bell for negligently injuring him because he was a member of the Relief Department, contributed thereto, and such Relief Department has funds which Bell was entitled to have paid to him on account of his membership and injury. If the rules and regulations of the Relief Department or the terms of Bell's contract were such that his membership in the Relief Department, and its possession of funds of which Bell had a right to avail himself, of themselves released or attempted to release the Railroad Company from liability to Bell for injuring him, then we agree with counsel that such rules and regulations and contracts would be void as against public policy. Again, if the rules and regulations of the Relief Department compelled him in case of his injury by the Railroad Company to accept the benefits and funds of the Relief De-

partment in release and discharge of the Railroad Company's liability to him for such injury, then such rules and regulations and contract would be void as against public policy. But nothing in the rules and regulations of the Relief Department, and nothing in Bell's contract or release, obligates or compels him in case he is injured by the Railroad Company to accept the funds of the Relief Department in release and discharge of any claim he may have against the Railroad Company for injuring him, nor makes the funds themselves—though Bell is entitled to them and refuses to accept them—a release of the Railroad Company's liability. As was held in *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645, 12 Am. Neg. Cas. 229*n*, neither the employee's membership in the Relief Department nor his execution of the contract under consideration was a waiver of the employee's right of action against the Railroad Company for injuring him (1). In that case Wymore was a member of the Relief Department, and was killed through the negligence of the Railroad Company. After his death his widow accepted from the funds of the Relief Department the death benefit to which she was entitled by virtue of being Wymore's widow and his membership in the Relief Department. She then brought a suit as administratrix against the Railroad Company for damages for negligently killing her husband. This suit was brought under chapter 21 of the Compiled Statutes, 1893; and we held that the right of action conferred by the statute was for the benefit of the widow and next of kin of the deceased who had lost

1. In *CHICAGO, BURLINGTON & QUINCY R. R. Co., v. WYMORE, ADM'X*, 40 Neb. 645 (May, 1894), 12 Am. Neg. Cas. 229*n*, section foreman killed in a collision between trains, the question of release and discharge arising out of benefits received from relief department was passed upon by IRVINE, C., as follows (per official syllabus):

"A railroad company had connected with it a relief department composed of employees who contributed certain amounts from their wages towards an insurance fund for their relief when injured and for

the relief of beneficiaries named in case of death. The railroad company collected the funds, furnished the necessary clerical force, and guaranteed payment of loss. A member of this association agreed that in consideration of the amounts paid by the company, the acceptance of benefits for injury or death should operate as a release and satisfaction of all claims for damages against the company arising from such injury or death which could be made by him or his legal representatives. He was killed in an accident upon the railroad. The beneficiary named was his

his life through the negligence of the Railroad Company, and that the acceptance by the widow of the death benefit from the funds of the Relief Department was a release and discharge of her cause of action against the Railroad Company given by that statute for her own benefit; but that neither Wymore's membership in the Relief Department, nor his contract with it, nor the acceptance of the death benefit by the widow, operated to bar or release her cause of action as administratrix against the Railroad Company in favor of Wymore's children. We adhere to that case. After Bell was injured he had the option to decline payment from the relief fund by reason of his injury, and rely upon his cause of action against the Railroad Company, and take as compensation for such injury what a jury might award him. The acts of Bell in becoming a member of the Relief Department and executing the contract under consideration did not and do not bar his right of action against the Railroad Company for negligently injuring him. In other words, by becoming a member of the Relief Department and by executing the release in question he did not waive nor bar any cause of action which might thereafter arise in his favor against the Railroad Company by reason of being injured or killed through the negligence of the Railroad Company or its employees. It was his action in accepting payments from the relief fund after he was injured and after his cause of action arose against the Railroad Company that now estops him. Notwithstanding his agreement and his membership in the Relief Department, whatever right of action he had against the Railroad Company for the injury he received remained unaf-

widow, who accepted the benefit, and by instrument in writing received it 'in full satisfaction and discharge of all claims or demands on account of or arising from the death of said deceased which I now have or can hereafter have' against either the relief fund or the railroad company. Subsequently, as administratrix, she brought suit for damages against the railroad company on behalf of herself and children. *Held*: 1. That the deceased's contract did not of itself waive a right of action; 2, that neither that contract, nor the accept-

ance of the money or release of liability by the widow, operated to bar a right of action by the administratrix on behalf of the children; 3, that her voluntary acceptance of the benefit and release of the company did operate to bar any action for her own benefit." Citing *Fuller v. B. & O. Employees' Relief Ass'n*, 67 Md. 433; *Graft v. B. & O. R. Co.*, 8 Atl. (Pa.) 206; *Owens v. B. & O. R. Co.*, 35 Fed. 715; *Martin v. B. & O. R. Co.*, 41 Fed. 125; *Roesner v. Hermann*, 8 Fed. 782.

fectured by such membership and agreement; but after his injury, after his cause of action arose, he made his choice between the benefits which he could and did receive from the Relief Department and what he might obtain by litigation, and, so far as this record shows, he made such choice knowingly, deliberately, and without fraud, coercion, or mistake, and he must be bound thereby. *Leas v. Penn. R. Co.* (Ind.), 37 N. E. Rep. 423. The expression, "contrary to public policy," we suppose means good public policy. This phrase has no fixed legal significance. It varies and must vary with the changing conditions and laws of civilizations and peoples. But we have been unable to discover anything in the contract made the subject of defense to this action unconscionable, contrary to law, or subversive of morals or good government. The judgment of the District Court is contrary to the law and the evidence of the case and is reversed and the cause remanded.

Reversed and remanded.

STREET CAR DRIVER KICKED BY HORSE — EVIDENCE — CASE FOR JURY — NONSUIT REVERSED. — In **LEIGH, Adm'r, v. OMAHA STREET R'Y CO.**, 36 Neb. 131 (*January, 1893*), judgment of nonsuit in the District Court of Douglas county was *reversed*. The official syllabus (per opinion by MAXWELL, Ch. J.) states the case as follows:

"1. It is the duty of a master to furnish his servants with such appliances for his work as are suitable and may be used with safety, and if the servant is injured by reason of defective appliances furnished by his master, the latter will be liable for damages unless he can show that he has used due care in the selection of the same.

"2. The driver of a street car propelled by horses was given a span of horses to propel the car, one of which was a broncho and would kick when struck, which fact was known to the master but of which the driver was not aware and was not informed by the master. The car was under the care of a conductor, who permitted the same to be overcrowded, every available foot of space, both in the car and on the platform, being filled. On attempting to start the car the broncho refused to pull, whereupon the driver, who was crowded close to the broncho, slapped it with the lines, when it kicked him in the abdomen, causing death in a few hours. *Held*, that there was sufficient testimony to submit the questions of fact to a jury."

TEAMSTER, A MINOR, IN EMPLOY OF STREET RAILROAD COMPANY, INJURED BY ELECTRIC WIRE — DEFECTIVE APPLIANCE — ERRONEOUS INSTRUCTION. — In **LINCOLN STREET R'Y CO. v. COX**, 48 Neb. 807 (*June, 1896*), minor employee, a teamster, injured by electric wire, judgment for plaintiff in the District Court of Lancaster county for \$800 was *reversed* for erroneous instructions. The facts are stated by IRVINE, C., as follows:

“Cox, a minor, by his next friend, brought this action against the Lincoln Street Railway Company to recover for personal injuries sustained by him while in the employ of the railway company. He recovered a judgment for \$800. Cox was employed in driving a team which drew what is called a ‘tower wagon,’ being a wagon bearing a scaffold used for the purpose of repairing the trolley wires by means of which the defendant’s electric railway was operated. At a point near the intersection of Seventeenth and South streets a fire-alarm wire passed above the trolley wire, crossing it at an angle of forty-five degrees and placed about fourteen inches above the trolley wire at the point of the crossing. The evidence tends to show that the fire-alarm wire was so located before the trolley wire was erected. Three co-employees of Cox were engaged in repairing the wires. In some manner, while their work was progressing, the fire-alarm wire fell across the trolley wire and thence to the ground, where it came in contact with Cox, injuring him by burning and electric shock. The negligence alleged in the petition was in the construction of the trolley wire in dangerous proximity to the fire-alarm wire, and in permitting them to come in contact. On the latter branch of the case the court instructed the jury that if the contact was brought about by the negligence of any of Cox’s companions in the work, there could be no recovery, as these men were his fellow-servants. This feature was therefore eliminated from the case, and the verdict must have been based upon the construction and maintenance of the trolley wire dangerously near the fire-alarm wire.” * * *

The official syllabus states the rulings in the Cox case as follows:

“1. A master does not insure his servant against defective appliances. The rule is that he is bound to use such care as the circumstances reasonably demand to see that the appliances furnished are reasonably safe for use and that they are afterwards maintained in such reasonably safe condition.

“2. He is not liable for defects of which he has no notice unless the exercise of ordinary care under all the circumstances would have resulted in notice.

“3. In an action by a servant against his master for personal injuries the jury cannot be permitted to infer negligence from the

mere fact that an accident happened. A want of ordinary care must be pleaded and proved.

"4. Instructions in such case which make the case turn upon the fact of a defect in the appliances instead of upon negligence in furnishing and maintaining such appliances are erroneous."

In discussing the points set out in paragraphs 1 and 2 of the foregoing syllabus the court said: "Sioux City & P. R. Co. *v.* Finlayson, 16 Neb. 578 (16 Am. Neg. Cas. 530, *ante*), Mo. Pac. R. Co. *v.* Lewis, 24 Neb. 848 (16 Am. Neg. Cas. 562, *ante*), and Union Pac. R. Co. *v.* Broderick, 30 Neb. 735 (16 Am. Neg. Cas. 576, *ante*), all recognize this rule. In Hammond *v.* Johnson, 38 Neb. 244, it is said that it is the duty of a master to furnish for the use of his servant in the course of his employment proper and safe appliances and instruments for the performance of the services required; but this language is used in such a connection that no intimation could reasonably be drawn from it that the duty is absolute (1). On the contrary, it clearly appears that it is only for negligence in failing to perform the duty that a liability exists. A peculiar rule is stated in Leigh *v.* Omaha Street R. Co., 36 Neb. 131 (16 Am. Neg. Cas. 592, *ante*). This is as follows: "It is a fundamental rule of law that the master is to furnish his servants with such appliances for his work as are suitable and may be used with safety, and if the servant is injured by reason of defective appliances placed in his hands by the master, or his agent, the master will be liable, unless he can clearly show that he has used due care in the selection of the same." It would seem from this that the plaintiff's case would be made out on proving that he was injured through a defect in the machinery, and that the burden would then devolve upon the master

1. In GEORGE H. HAMMOND COMPANY *v.* JOHNSON, 38 Neb. 244 (November, 1893), plaintiff, an employee of defendant, severely injured by a vicious horse furnished to him by defendant to drive, judgment for plaintiff for \$3,500 in the Circuit Court of Douglas County, was *affirmed*. The jury rendered a verdict for \$4,750, but remittitur was filed for amount over \$3,500. The rulings of the Supreme Court (per RYAN, C.) are stated in the official syllabus to the report as follows:

"It is the duty of a master to furnish for the use of his servant, in the course of his employment, proper and safe appliances and instruments

for the performance of the services required. And if the master fail so to do, he is liable for such damages as are the direct result of such negligence, unless the servant himself is guilty of such negligence as contributes directly to the injury; and this rule applies irrespective of whether the appliances and instruments so furnished were animate or inanimate.

"Where a master, a corporation, furnished a horse for the use of its service in the line of his employment, wherein said horse injured the servant, the jury were properly instructed that even if they should find the horse was vicious and dangerous,

not only to show by a preponderance of the evidence, but to "clearly show" that he had used due care. We do not think that it was the intention of the writer of the opinion to convey such an impression; because every one of the ten cases he cites in support of the rule is to the effect that the master is not absolutely responsible for defects, but liable only where he had failed to exercise due care in the premises, and that the plaintiff must plead and prove such want of care."

STOCK YARDS — SWITCHMAN INJURED — DEFECTIVE TRACK — LIABILITY OF STOCK YARDS COMPANY.— In **UNION STOCK YARDS COMPANY OF OMAHA v. CONOYER**, Adm'r, 38 Neb. 488 (November, 1893), death of switchman in defendant's employ caused by alleged defects in track, judgment for plaintiff in the District Court of Douglas county for \$5,000 was *affirmed* (1). It was held that it was unnecessary to allege in plaintiff's petition that he had no knowledge of the defects, that being a matter of defense which, to admit proof, must be pleaded. Opinion by MAXWELL, Ch. J.

On rehearing of the CONOYER case, the former decision in 38 Neb. 488, was *reaffirmed*. See 41 Neb. 617 (June, 1894). The case is very fully stated on rehearing in the opinion by HARRISON, J., from which the facts are taken as follows:

"The stock yards company own and operate a number of railroad tracks uniting the various packing houses at South Omaha with the railways centering there. Over these tracks cars are moved from the packing houses to the railways. At the time this cause of action arose there was in the employ of the stock yards company two

still that the plaintiff could not recover unless the jury further found from the testimony that the master, through its managers or officers, knew, or by the exercise of proper care and diligence *might have known*, of the vicious and dangerous character of the horse.

"The evidence in this case justified the jury in finding that the agent who, in the employ of a common master with the servant, directed the said servant to use the horse, whereby said servant was injured, was not his mere co-servant, but in giving the instruction aforesaid was a vice-principal and the master was, therefore, properly held liable for the injuries

received by the servant in obeying such instruction."

1. In **UNION STOCK YARDS COMPANY OF OMAHA v. LARSEN**, 38 Neb. 492 (September Term, 1893), switchman in employ of defendant in its yards injured while attempting to uncouple a car from an engine, his left hand being caught between the top lip of the drawbar of the engine and the headpin in the drawbar on the car, judgment for plaintiff in the District Court of Douglas County for \$3,900 was *affirmed*. The sole question was as to sufficiency of the evidence to sustain the verdict.

'engine crews' so called, one employed at night, the other by day. An engine crew consisted of an engineer, fireman, two brakemen and a foreman. The deceased, William McAnnelly, was foreman of the engine crew operating during daytime. On February 5, 1890, at 8 o'clock in the morning, the stock yards company's foreman, the immediate superior to McAnnelly, directed McAnnelly to take his crew and engine, go west over the tracks of plaintiff in error to the Omaha Packing Company's establishment and bring from there a number of freight cars. He went as directed and did what was necessary to get the cars together preparatory to hauling them away. After the train was made up, and about five or ten minutes before it started east, McAnnelly was seen looking the train over — we assume, for the purpose of seeing that everything was all right, as it is in evidence that to do so was included in his duties. That was the last seen of him alive. The train started east. After it had gone a short distance a brakeman on the drawbar of the last car discovered McAnnelly's dead body between the rails of the track over which the train had passed. The forward trucks of the box car next to the last in the train had jumped the track. The theory of the defendant in error was that McAnnelly was on the end of the car under which were the trucks discovered to be off the track; that cinders and coal and rubbish which had accumulated on the track, over which the train was passing at the time McAnnelly was killed, caused the trucks to leave the track; that this caused an unusual and unexpected movement of the end of the car, or a jar or a jolt sufficient to and which did throw McAnnelly from the car and down between the cars to the track, where he passed under the cars and was dragged and crushed to death." * * *

CAVE-IN OF TUNNEL — EMPLOYEE KILLED — PROXIMATE CAUSE — DEFECTIVE APPLIANCES — ASSUMPTION OF RISK — EXTRA-HAZARD — NOTICE — INSTRUCTION — DEATH — STATUTE — PARTIES — PLEADING. — In **KEARNEY ELECTRIC CO. v. LAUGHLIN**, 45 Neb. 390 (June, 1895), action by administratrix for death of her intestate, an employee of defendant, who was killed by the cave-in of a tunnel in which he was at work, judgment for plaintiff in the District Court of Buffalo county was *reversed* for erroneous instruction (1). The opinion by RAGAN, C., sets out very fully the

1. *Fall of bank of earth — Employee injured — Master liable.* — In **STEPHENSON v. RAVENSCROFT**, 25 Neb. 678 (1889), judgment for plaintiff (Ravenscroft) in the District Court for Douglas County, on verdict rendered for \$900, was *affirmed*. Plaintiff was in the employ of defendant, engaged at the foot or bottom of a high bank which was being excavated or taken down, and while so at work the defendant ordered a force of

facts and assignments of error. The rulings are stated in the official syllabus to the report of the case as follows:

"1. A widow, as administratrix, sued a corporation for negligently causing the death of her husband. The action was based on chapter 21, Compiled Statutes, 1893 (2). The petition alleged that the deceased left seven minor children, the oldest thirteen years and the youngest five months of age, 'wholly dependent' on the deceased 'for their support and maintenance.' *Held*: 1. That the petition was not open to the objection that it did not aver facts showing that the persons for whose benefit the suit was brought had, by reason of the death of the intestate, sustained pecuniary injuries within the meaning of said statute; 2, that the words 'support and maintenance,' as used in the petition, meant food, clothing and shelter, and the words 'wholly dependent' implied that the deceased was the person and the only person whose legal and moral duty it was, and to whom the children looked, and upon whom they relied, to furnish the necessaries of life; 3, that it is not absolutely necessary that a petition based on this statute should contain the words 'damage, injury or loss.' It is sufficient in that respect if it appears from the averments of the petition that by reason of the

men to go to the top of the bank and wedge the same down, plaintiff not knowing of the order nor being warned thereof; and while the said men were so working at the top a large amount of frozen dirt fell down and struck plaintiff, severely injuring him. Defendant held liable for negligence. Opinion by MAXWELL, J.

2. The statute referred to (chap. 21, Compiled Statutes, 1893), is as follows:

"Sec. 1. That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or company or corporation which would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although

the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars. *Provided*, that every such action shall be commenced within two years after the death of such person."

death of the intestate a pecuniary loss, injury or damage has resulted to the wife and next of kin of the deceased.

" 2. Such an action as the one at bar was unknown to the common law, and is purely a creature of statute; but solely because of that the courts will not give the statute a technical or narrow construction.

" 3. Whether the rule of the common law, that statutes in derogation thereof are to be strictly construed, is in force in this State, doubted.

" 4. The intestate was killed by the caving in of the earth while digging a tunnel for the corporation. The evidence, set out at length in the opinion, examined, and held to support the finding of the jury that the negligence of the corporation was the proximate cause of the death of the intestate.

" 5. The rule that a servant by his contract of employment assumes the ordinary risks and dangers incident thereto cannot be successfully invoked as a defense by a master, unless he shows that the machinery, tools and appliances furnished by him to the servant were reasonably safe and fit for the performance of the work in hand, and which the servant in the execution of his work, by the exercise of ordinary care on his part, might use with reasonable safety to himself, and that the appliances, machinery or tools, which caused the injury to the servant, were, when used by him, obviously defective and dangerous. *Mo. Pac. R. Co. v. Baxter*, 42 Neb. 793, 16 Am. Neg. Cas. 555, *ante*.

" 6. Under an assignment that the court erred in admitting or rejecting evidence this court cannot review anything. Under an assignment that the court erred in admitting the evidence of a named witness, if the record shows that any part of the evidence of such witness was properly received, the assignment will be overruled.

" 7. On the trial the court instructed the jury as follows: 'You are to determine from all the facts and circumstances, as shown by the evidence, whether the deceased was exposed to unusual or extraordinary danger in digging the tunnel; and if you find that he was, this would be negligence on the defendant's part and the plaintiff could recover,' etc. *Held*: 1. That the court might have properly told the jury that if the deceased, by working in the tunnel at the time and in the manner and under the circumstances that he did, was thereby exposed to unusual or extraordinary danger without knowing it and without opportunity to know it, that that fact was evidence of negligence on the part of the company; but it was not for the court to say that the fact rendered the company guilty of negligence; whether it did was for the jury; 2, that the giving of the instruction was reversible error.

" 8. On the trial the District Court instructed the jury as follows:

'If the danger was unusual and not incident to the employment, and the employee had no knowledge of the unusual danger, and could not with ordinary care and prudence have discovered it, he would not be deemed to have consented to incur such unusual risk.' *Held*, that the instruction was correct."

EMPLOYEE INJURED WHILE OPERATING LAUNDRY MANGLE — UNGUARDED MACHINE — KNOWLEDGE OF DEFECT BY EMPLOYEE — ASSUMPTION OF RISK. — In **MALM v. THELIN**, 47 Neb. 686 (*January Term, 1896*), appeal from judgment for plaintiff for \$2,500 in the District Court of Douglas county, judgment was *reversed* on the ground of assumption of risk by the injured party, etc. Mary Thelin (plaintiff below) was in the employ of Charles E. Malm (defendant below), and while operating a mangle in defendant's laundry was injured by the machine cutting three fingers of her left hand (1). The negligence alleged was failure to provide for a guard or protection for the operator's hands, and knowledge by defendant of such defect. The court (per IRVINE, C.) reviewed the evidence which showed that attention was called to the defect and that plaintiff was aware of it. In discussing the rule of assumption of risk, the court said:

"A servant assumes the risks arising from defective appliances used or to be used by him, or from the manner in which the business in which he is to take part is conducted when such risks are known to him, or apparent and obvious to persons of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objection as to the hazards. *Mo. Pac. R. Co. v. Baxter*, 42 Neb. 793, 16 Am. Neg. Cas. 555, *ante*; *Dehning v. Detroit Bridge & Iron Works*, 46 Neb. 556. In this State this rule has been modified to this extent that where the servant in obedience to the requirements of his master incurs the risk of machinery or appliances which, although dangerous, are of such a character that they may be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume

1. *Minor employee injured by machinery — Master not liable.* — In **McMAHON v. O'DONNELL**, 32 Neb. 27 (*May, 1891*), minor employee injured by machinery, judgment for defendant in the District Court for Lancaster County was *affirmed*. The official syllabus to the report (opinion by MAXWELL, J.) states the case as follows: "In an action by a girl of thirteen years of age to recover damages for the loss of three fingers cut

off in a straw cutter while in the employ of defendant, the defense in substance was that the operating of the straw cutter was no part of her duties, and that she operated that machine voluntarily and without the knowledge of the defendant. *Held*, that a clear preponderance of the evidence sustained the defense and that there was no material error in the instruction."

the risk of injury from accident resulting from the master's negligence. *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 16 Am. Neg. Cas. 530, *ante*; *Lee v. Smart*, 45 Neb. 318; *Dehning v. Detroit Bridge & Iron Works*, *supra* (1). Therefore, the presumption is that a servant operating machinery obviously defective has assumed the risk occasioned by the use of such machinery, and in order to recover he must rebut that presumption, and in order to rebut it he must not only prove, but he must plead, the facts which create an exception to the rule as, for instance, that, on complaint to the master, a promise was made to remove the defect and the machinery was used relying upon that promise. In *Mo. Pac. R. Co. v. Baxter*, *supra*, a judgment was reversed because the petition did not plead such exceptions, and in *Dehning v. Detroit Bridge & Iron Works*, *supra*, an amendment had been required in a similar case before the plaintiff was permitted to introduce evidence of such exceptions. The following cases also hold that in order for the plaintiff to avail himself of such exceptions, they must be specially pleaded. *Bogenschutz v. Smith*, 84 Ky. 330, 15 Am. Neg. Cas. 223; *Internat. & G. N. R. Co. v. Doyle*, 49 Tex. 190; *Louis. N. A. & C. R. Co. v. Sandford*, 117 Ind. 265, 14 Am. Neg. Cas. 483; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669;

1. In *LEE v. SMART*, 45 Neb. 318 (June, 1895), teamster in employ of defendant injured in jumping from heavily loaded wagon to avoid imminent danger, the team having become unmanageable while descending a bridge road, the negligence alleged being overloading the wagon with lumber and failing to supply it with a brake or similar appliance, judgment for plaintiff in the District Court for Douglas County was *affirmed*. It was held (as per official syllabus, opinion by Post, J.) that: "Where a servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such a character that they may not be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence." *Sioux City & P. R. Co. v. Finlayson*, 16 Neb. 578, 16 Am. Neg. Cas. 530, *ante*, followed.

In *DEHNING, ADM'R, v. DETROIT BRIDGE & IRON WORKS*, 46 Neb. 556 (December, 1895), verdict directed for defendant and judgment thereon, in the District Court of Douglas County, was *affirmed*. The action was instituted by plaintiff as administrator of the estate of Adam C. Dehning, deceased, to recover damages for the death of plaintiff's son, while in defendant's employ, which death was alleged to be caused by defendant's negligence. The intestate was employed by defendant to heat rivets used in fastening together certain parts of a viaduct being constructed by defendant; the heating was done in a small forge, which was placed upon planks laid on the framework of the upper portion of the viaduct, at a distance of about thirty feet from the ground or the surface of the street beneath; coal was used as fuel for the forge and was kept on the ground beneath the structure; part of intestate's labor was to pro-

Stephenson *v.* Duncan, 73 Wis. 404; Coal & Car Co. *v.* Norman, 49 Ohio St. 598. In this case the plaintiff, without pleading the particular exception to the general rule referred to, was permitted, over objections, to introduce evidence of the existence of that exception. This was erroneous, and particularly prejudicial, because it was neither pleaded nor proved that the defect was not obvious, that the plaintiff was inexperienced, or that other circumstances existed except the one referred to which would permit a recovery, and the case finally rested largely on the fact of this promise." * * *

EMPLOYEE STRUCK BY HEAVY BLOCK OF ICE — FOREMAN — AGENT — FELLOW-SERVANT — MASTER LIABLE. — In **CRYSTAL ICE COMPANY v. SHERLOCK**, 37 Neb. 19 (*May, 1893*), employee acting under foreman's orders in trying to disengage a block of ice which stuck fast on descending chute in defendant's ice house, struck by a heavy block of ice which was sent down said chute, judgment for plaintiff in the District Court of Douglas county was *affirmed*. It was held (as per official syllabus, opinion by RYAN, C.) that: "Where a foreman, having charge of laborers, directs one of them to perform certain work, in such manner and under such circumstances as to subject the said laborer

cure this coal from where it was placed in the street, for use in the forge, whenever needed. The negligence alleged was the insecure approaches to the forge and failure to provide safe and proper appliances for use, by reason of which the intestate, without any fault on his part, fell from the viaduct to the ground below and was killed. The points decided in the opinion by HARRISON, J., stated in the official syllabus, are as follows:

"1. A person who contracts to perform labor or services for another is presumed to have so contracted in view of the risks ordinarily incident to or connected with the employment. He assumes all such risks.

"2. An employee assumes the risks arising from defective appliances used or to be used by him, or from the manner in which a business in which he is to take part is conducted, when such risks are known to him, or apparent and obvious to persons

of his experience and understanding, if he voluntarily enters into the employment or continues in it without complaint or objection as to the hazards.

"3. The above rule has been modified in this State as follows: 'Where a servant, in obedience to the requirements of his master, incurs the risk of machinery or appliances which, although dangerous, are not of such character that they may not be safely used by the exercise of reasonable skill and caution, he does not, as a matter of law, assume the risk of injury from accident resulting from the master's negligence.' Sioux City & P. R. Co. *v.* Finlayson, 16 Neb. 578, 16 Am. Neg. Cas. 530, *ante*; Lee *v.* Smart, 45 Neb. 318 [reported in preceding paragraphs herein].

"4. When the evidence is insufficient to sustain a verdict for plaintiff, it is proper practice for the trial court to direct a verdict for defendant."

to great danger of injury, the company for whom the said foreman is acting cannot shield itself from liability for damage under such circumstances caused directly to such laborer by the negligent order of such foreman, upon the ground that the only negligence imputable to the foreman consisted in the performance of an act of mere manual labor in setting in motion the agency which caused the injury, and that thereby the foreman, as to such act, was reduced to the grade of a co-servant of the injured party."

EXPLOSION OF STEAM KETTLE — MASTER LIABLE — INSTRUCTION — WORDS AND PHRASES. — In **JOSEPH GARNEAU CRACKER CO. v. PALMER**, 28 Neb. 307 (1889), employee, a machine cake baker, injured by the explosion of a steam kettle in which sugar and other articles were being melted to be used in manufacturing cakes, judgment for plaintiff in the District Court for Douglas county was *affirmed*. "An instruction that it was the duty of a master who employed a servant in the use of machinery to 'use ordinary and reasonable care and judgment' in providing suitable and safe machinery for the use to which it was to be put, *held*, not erroneous by reason of the use of the word 'judgment,' it being synonymous with 'prudence' in the sense in which it was used." Opinion by REESE, Ch. J.

FALL OF ELEVATOR — EMPLOYEE FATALLY INJURED — MASTER LIABLE. — In **OBERFELDER et al. v. DORAN, Executrix**, 26 Neb. 118 (March, 1889), judgment for plaintiff in the District Court for Douglas county was *affirmed*, on the facts set out in the syllabus to the official report (per opinion by COBB, J.) as follows: "Isaac and Simon Oberfelder were the lessees of a large, double-store building in which they carried on a wholesale millinery business. To this store building was attached and used by I. and S. O., their employees and customers, in ascending to the second, third, and fourth stories of said building, also in descending to and ascending from the basement thereof, and was also used by I. and S. O., and their employees in carrying goods into and from different stories of said building, and empty boxes and other litter from the same, a hydraulic passenger and freight elevator. The beams, upon which rested the axles or journals of the main wheel or pulley, over which ran the cable which sustained the traveler or carriage of said elevator, were composed of pine lumber, which, at the date of the cause of action hereinafter mentioned, by reason of dry-rot, in connection with the numerous knots therein, had become and were unsuitable, improper and unfit for such use. Bernard Doran, husband and testator of Julia Doran, was in the employment of I. and S. O., either as their servant or

casually employed expressman, and as such was lawfully upon the traveler or carriage of said elevator, when, by reason of the weak, knotted, and rotten condition of said beams, they split, broke, and fell, precipitating said B. D. to the bottom of the basement of said building, and bringing down upon him the said main wheel or pulley, breaking his legs, and inflicting other injuries upon him, by reason of which he soon afterwards died. A verdict and judgment for the plaintiff sustained."

Liability of master for tort of servant resulting in injuries to third person.

Person shot by watchman or guard — Scope of employment.

In *DAVIS, ADM'X, v. HOUGHTELLIN*, 33 Neb. 582 (1891), an action for the wrongful killing of plaintiff's intestate by an employee of defendant, the deceased being a trespasser, as defendant alleged, on defendant's premises, and was shot by defendant's guard or watchman, it was held that a master is liable to third persons for damages resulting from the negligence of his servants only when the latter is acting within the scope of his employment. Citing, among other cases, *Miller v. B. & M. R. Co.*, 8 Neb. 219. Judgment sustaining demurrer to plaintiff's petition *affirmed*. Opinion by NORVAL, J.

Mistake of telegraph clerk — Scope of employment.

In *WESTERN UNION TELEGRAPH CO. v. MULLINS*, 44 Neb. 732 (1895), it was held that "it is familiar law that a master is not liable for the acts of his servant unless those acts have been done in the line of the servant's duty and in furtherance of the master's business, or, as sometimes expressed, the acts must be within the servant's apparent scope of employment." This rule was applied on the following facts: "At the instance of the plaintiff one P. sent a telegraph message to the chief of police at Seattle, Washington, inquiring whether plaintiff's husband was there employed by a certain company. P. left orders to deliver the answer to the plaintiff. The telegraph company delivered to the plaintiff a message dated Aspen, Colorado, and saying: 'H. is here. Come at once. Will meet you at Glenwood Springs. Answer here if coming.' In fact this message was not an answer to the plaintiff's and had no relation thereto. The plaintiff went to the telegraph office and asked the clerk to write a message in reply. The clerk asked where it should be sent. Plaintiff replied to Seattle. The clerk said, 'This is from Glenwood Springs.' Plaintiff replied, 'Is not this the answer to the dispatch which P. sent to Seattle?' The clerk said, 'Certainly it is the answer. They have got him at Glenwood Springs and want you to meet him there.' Plaintiff then asked if Glenwood Springs was on the route to Seattle and if it was far from Seattle. The clerk said it was on the route and he did not think it was very far from Seattle. Plaintiff then went to Seattle, but did not find her husband. The expense of the trip to Seattle and the loss of time caused thereby were the damages allowed by the jury. *Held*: 1. That the clerk's statement that Glenwood Springs was on the route to Seattle and not far therefrom was not within the line of his duty or the apparent scope of his employment, and the company was

not liable for the consequences of that statement. 2. That plaintiff's going to Seattle was not a consequence reasonably to be considered as arising according to the usual course of things from the delivery to plaintiff by the telegraph company of the wrong message, and that, therefore, such damages could not be recovered. Judgment for plaintiff for \$167.20 reversed.

MINER INJURED BY FALL OF BUCKET IN MINE — KNOWLEDGE OF DANGER — ASSUMPTION OF RISK — CONTRIBUTORY NEGLIGENCE — NONSUIT. — In **PATNODE v. HARTER et al.**, 20 Nev. 303 (*Supreme Court, Nevada, April Term, 1889*), judgment of nonsuit in the District Court of the State of Nevada, White Pine county, was *affirmed*. **BAKER & WINES** and **HENRY RIVES**, appeared for appellant (plaintiff below); **WREN & CHENEY**, for respondent. The opinion was delivered by **MURPHY, J.**, who stated the facts of the case as follows:

"This is an action to recover damages for injuries received by plaintiff while employed at work in defendants' mine. The court below granted a nonsuit upon the ground that the testimony introduced by the plaintiff showed that the plaintiff had by his own negligence proximately contributed to the injuries he received. The testimony shows that plaintiff was forty-two years of age; that he had been engaged in the business of mining for a number of years; that he had been at work for defendants for a period of sixteen days; that the mine of defendants was worked with a windlass over an incline, which was mostly at an angle of forty-five degrees; the lower part of the incline was about sixty degrees; that there were skids and two runways for buckets, about eight inches apart; that there was a ladderway on one of the runways; that three buckets were in use in the incline — one going up as the other came down and one was being filled while the loaded one was hauled up and the empty one lowered; that three of the employees were in the incline — two at the windlass, and one at the bottom, filling the buckets; that it was a custom of these men to take turns about at the windlass and filling the buckets, and all did the same kind of work at times; that on the day the injuries were received plaintiff was at work at the bottom of the incline filling the buckets; that he had put a few inches of dirt in the bottom of the bucket, then six drills, and one short pick, and then filled the bucket to within a few inches of the top with dirt; that plaintiff was looking up the incline, and the bucket got caught; "that one of the men at the windlass hallooed to loose the bucket," and he started up to relieve the bucket, and when up about twenty-five feet from the bottom of the incline the rope broke, and the bucket fell upon him causing the injuries he received; that it was the rule of the mine that no man should follow up a loaded bucket; that the men at the windlass were, however, in the habit of calling to the man below to come up and

loosen the bucket, and the man below was in the habit of so doing; that the rope used was an inch rope; that it had been in use for two or three weeks; that there was rope in the office to be put on when a new rope was needed; and when the bucket caught, as it was apt to do when tools were put therein, and sometimes from rough places in the skids, it was the custom for the windlass men to try and shake it loose, and sometimes they would pull on the rope. Plaintiff knew it was dangerous to follow the bucket up the incline. He knew that the rope looked old and had been worn from dragging on the skids or cross-beams which held or supported the two runways for the buckets, but had never called the attention of the owners of the mine, or their foreman, thereto.

"This is substantially the testimony introduced upon the part of the plaintiff, and upon which the nonsuit was granted. Whether a case should be withdrawn from the jury, and the plaintiff nonsuited, is purely a question of law. When properly made, it is plainly a decision that the law affords no relief upon the evidence adduced, admitting every fact and conclusion which it tends to prove. It is not a decision upon the weight of the evidence where it is conflicting, but that it is not sufficient to justify its submission to the jury. *Cooper v. Insurance Co.*, 7 Nev. 121; *Pratt v. Hull*, 13 Johns. 335.

"Did the plaintiff contribute in any degree to the injuries received by him when he left the bottom of the shaft and ascended the incline for the purpose of loosening the bucket, knowing it to be dangerous to do so? In *Harper v. Erie R. Co.*, 32 N. J. Law, 88, 5 Am. Neg. Cas. 7, the court said: 'When, in an action for damages, it appears from the evidence that the plaintiff has been guilty of great imprudence, which was at least one of the proximate causes of the injury which befell him, the law does not afford him any compensation, and the question upon the point of the existence of negligence in the conduct of the defendant becomes wholly important.' To the same effect are the following cases: *Runyon v. Central R. Co.*, 25 N. J. Law, 556, 12 Am. Neg. Cas. 257n; *Waite v. R. R. Co.*, 96 Eng. C. L. 725; *Flemming v. Western Pac. R. Co.*, 49 Cal. 257, 11 Am. Neg. Cas. 193. In *Railway Co. v. Fowler*, 56 Tex. 457, Bonner, J., said: 'The master will not be liable for any injuries resulting to the servant from causes open to the observation of the servant, and which it requires no special skill or training to foresee will be likely to occasion him harm. When a servant of mature years undertakes any labor — the risks incident to which are equally open to the observation of himself and the master, the servant takes upon himself all such risks.' See, also, 2 Thomp. Neg. 1008; *Rush v. R. R. Co.*, 36 Kan. 133; *Berger v. St. P., M. & M. R'y Co.*, 39 Minn. 78, 15 Am. Neg. Cas. 762, 38 N. W. Rep. 814; *Thompson v. Railroad Co.*, 57 Mich. 308; *Railroad Co. v. Lyons*,

119 Pa. St. 336; *Dewille v. Railroad Co.*, 50 Cal. 385; *Solen v. Va. & T. R. Co.*, 13 Nev. 120, 12 Am. Neg. Cas. 240*n*; *Bunting v. Cent. Pac. R. Co.*, 14 Nev. 356, 12 Am. Neg. Cas. 241*n*; *Glascock v. Cent. Pac. R. Co.*, 73 Cal. 141, 11 Am. Neg. Cas. 203*n*; *Central R. & B. Co. v. Kenney*, 58 Ga. 490, 14 Am. Neg. Cas. 175. It is the duty of the employer to furnish his employee suitable and adequate tools and implements for his use. When he has done this he does not engage, however, that they will always continue in the same condition, and any defect which may become apparent from their use it is the duty of the employee to observe and forthwith report the same. An employee who before the injury had knowledge of the defect in the tools or implements, or who having a reasonable opportunity to inform himself, ought to have known such defects, is to be presumed, by his remaining in the employment, to have assumed the risk of such danger, and cannot recover for an injury therefrom, and his knowledge will have the same effect whether his employer was informed or ignorant of such defect; and this rule applies with much greater force when the defect or danger is obvious to the senses." * * *

The court cited a number of cases on assumption of risk in continuing to work with knowledge of danger, and also authorities on contributory negligence, namely, *Sullivan v. Louisville Bridge Co.*, 9 Bush (Ky.) 81, 89, 15 Am. Neg. Cas. 147; *Railway Co. v. Fowler*, 56 Tex. 457; *R. R. Co. v. Drew*, 59 Tex. 11; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 557, 13 Am. Neg. Cas. 669; *R. R. Co. v. Still*, 19 Ill. 509, 11 Am. Neg. Cas. 389; *Money v. Lower Vein Coal Co.*, 55 Iowa, 671, 14 Am. Neg. Cas. 587*n*; *McGlynn v. Brodie*, 31 Cal. 381, 13 Am. Neg. Cas. 425; *Williams v. Clough*, 3 H. & N. 258; *Assop v. Yates*, 2 H. & N. 770; *Griffiths v. Gidlow*, 3 H. & N. 655; *Patterson v. Wallace*, 1 Macq. 748; *Priestley v. Fowler*, 3 M. & W. 1; *Laning v. R. R. Co.*, 49 N. Y. 534; *Winship v. Enfield*, 42 N. H. 213; *Clarke v. Barrington*, 41 N. H. 44; *Tucker v. Henniker*, 41 N. H. 317; *Lopez v. Central Arizona Mining Co.*, 1 Ariz. 481, 13 Am. Neg. Cas. 198; *Bunt v. Mining Co.*, 11 Sawy. 178; *Coal Co. v. McEnery*, 91 Pa. St. 195; *Harper v. Erie R. R. Co.*, 32 N. J. L. 88, 5 Am. Neg. Cas. 7; *Robinson v. Western Pacific R. R. Co.*, 48 Cal. 421, 11 Am. Neg. Cas. 225; *Gay v. Winter*, 34 Cal. 163; *Needham v. R. R. Co.*, 37 Cal. 419; *Moore v. Central R. R. Co.*, 24 N. J. L. 368, 12 Am. Neg. Cas. 256; *Birge v. Gardner*, 19 Conn. 511; *Trow v. R. R. Co.*, 24 Vt. 493; *Lucas v. New Bedford & T. R. Co.*, 6 Gray, 72, 3 Am. Neg. Cas. 735; *Penn. R. Co. v. Aspell*, 23 Pa. St. 147, 6 Am. Neg. Cas. 225; *Gonzales v. N. Y. & H. R. R. Co.*, 38 N. Y. 440, 5 Am. Neg. Cas. 114; *Gothard v. Ala. Gt. So. R. R. Co.*, 67 Ala. 118, 11 Am. Neg. Cas. 32; *Thompson v. R. R. Co.*, 57 Mich. 308; *Kroy v. C. R. I. & P.*

R'y Co., 32 Iowa, 357, 361, 14 Am. Neg. Cas. 603; Deville v. R. R. Co., 50 Cal. 385; Wells v. Coe, 9 Colo. 166, 13 Am. Neg. Cas. 587; Cahill v. Hilton, 106 N. Y. 512; Marsh v. Chickering, 101 N. Y. 399.

FIFIELD V. NORTHERN RAILROAD.

Supreme Judicial Court, New Hampshire, December Term, 1860.

[Reported in 42 N. H. 225.]

BRAKEMAN INJURED—TRACK BLOCKED WITH SNOW AND ICE—DEFECTIVE CAR.—An action may be maintained against a railroad corporation by one of its servants employed as a brakeman, who was injured by reason of the negligence of the corporation in permitting its road to become blocked with snow and ice, and a car to be out of repair, the plaintiff being in no fault.

CASE. The defendants demurred to the declaration, which was as follows:

In a plea of the case for that the defendants heretofore, to wit, on the tenth day of February, 1859, owned, occupied, and were possessed of a certain railroad called the Northern Railroad, running from Concord, in the county of Merrimack and State of New Hampshire, to a place called West Lebanon, in the town of Lebanon, in the county of Grafton, which railroad runs through the town of Canaan, in said county of Grafton, and the defendants, at the time aforesaid, operated said railroad by running their cars and engines on and along said railroad from said Concord to said West Lebanon, and had the management, control, and direction thereof, and the engines and cars on the same, and the plaintiff was at the said time in the employ of the defendant as a brakeman upon a freight train of said road of the defendants, and employed by the defendants for that purpose; by reason whereof it became and was the business and duty of the plaintiff to attend to the brakes upon the train or trains of the defendants, upon which he was, and it was also his duty to assist in setting out cars from said train or trains, and in taking into said train or trains such cars as it was necessary to take in, or set off, by shackling or hitching, unshackling or unhitching the cars, as might be necessary, or as he might be ordered to do by the superintendent, or other officer of said railroad; and it was the duty of the defendants to keep said road in good and sufficient re-

pair, and the track so cleared from snow, ice, and other impediments, and the engines and cars used and drawn thereon in good and sufficient order, so that their servants and men employed in making up, running, managing and controlling their said trains upon said road, could, with ordinary care and prudence, do and perform their said duties in, upon, and about said engines and cars, and about the said railroad with safety; yet the defendants, not regarding their said duty in these respects, negligently and carelessly allowed and suffered their said road, to wit, at said Canaan, on the day and year aforesaid, to become filled and blocked up with snow and ice on the side and sides of said road and tracks, and then and there negligently and carelessly suffered a certain freight car to be and remain out of repair, by reason of which negligence and carelessness of the defendants in permitting the said road and tracks to become so filled and blocked up with snow and ice as aforesaid, and so carelessly and negligently permitting the said car to be so out of order, as aforesaid, the plaintiff, while in the performance of his duty as by his said employment by and with the defendants as brakeman on said train or trains, in shackling and unshackling said cars at said Canaan, heretofore, to wit, on the said tenth day of February, and while in the exercise of great care and prudence on his part, was unavoidably caught between the said cars, and run against and upon by the said cars, whereby the plaintiff's arm was broken, and he was so otherwise cut, bruised and wounded that he became and was very weak, sick, sore and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, and still so continues, during all which time the said plaintiff suffered great pain, and has been wholly prevented and hindered from performing any business whatever during that time, and deprived thereby from earning a support for himself and family, and so now continues; and also by means of the premises the plaintiff was forced to pay, lay out and expend, and has necessarily paid, laid out, and expended divers large sums of money, in all amounting to a large sum of money, to wit, the sum of five hundred dollars, in and about endeavoring to be healed and cured of his wounds, hurts and bruises occasioned as aforesaid; to the damage of said plaintiff, as he says, the sum of five thousand dollars.

The case is stated in the opinion. *Demurrer overruled.*

GEORGE, FOSTER & SANBORN, with whom were PIKE & BARNARD, for defendants.

LUND & BUCKINGHAM, for plaintiff.

Doe, J.—The gist of the declaration is, that by reason of the defendant corporation negligently permitting its road to be blocked with snow and ice and a car to be out of repair, the plaintiff, a servant of the defendants, employed as a brakeman, was injured.

If the railroad were owned by one individual, and he should personally assume the duty of examining and repairing the road and the cars, and through his negligence in not repairing, or in imperfectly repairing them, a brakeman employed by him should be injured, the employer would be liable. And if the employer did not attend to the repairs himself, and if ordinary care and prudence required that one or more persons should be constantly engaged in making repairs, and the employer, through gross negligence, did not employ any, or a sufficient number of repairmen, or negligently employed unskilful ones, and a brakeman, not knowing this fact, and being in no fault for not knowing it, and being chargeable with no negligence or fault whatever, were injured, solely in consequence of such negligence of his employer, the employer would be liable. In such case, the master would be held responsible for the exercise of ordinary care and prudence. If he assumed to do any part of the work himself, he should exercise ordinary care and skill in doing it; if he did nothing personally, except hiring all the servants, he should exercise ordinary care in employing a sufficient number of competent servants. And a declaration, alleging that he carelessly and negligently permitted the track and a car to become and remain defective, would be sustained by evidence that they became and remained defective through his personal carelessness and negligence in not discovering and remedying the defects, if he took upon himself that branch of the business; or by evidence that he assumed the general management and superintendence of the road, and employed all the workmen, and that from gross negligence he employed no repairmen, or an insufficient number, or unskilful ones, whereby the track and a car became and remained defective. In either case, the defects would exist by reason of his own negligence. Whether his negligence consisted in not discovering or in not removing the

defects himself, or in not employing any or a sufficient number of repairmen, or competent ones, the action could not be founded upon his personal negligence, and the allegation that the defect existed by reason of his negligence would be sufficient.

The same general rules must be applicable, whether the owner of the road and employer of the workmen is a person or a corporation. The agents of a corporation must have a principal, and its servants must have a master; and the mutual duties between master and servant must be the same, whether the master is a man, or a being existing only in contemplation of law. In the present case, ordinary care and prudence may have required that workmen should have been employed to repair the cars, and to remove the snow and ice from the track, and the stockholders may have voted not to employ such workmen, or to employ a number known to be insufficient, or those known to be incompetent, and the plaintiff, in the exercise of reasonable care, and without any knowledge, or means of knowledge of defects in the car or track, or of the insufficiency or incompetency of the repairmen, may have been injured in consequence of the action of the stockholders. In such case, although the stockholders, for many purposes, are not the corporation, it would not, probably, be denied that the plaintiff, being injured by the gross negligence of the controlling power of the corporation, could maintain this action. The declaration must, therefore, be held sufficient.

It is understood that the powers and duties of the directors are such, that, in the general management of the business of the corporation, their negligence may be called the negligence of the corporation, in contradistinction to the negligence of its servants. Whether any other officers occupy a similar position in relation to the corporation and its servants, cannot now be decided. *King v. B. & W. R. R.*, 9 Cush. 42, 15 Am. Neg. Cas. 413*n*; *C. C. & C. R. R. v. Keary*, 3 Ohio St. 201.

The rule is very generally established that a servant who is injured by the negligence of a fellow-servant in the course of their common employment, without any fault on the part of the master, can maintain no action against the master for such injury. The rule appears to be founded on the implied contract that he who engages in the employment of another for the performance of specified duties and services, for com-

pensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services, the compensation, in legal presumption, being adjusted accordingly; and it is said that perils arising from the negligence of fellow-servants are incident to the service. *Farwell v. B. & W. R. R.*, 4 Metc. 49, 15 Am. Neg. Cas. 407.

The contract between master and servant, for many if not for all purposes, is, that each will exercise ordinary and reasonable care. If an individual is the sole owner of a railroad, and also general manager, purchaser and superintendent, he is presumed to engage with his workmen that he will use ordinary care in furnishing them with engines, cars and road, in a condition reasonably safe, and if, from any defect in the engines, cars or road, which ordinary care on the part of the owner personally would have prevented or cured, a brakeman, in the exercise of ordinary care, having no knowledge or means of knowledge of the defect, is injured, the owner is liable. But it would be unreasonable to imply a contract of warranty, on the part of the owner, that the engines, cars and road should be sufficient and free from defect. And it is claimed that it would be equally unreasonable to imply a contract of warranty on the part of the owner with each of the workmen that all the other workmen should be competent and free from fault, and that the only reasonable and consistent contract that can be implied on this point is that the owner will exercise ordinary care in employing competent workmen. If such owner hires an engine and engineer, and a brakeman is injured at one time by a defect in the engine, and at another time by the fault of the engineer, it might be difficult to imply a contract on the part of the owner to use ordinary care in hiring a suitable engine, and a contract of warranty that he would hire a suitable engineer, and that the engineer should not only be reasonably competent, but that he should never be negligent.

It has been held substantially that whether a workman is injured through inadequacy of machinery, or other aids or means furnished by his master, or through incompetency or carelessness of fellow-workmen, his right of action against his employer stands upon the same ground; that between master and servant the implied contract is that each will use ordinary care in all things pertaining to the servant's business;

that if a master exercises ordinary care in hiring and retaining in his employment a competent engineer, and in buying and continuing to use a suitable engine, the master should no more be liable to a brakeman, if the engineer should prove to be incompetent, or being generally competent should on some occasion be careless, than if the engine, apparently sufficient, should explode; that the master has performed his contract with the brakeman, so far as it relates to the engine and engineer, when he has done all that ordinary care requires him to do to secure an engine and engineer reasonably suitable for the business. If the owner of a railroad, being a person of ordinary care, should select his servants with reasonable circumspection, and ride upon the road himself, he would take as much care of his brakemen as of himself, so far as their safety depended upon that of the other servants; and the brakeman, who would charge the owner with greater obligations, should establish his claim upon strong and satisfactory grounds of reason, justice, public policy, or probability as to the actual intention and understanding of the parties in making the contract of service.

The law on this subject is not peculiar to common carriers, railroads, or other extensive enterprises. The responsibilities of the defendants, in this case, and of the individual who hires two laborers in harvest, or two carpenters to erect a staging and shingle his house, are to be determined by the same legal tests. This case is between master and servant, and is to be carefully distinguished from a case between common carrier and passenger, as there may be no foundation in the former for the peculiar principles applicable in the latter. Bailees are held to different degrees of care in different kinds of bailment, as between themselves and the other parties to the contract of bailment; but all bailees as between themselves and their servants, must be held to a degree of care fixed by a general and uniform rule. The business in which the master is engaged is immaterial.

If the employer's contract with his workmen is, that he will use ordinary care in the employment of other workmen, but that he will not guarantee their carefulness, and if he use such care, and, by the negligence of one of them another of them is injured, the employer is not liable, the common rule of torts, that the act of the servant is the act of the master, being sus-

pendent as to that case by the contract. But if a third person, not a party to the contract between the master and servant, is injured by the fault of the servant, his right of action against the master does not depend upon, and is not limited by that contract. The servant has agreed to bear, and is paid for bearing the risks incident to the service; the stranger has not made such an agreement, and is not paid for bearing such risks.

And if the contract, implied on the part of the servant is to bear the risks only of the business in which he is engaged, and not the risks of other business, he would not be prevented by his contract from maintaining an action against the master, if he were injured by the negligence of another servant of the same master, engaged in other business. His remedy would be restricted by the contract only as to the negligence of fellow-servants engaged in the same general service, or those employed in the conduct of one common enterprise or undertaking, or those whose employment is such that, by their negligence in the usual line of their duty, he might reasonably expect to be endangered, or those whose negligence might be understood to be incident to his service.

There being an express agreement between the master and servant to do certain work and to pay for that work, but no express agreement as to the care to be exercised, the liabilities to be assumed, or the risks to be borne by either, the most reasonable contract is to be implied on those subjects. The servant is supposed to undertake that he will exercise reasonable and ordinary care in doing the work; and he is liable, if, from the want of such care on his part, any damage result to the person or property of the master, and the damage could not have been avoided by ordinary care on the part of the master. And if the servant receives an injury which such care on his part would have avoided, he has no remedy against the master, although the master may also have been in fault. And if the servant knows that a certain part of the work is to be done by other servants, and the master is required to use ordinary care in employing them, the obligations of master and servant, as between themselves, in everything done by each of them in relation to the servant's business, would be reciprocal and equal.

A contract is implied, on the part of the servant, that he

assumes the apparent risks, as well as those generally incident and ordinarily and reasonably to be expected in the service. *Assop v. Yates*, 2 H. & N. 768. He engages to bear the special perils which he knows actually to exist in his particular service, as well as the dangers appertaining to such business. If an engineer undertakes to run an engine which he knows to be defective and peculiarly liable to burst, he has no remedy for an explosion to which he voluntarily exposes himself. If he would have the visible or known risks borne by his employer, he should insist upon an express stipulation to that effect in the contract; no such stipulation can reasonably be inferred. And if the servant takes the risks of known defects of machinery, it would seem that he also assumes, to some extent, the risks of known incompetency and insufficiency of fellow-servants. *Skipp v. E. C. R. Co.*, 9 W. H. & G. 223.

In the present state of this case we are not called upon to determine what rule, as to the liability of a master to a servant, for the negligence of a fellow-servant, is the law of this State, as the defendants may be made liable without raising that question. And whether it should have been alleged in the declaration that it was the duty of the defendants to use and exercise ordinary and reasonable care and diligence to keep the said road and car in reasonably good and sufficient repair, etc., and that the defendants did not use and exercise ordinary and reasonable care and diligence to keep, etc., but negligently and carelessly allowed and suffered, etc., is a question not argued by counsel or considered by the court. Similar allegations, in the leading case of *Priestley v. Fowler*, 3 M. & W. 1, were held insufficient upon grounds which are not satisfactory to us. It was there said that if the owner of a carriage is responsible to his servant for the sufficiency of the carriage, he is responsible to the servant, also, for the negligence of his coach maker, or his harness maker, or his coachman, and that the mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. But the declaration in that case was, not that the defendant insured the plaintiff against injury from all defects in the carriage, but that it became the duty of the defendant, on that occasion, to use due and proper care that the said carriage should be in a proper state of repair. The declara-

tion seems to have been considered as setting forth a right of action growing out of a contract of warranty; whereas, in fact, it alleged substantially that from the relation of master and servant there was to be implied, on the part of the master, a contract to use due and proper care. If the implied contract were that the master should use ordinary care in procuring a suitable carriage and suitable fellow-servants for the plaintiff, the inconvenient and absurd consequences which the decision in that case seems to have been intended to avoid, would not have resulted from holding the declaration sufficient. The terms "ordinary and reasonable care and diligence," have an exactly defined meaning in law, and perhaps they should be used in declarations of this kind.

Demurrer overruled.

SECTION MAN LOADING RAILS UPON CAR COVERED WITH SNOW INJURED BY RAIL FALLING UPON HIM — INSUFFICIENT EVIDENCE — FELLOW-SERVANT. — In **HANLEY v. GRAND TRUNK R'Y CO.**, 62 N. H. 274 (*June, 1882*), judgment was rendered for defendant on the following facts: "The declaration alleged an injury to the plaintiff while assisting, as an employee of the defendants, in loading upon a car old rails, one of which fell upon the plaintiff through the negligence of the defendants in suffering a car with a large amount of snow upon it to be used for that purpose. Another count alleged an injury through the incompetency of the defendants' agents and servants to manage the business of loading the rails, and that the plaintiff was in the exercise of reasonable care. The plaintiff introduced evidence tending to show that he had been employed by the defendants from 1855 to 1874. In 1874 he worked under one Morrill as a sectionman, having charge of the track repairs on the section which included the railroad yard at Gorham. December 9, 1874, he was notified by Morrill to go the next morning down the line towards Portland, and assist in loading old rails, to be taken to the rolling-mill; he had sometimes assisted in loading rails before. On the morning of December 10, 1874, before light, in company with Morrill and other section men, he started upon a train made up for the purpose of collecting old iron, consisting of a brake van and about a dozen platform cars, and went down the line about a mile onto another and different section from the one on which he was employed. The rails were piled by the side of the road a convenient distance from the track for loading. When the train arrived at the first pile, it was stopped by Cole, who was foreman of an extra gang on the road, and who had charge of the business of collecting and

loading the rails and of the train for that purpose. The men, of whom the plaintiff was one, commenced to load the rails, at Cole's direction, onto one of the platform cars. On the car was from one and a half to two and a half feet of snow. It was hard, and heaped up in the middle and falling away towards the sides of the car. How the snow came upon the car did not distinctly appear. There was evidence tending to show that the plaintiff had no special knowledge of the condition of the car on which they began to load the rails, or of the snow upon it, until they began loading, except what was derived from seeing the train, and then he did not know how solid and hard it was. It was no part of the plaintiff's duty to make up the train, and he had nothing to do with making it up. There were ten men engaged in loading the rails. The evidence tended to show that the top of the car was about four feet above the track, and the ground on which the men stood in loading the rails was somewhat lower. The men loaded the rails by taking hold of them and raising them up and heaving them over upon the car. In attempting to load the second or third rail, it did not distinctly appear which, it struck upon the car and slipped back and fell upon the plaintiff, breaking both his legs and seriously injuring him. He was then put upon the car and carried home. There was no evidence of any incompetency of any of the defendants' servants, or that the cars on this train were not in proper condition, except the evidence of the snow upon the car on which the plaintiff was assisting to load the rails at the time he was injured. There was evidence that it was usual in loading rails to have men on the cars to assist in placing the rails as they were put on, but there was no one on this car when the accident happened. Cole was standing on the next car giving directions to the men as to the loading. The snow on this car was plain to be seen by the plaintiff when he began to assist in loading, and he testified that he blamed the snow. The car and train and men were all right. He did not know whether it was dangerous attempting to load the rails upon the car with the snow upon it. He did not think of any danger. The evidence also tended to show, that after the accident to the plaintiff the snow was shoveled off before any more rails were put upon it, and that it was nearly time for the regular train, and they were in a hurry to get the pile of rails loaded before the regular train came along, which was expected soon. As to Cole's duties and authority, the evidence tended to show that he was foreman of an extra gang, whose duty it was to work on the line of the road under directions from Murphy, who was roadmaster of that division of the road, assisting the sectionmen in repairing the worst places and in putting in side tracks, collecting old iron and similar work. The train in question was not made up

under Cole's direction, and he did not select the cars composing it. There was no claim or evidence of Cole's incompetency except in his not causing the snow to be removed from the car before the loading was commenced. The defendants moved for a nonsuit on the ground that there was no evidence upon which the plaintiff was entitled to recover, and that question was reserved." A. S. TWITCHELL and LADD & FLETCHER, appeared for plaintiff; RAY, DREW & JORDAN, and BINGHAM & ALDRICH, for defendants.

The court (per ALLEN, J.), after stating the rule of assumption of risk, fellow-servant, duty of master to furnish safe appliances, etc., and citing the leading authorities thereon, said:

"In this case there is no evidence upon which it could properly be found that the car was defective through any want of care on the part of the defendants. If the snow was a defect, it could not be fairly found on the evidence that it was on the car at the time of the injury through any fault of the defendants' servants not co-servants of the plaintiff. Moreover, the defect, if there was one, was apparent. Whatever danger there was was encountered by the plaintiff, with full knowledge or abundant notice putting him on his guard. There was no concealed or unknown defect. The height of the snow was apparent, and there is no evidence of anything delusive or deceptive in its appearance, and the plaintiff had full means of knowledge. He saw the snow, and described it in his testimony. There was sufficient light to enable him to see it perfectly. It was not the first rail thrown upon the car that fell upon him, nor was this his first work of the kind. The plaintiff was accustomed to the work. On this occasion he engaged in it in the usual course of business; and to hold that it could be fairly found that the danger into which he went was not apparent, or that he was injured by the fault of any one not a fellow-servant, would be upholding a refinement that would hardly be relied upon if the defendants were not a corporation, and regarding that as sufficient evidence to justify an action which would not be so regarded in a suit between two natural persons." * * *

HARDY, ADM'R V. BOSTON AND MAINE RAILROAD.

Supreme Judicial Court, New Hampshire, June, 1896.

[Reported in 68 N. H. 523.]

BRAKEMAN FATALLY INJURED BY CONTACT WITH OVER-HEAD BRIDGE — DIFFERENCE IN ELEVATION — BRIDGE GUARD — KNOWLEDGE OF DANGER — WARNING — RAILROAD LIABLE. — Where plaintiff's intestate, a head brakeman on

defendant's freight train, was fatally injured by being struck on the head by an overhead bridge, the telltale wires being six inches higher than the under surface of the bridge timbers, a motion for nonsuit was properly denied, where the evidence did not conclusively show that the deceased knew or ought to have known of the difference in elevation between the ends of the wires and the under surface of the bridge timbers, and there was evidence to warrant a finding that he mounted the car before reaching the bridge guard upon which he relied to warn him, and that he was injured because of the failure of the bridge guard to warn him of the danger of raising his head while passing under the bridge.

"CASE, for injuries to plaintiff's intestate caused by the defendant's negligence. Trial by jury and verdict for plaintiff. At the close of plaintiff's evidence defendants moved for a nonsuit; and at the close of the evidence on both sides they moved that a verdict be directed in their favor. Both motions were denied, subject to their exception.

"The evidence tended to prove the following facts: The deceased, William H. Hardy, was employed by defendants as head brakeman upon a freight train running over the Concord & Claremont road. He was thirty-three years old, five feet and eight inches tall, in good health, and had a common-school and academic education. He had been employed upon railroads fifteen or sixteen years, a good share of the time as brakeman. He was an active, intelligent and capable brakeman. At the time of his employment by defendants, there was a highway bridge over the railroad near the Mast Yard station in Concord, which rested upon abutments at the sides of the railroad, about fourteen and a half feet above the top surface of the rails, making a space underneath for the passage of trains about sixteen feet wide and fourteen and a half feet high. Freight trains passing there were composed, in part, of box cars varying in height from eleven to fourteen feet above the rails, making the free space between the tops of the cars and the bridge to vary from a few inches to three and a half feet. At a distance of 125 feet easterly of the bridge there was a bridge guard, consisting of an arm extending across the track from a post at one side with wires about five feet long and eight inches apart hanging from it — their lower ends being fifteen feet above the track, or six inches higher than the under surface of the bridge timbers. Fifty or a hundred rods westerly of the bridge there was a spur

track, connected with the main line by a switch at its easterly end. This was the lowest bridge upon the line, and the only one located so near a spur track. No change was made in these conditions after the last employment of the deceased.

“Some eleven years prior to his injury, the deceased worked upon this railroad as spare brakeman for a short time. The bridge was then substantially the same as at the time of his last service. It did not appear whether it was then protected by bridge guards, nor whether the spur track was there. After his last employment he worked about six weeks, making about eighteen trips each way over the road. On nearly every trip in the westerly direction the trainmen set cars from the train upon the spur track. On these occasions it was the duty of the deceased to inform the engineer what was to be done, and when the train was sufficiently near the siding to go upon one or more cars at the head of the train and set the brakes — thereby reducing the speed of such cars and bringing the rear cars against them, and enabling the rear brakeman to pull the connecting pins at the desired points. Sometimes the deceased assisted in pulling the pins, and sometimes he set the switch for the admission of the cars to the siding. After the pins were pulled, the forward end of the train went by the switch at an increased speed, the switch was set, and the disconnected cars following at a slower speed, went upon the spur track. This duty must be performed near the bridge. It was easier to do the work if it was commenced at a considerable distance from the siding; and if the rails were wet, it was necessary to begin at a greater distance than if they were dry. The deceased sometimes went upon the cars before reaching the bridge, and sometimes afterward. He had been seen to ride under the bridge on top of a car in a stooping posture, and also in a sitting posture. He knew that the trains were made up of cars of different heights. He received his injury upon a westward trip on the morning of August 1, 1892. It was misty or rainy at the time, causing the smoke to settle over the train and the rails to be wet. He went to the locomotive some time before arriving at the bridge, and informed the engineer that two cars were to be set upon the spur track, and two more upon a side track at the Mast Yard station. The train was running about fifteen miles an hour, or twenty-two feet a second. At

some point within 1,575 feet of the bridge, he went back over the tender to the first car in the train—a box car about eleven feet high—to set brakes and assist in setting out the cars. The only witness called by the plaintiff, who saw Hardy after he started back and before his injury, was the fireman. He testified, in substance, that he had no doubt they had come in sight of the bridge—that is, within 975 feet of it—when Hardy started from the engine to go back; that he was leaning out the cab window looking to the rear of the train for signals; that he got a glimpse of Hardy as he passed over the tender and jumped onto the end of the next car; that just as he went onto the car they went under the bridge, and the smoke hid him from view; that when they got out from under the smoke he saw Hardy's hat going in the air and an outline of his heels, or something; that he then drew his head in and looked over the tender and saw Hardy lying upon the car; that he went to him and found him lying lengthwise of the car, apparently dead, with his head toward the engine and a little nearer to the forward end than to the middle of the car; that he thought Hardy had got both feet on the top of the car before he was hit, but, on account of the smoke, could not see whether he straightened up or not; that it was only a matter of seconds between the time when he saw Hardy in the act of jumping onto the car and the time they went under the bridge; that he did not know whether it was between the bridge guard and the bridge where Hardy got on the car, but from the speed they were going he thought it might have been before he reached the guard. The plaintiff's evidence also tended to show that the bridge struck Hardy's head about three inches below the top. To produce this result, the body must have been bent so as to reduce its height to about three feet and nine inches."

ALMON F. BURBANK, and GEORGE B. FRENCH, for the plaintiff.

FRANK N. PARSONS (with whom were JOSEPH W. FELLOWS and EDWARD B. S. SANBORN), for the defendants.

OLIVER E. BRANCH, in oral argument, also for defendants.

Chase, J.—Assuming the truth of the evidence (*Bullard v. Boston & M. R. R.*, 64 N. H. 27, 30, 5 Am. Neg. Cas. 51), and construing it most favorably for the plaintiff (*Lyman v. R. R.*, 66 N. H. 200), does it conclusively appear that

the injury to the deceased was caused by dangers of which he assumed the risk when he entered the defendant's service? Is the evidence so definite and convincing that fair-minded men might not arrive at opposite conclusions in answering this question? Unless it is, it cannot be said that the jury could not properly find a verdict for the plaintiff, and the denial of the motion for a nonsuit must be sustained. *Paine v. R. R.*, 58 N. H. 611; *Lyman v. R. R.*, 66 N. H. 200, 204.

Among the risks which Hardy assumed by entering into the service were those incident to the performance of his duties in setting cars from a train upon a spur track, of which he was informed, or which ordinary care would disclose to him. *Fifield v. R. R.*, 42 N. H. 225; *Nash v. Nashua Steel, etc., Co.*, 62 N. H. 406; *Henderson v. Williams*, 66 N. H. 405; *Bancroft v. R. R.*, 67 N. H. 466 (1). He knew, or by the exercise of such care would have learned, of the following facts affecting the risks of his service at that point: The proximity of the siding to the bridge — not in feet or inches, but in a general way; the necessity of being upon cars at the bridge when they were moving at a speed of about fifteen miles an hour; the insufficiency of the space between the top of a car and the under side of the bridge to allow him to stand erect; the variation in the space by reason of the different heights of cars; the necessity of taking this variation into account in adjusting the position of the body so as to pass safely under the bridge; the liability to obstruction of one's view by the smoke from the locomotive; the location and general character of the bridge guard; the nature of his duties, and the way in which they should be performed. Fair-minded men could not come to different conclusions in respect to these matters; but there were others to be considered.

If there had been no bridge guard near the bridge, and the deceased had known, or ought to have known, of this fact, the whole duty of looking out for his safety in passing the bridge would have devolved upon him. The introduction of a guard transferred a part of this duty to the defendants. There being a guard, the risk assumed by the deceased was not that of passing under the bridge without any means for reminding him of its proximity, but that of passing under the bridge protected by a guard such as he knew, or ought to have known,

1. Reported with the New Hampshire cases in this volume of *AM. NEG. CAS.*

this one was. He had a right to rely upon the guard to remind him of his approach to danger. Its office was to notify him and other trainmen, by the senses of sight and feeling, that they were about to pass a bridge which would hit them unless they changed their position. The necessity for such a reminder arises from the fact that trainmen are liable to become absorbed by the immediate duty before them and so lose consciousness for the moment of their proximity to danger. To accomplish the object in view, the guard should be some device that will hit some portion of the body when the head is above the plane of the under surface of the bridge, not for the purpose of furnishing a gauge by which to adjust the position of the body, but for the purpose of calling attention to the proximity of danger in and above that plane. The statute provides that the character and location of guards shall be approved by the board of railroad commissioners. P. S., chap. 159, § 26. It did not appear that the commissioners had acted on the subject at the time of the deceased's injuries. The question of suitableness of the guard, in character and location, was therefore to be determined by the jury. It cannot be said, as a matter of law, that it was suitable. The jury might find that the lower ends of the wires should be as low, at least, as the level of the under surface of the bridge timbers, so that they would give warning whenever any portion of the body was above that level.

It is evident that a bridge guard properly constructed and located will not always perform its office, and does not wholly remove the risk of injury from overhead obstructions. A man may thoughtlessly go upon a car as he is passing under the guard or between it and the obstruction, however suitable the character and location of the guard may be, and receive no warning from it. The risk of doing this is incident to the service. To avoid it, a duty rests upon the man to use his sense of sight when about to go upon a car, to ascertain whether he has passed the guard. Whether Hardy stepped onto the car before or after passing the guard, was a question of fact. The evidence bearing upon it is not so positive and convincing as to remove all doubt. The fireman thinks he had got on the car before passing the guard; but his testimony seems to be an inference drawn from other facts, instead of positive recollection. Some fair-minded men might agree with

him, while others might come to the opposite conclusion. If he got upon the car before passing the guard, he was at liberty to rely upon it to warn him by the sense of touch of his approach to danger, unless the guard was unsuitable in location or character for that purpose, and he knew, or ought to have known, of its unsuitableness. While it may be safely said that he knew, or ought to have known, of its location in reference to the bridge, the evidence does not conclusively show that he knew, or ought to have known, of the difference in elevation between the ends of the wires and the under surface of the bridge timbers. This fact may not have been — probably was not — ascertainable except by actual measurements or a sighting from one object to another under more favorable circumstances than was possible when the person was upon top of a freight car in motion attending to other duties. Upon the evidence, the jury might find that Hardy mounted the car before reaching the bridge guard, and supposing its wires depended as low, at least, as the under side of the bridge timbers, relied upon it to warn him if his head got above that level; that at the moment of passing the guard his head happened to be below the level, and he did not raise it higher before reaching the bridge; and that receiving no warning, he understood he was below the danger level. It is no answer to say that the jury might find the other way. Fair-minded men, upon considering and weighing the evidence, might come to different conclusions on this point, but, as has been seen, this does not shift the duty of deciding the question from the jury to the court. These considerations show that the motion for a nonsuit was properly denied. It follows that the defendants' motion at the close of the evidence, for judgment in their favor, was also properly denied.

Exceptions overruled.

Railroad employees injured. New Hampshire cases.

Brakeman on switching engine injured in collision with cart at crossing — Assumption of risk.

In *BANCROFT, ADM'R, v. BOSTON & MAINE R. R.*, 67 N. H. 466 (June, 1893), verdict for plaintiff was set aside and judgment rendered for defendant. CLARK, J., said: "February 4, 1891, Bancroft received injuries which caused his death six days afterward, while riding on a switching engine of defendant, which came in collision with a baker's cart at the Walnut Street crossing in Nashua. He was about his ordinary work at the time. The defend-

ant had no gate or flagman at the crossing, and freight cars were commonly kept standing, and at the time of the accident were standing, on a side track in such position as to hide the engine from the view of persons in the street and approaching the crossing from the west. This was the negligence complained of. Bancroft was in defendant's service as a brakeman and car coupler, and had been for three years a member of the gang operating the switcher." He was familiar with the mode of work, passed over the crossing several times daily, knew the condition of things there, and that there had never been a flagman or gate at the crossing. *Held*, that the deceased assumed the risks, which were obvious and incident to his employment.

Switchman coupling cars — Unblocked guard rail — Assumption of risk.

In *BURNHAM, ADM'R, v. CONCORD & MONTREAL R. R.*, 68 N. H. 567 (June, 1896), verdict for plaintiff was set aside and judgment rendered for defendant, in an action for injuries to plaintiff's intestate, caused by an unblocked guard rail. "The evidence tended to prove the following facts: At the time of the accident Duquette (plaintiff's intestate) was employed by the defendant as one of a switching crew in defendant's railroad yard, at Nashua, and had been so employed for about two months, working in the night-time from 6 P. M. to 6 A. M. His usual work was coupling cars. On the night of the accident the foreman being absent, he was placed in charge of the crew. In attempting, about midnight, to pull the pin for the purpose of uncoupling a car, he stepped between two moving cars, caught his foot in an unprotected guard rail, was thrown down, and injured. There were some two hundred similar opportunities for like accidents in the yard from switches, frogs, and guard rails, none of which were blocked. In an adjoining yard of another railroad company all such constructions were protected by blocking. There was evidence tending to show that Duquette in the course of his employment had not coupled cars before in the part of the yard where he was injured. At the close of the evidence the defendant's motions for a nonsuit and that a verdict be directed for it were denied, subject to exception. The only question submitted to the jury was whether Duquette knew of the dangerous condition which caused his injury, or in the exercise of ordinary care could have known of it." Assumption of risk; knowledge of danger. Opinion by PARSONS, J.

Laborer shoveling coal in yard struck by falling mass — Assumption of risk.

In *CASEY v. GRAND TRUNK R'Y Co.*, 68 N. H. 162 (June, 1894), it appeared that "defendants had a coal yard, a part of which was uncovered. During the winter the soft coal stored in this section when wet by rain and melting snow froze, and formed a crust to the depth of a foot or more. The frozen crust at times overhung the coal bank, and would fall down in large masses. A day gang and a night gang worked in the coal yard. The plaintiff was employed in the night gang, and while shoveling coal from the bottom of the bank was struck by a falling mass and injured." On the trial the jury disagreed. Defendants moved for a nonsuit which, being denied, they excepted. Motion for nonsuit granted by the Supreme Court, on the ground that the danger being apparent and known to the plaintiff,

the risk was assumed by him. Opinion by SMITH, J. Citing *Fifield v. Northern R. R.*, 42 N. H. 225; *Foss v. Baker*, 62 N. H. 247; *Hanley v. Grand Trunk R'y*, 62 N. H. 274; *Nash v. Nashua Iron & Steel Co.*, 62 N. H. 406; *Bancroft v. Boston & Maine R. R.*, 67 N. H. 466, which cases are reported in this volume of AM. NEG. CAS.

Employee in railroad shop injured by circular saw — Railroad company liable.

In *BROWN v. CONCORD & MONTREAL R. R.*, 68 N. H. 518 (June, 1896), employee injured by circular saw in defendant's shops, judgment was rendered on the verdict for plaintiff. "Plaintiff's evidence tended to show that he had never seen the saw until the time of the accident; that he was directed to use it for sawing a board which he needed in his work; that he ran the board through on the right side of the saw, and found it was sawed badly and crooked; that he then ran it through on the left side of the saw; that the saw caught the board just after it had got by the cutting part, turned it over, and threw his hand upon the saw; that the catching of the board was caused by the defective condition of the saw." *Held*, that the facts did not charge plaintiff with contributory negligence as matter of law. Opinion by BLODGETT, J.

Person assisting employee injured — Railroad company not liable.

In *JEWELL v. GRAND TRUNK R'y Co.*, 55 N. H. 84, the railway company was held not to be liable for the negligence of one employed by its servant, without authority, to assist him in moving a crate of crockery.

HENDERSON v. WILLIAMS.

Supreme Judicial Court, New Hampshire, December, 1890.

[Reported in 66 N. H. 405.]

EMPLOYEE INJURED BY EXPLOSION OF UNEXPLODED CHARGE OF POWDER — ASSUMPTION OF RISK. — A servant assumes the perils incident to his service of which he is informed, or which ordinary care would disclose to him; and his master's failure to inform him of facts immaterial to his safety is not negligence.

So *held*, where plaintiff, one of defendant's servants, while removing an unexploded charge of powder placed in a hole previously drilled by him and others, was injured by the explosion of the charge.

CASE, to recover for injuries sustained by the plaintiff, October 5, 1886, in the defendant's quarry in Frankestown. Verdict for the plaintiff. *Exceptions sustained.*

"While the plaintiff, as the defendant's servant, was engaged in removing an unexploded charge of powder by him placed in a hole previously drilled by him and others, the

charge exploded, whereby he was injured. The plaintiff claimed that the fuse used by him to ignite the charge was, without his knowledge, defective in that it had been wet; that by order of the defendant's superintendent, who had charge of the blasting materials and who knew of its condition, the fuse was placed in the defendant's powder house, where the plaintiff was instructed and accustomed to get materials for blasting; that it was thence taken by the plaintiff and used in loading the hole, and that by reason of its having been wet he was blown up and injured. He further claimed that wet fuse may be good in parts, and that to drill out a charge by the side of fuse that may at some point be filled with undamaged powder is more hazardous than to drill down by a burned-out fuse; that the plaintiff, not knowing that the fuse had failed to burn throughout its length, was led by this want of knowledge to presume that there was no danger of an explosion unless sparks from his tools came in direct contact with the charge, and that so he was exposed to unusual and unexpected danger. At the close of the plaintiff's testimony the defendant moved for a nonsuit, and at the close of all the evidence that the court order a verdict in his favor. The motions were denied, and the defendant excepted."

SULLOWAY & TOPLIFF, J. F. BRIGGS, and O. E. BRANCH, for defendant.

GEORGE B. FRENCH and C. H. BURNS, for plaintiff.

Carpenter, J.—A servant assumes the perils incident to his service of which he is informed, or which ordinary care would disclose to him. *Fifield v. Northern R. R.*, 42 N. H. 225, 240, 16 Am. Neg. Cas. 607, *ante*; *Nash v. Nashua, etc., Co.*, 62 N. H. 406, 408 (1).

The evidence tends to show — and at the trial was apparently not disputed — that the failure of a charge to explode was not uncommon, and might happen from various causes, as from a wetting of the fuse either before or after it was put

1. In *NASH v. THE NASHUA IRON & STEEL Co.*, 62 N. H. 406 (December, 1882), defendant's exceptions to denial of motion for verdict on the ground that the facts did not support plaintiff's claim, were sustained. The syllabus to the report (per opinion by ALLEN, J.) states the case as fol-

lows: "A laborer in the employment of a manufacturing corporation, who is injured by the fall of a steel ingot from a mass of such ingots carelessly piled by his fellow-laborers in the same employment, cannot recover of the corporation for the injury when no want of reasonable care

in position, from a defect in its manufacture, from its severance in the process of tamping, or by reason of its not extending to the charge; that from whatever cause the failure happened, the usual and ordinary course of proceeding was to extract the charge in the method pursued by the plaintiff, with which he was familiar.

The plaintiff did not know the cause of the non-explosion — it might be, so far as he knew, a cut of the fuse in tamping, or a defect in its manufacture, either of which would render the removal of the charge as dangerous, and require as much care in extracting it, as if the cause were known to be a wet fuse. He stands no better than he would if the defendant had personally prepared the charge with wet fuse, and on its failure to explode had directed the plaintiff to drill it out without informing him that the fuse was wet.

There was no evidence tending to show that wet fuse is objectionable for any reason except that it may fail to ignite the charge; that it is more dangerous to extract a charge which from wetness of the fuse has failed to explode, than one which has failed by reason of a severance of the fuse in tamping, or a defect in its manufacture; or that knowledge of the wetness would in the slightest degree affect the method of extraction required when the cause of the non-explosion is unknown. If the fact was immaterial; if the plaintiff's action could not be affected by his knowledge or ignorance of it; if ordinary care required the charge to be extracted in precisely the same manner whether the cause of its failure to explode was known to be a wet fuse or was unknown — the plaintiff's injury is not attributable to negligence of the defendant. He was not in fault for not communicating a fact which was immaterial to the plaintiff's safety.

There being no evidence tending to show that the plaintiff was ignorant of any fact material to his safety, the verdict must be set aside.

Exceptions sustained.

on the part of the managing agents of the corporation is shown, either in the piling of the ingots, or in the employment and retention of laborers competent for the work.

"Neither the careless piling of the ingots nor the incompetency of the servants who piled them, was evidence

of the corporation's negligence, unless its managing agents knew or ought to have known of the careless piling, or of the servant's incompetency, or did not use reasonable care in the employment of servants competent for the work."

FEMALE EMPLOYEE STRUCK IN THE EYE BY SHUTTLE OF LOOM — MASTER LIABLE — FELLOW-SERVANT — VICE-PRINCIPAL. — In **JAKUES v. GREAT FALLS MANUFACTURING CO.**, 66 N. H. 482 (*June, 1891*), verdict for plaintiff was sustained and defendants' exceptions overruled. "The declaration alleged, among other things, that the plaintiff was in the service of the defendants as a weaver; that December 12, 1889, while she was engaged in the work assigned to her on a certain loom, the shuttle, by reason of defects in the machinery known to the defendants and not known by her, flew out of the loom, struck her in the eye, and destroyed her sight. The plaintiff was employed by the defendants in their cotton mill as a weaver, and had charge of six looms. She adduced evidence tending to show that the shuttle would not fly out of a loom unless the machinery was defective or out of repair; that she knew nothing about the machinery, and was not allowed to meddle with it; that in case it did not properly operate, she was required to call upon John C. Burke, a loom-fixer employed by the defendants, whose duty was to look after and keep in proper repair the machinery of the looms operated by the plaintiff; that about ten o'clock in the forenoon of December 12, 1889, the shuttle flew out of her loom numbered 315; that, in accordance with instructions, she thereupon called on Burke, who examined the loom, made whatever repairs he thought necessary, and set it running; that about eleven o'clock of the same day the shuttle caught in the 'binder' or in the 'picker;' that she thereupon again called on Burke, who again examined the loom, made such repairs as he deemed necessary, and put it in motion; that shortly afterwards, and before twelve o'clock, the shuttle flew out and struck her in the eye. She testified that the behavior of loom 315 made her afraid of it, and that she watched it more closely than the other looms." * * *

The court (per CLARK, J.) said: "The evidence produced by the plaintiff — that the shuttle would not fly out of a loom unless the machinery was defective or out of repair; that the plaintiff had no knowledge of the machinery and was not allowed to meddle with it, and in case it did not operate properly, was required to call on Burke, a loom-fixer employed by the defendants to look after the looms operated by the plaintiff and keep them in proper repair; that the shuttle flew out of one of her looms about ten o'clock in the forenoon of the day of the injury, and she notified Burke, who examined it, made whatever repairs he thought necessary, and set it running; that at eleven o'clock the shuttle caught in the 'binder' or in the 'picker' and she again called on Burke, who again examined the loom, repaired it, and put it in operation; that shortly

after, and before twelve o'clock, the shuttle flew out and struck her, putting out one of her eyes; and that she had watched the loom more closely than the others because its action made her afraid of it, — was evidence tending to show that the plaintiff, exercising reasonable care, was injured by the defendants' negligence in failing to provide suitable machinery for her use; and, in the absence of rebutting evidence, was sufficient to sustain a verdict for the plaintiff. The motion for a nonsuit was properly denied." * * *

Continuing, the court said: "Who are fellow-servants within the rule exempting the employer from the consequences of the negligence of fellow-servants, is not ordinarily determined by rank or grade of service, but by the character of the service performed or acts complained of. As a general rule, those doing the work of a servant are fellow-servants, whatever their grade of service; and a servant of whatever rank, charged with the performance of the master's duty toward his servants, is, as to the discharge of that duty, a vice-principal, for whose acts and neglects the master is responsible." Citing several leading cases.

EMPLOYEE OPERATING SAW INJURED WHILE TRYING TO FIX BELT TO MACHINE — INEXPERIENCE — FAILURE TO WARN — MASTER LIABLE. — In **DEMARS v. GLEN MANUFACTURING CO.**, 67 N. H. 404 (*December, 1892*), judgment was rendered on the verdict for plaintiff, on the following facts: "Plaintiff was employed by defendants as a carpenter to make repairs about their mill, and occasionally used a saw which was propelled by power transmitted to it from a large pulley upon the main shafting of the mill by means of belts, pulleys, and shafting. At one side of the large pulley was a device called a belt-catcher, the purpose of which was, like that of a loose pulley, to receive the belt running over the driving pulley when in use. The belt was shifted back and forth between the driving pulley and the belt-catcher by means of a horizontal bar located just above the belt at the top of the pulley and at right angles with it, having a pin projecting from its under surface on each side of the belt, and a lever connected with its opposite end by which it was moved. While using the saw plaintiff noticed that the belt was running off the large pulley on the side opposite the belt-catcher, and he attempted to push it back with a stick held in his hands, when the stick was hurled against his shoulder and side, causing the injury complained of. He contended that he could not have got the belt back onto the pulley by using the lever, and that the belt-catcher, bar, and lever were not reasonably adapted to the uses for which they were intended. There was evidence tending to show that plaintiff was

inexperienced in the use of machinery (1); that during his employment by defendants he had shifted the main belt a few times without receiving injury; that he had seen other employees in the mill push the belt in with a stick; that the use of the catcher was attended with danger, and that it would not operate when the belt ran off on the opposite side; that it was put in as an experiment; that the pulley was out of repair so that it wobbled, and that the belt was old, notched on the sides, and badly worn, and was too wide for the pulley; that these defects, which were apparent to plaintiff, caused the stick to fly and strike plaintiff; that defendants had not warned him of the danger he incurred, and he did not understand that there was any special danger in pushing the belt on with a stick; and that if, instead of the catcher, there had been a loose pulley in connection with the driving pulley, the accident would not have happened. The jury took a view and examined the machinery in question. Defendant moved for a nonsuit, and at the close of the evidence for a verdict, which motions were denied subject to exception. *Exceptions overruled.* Opinion PER CURIAM.

EMPLOYEE INJURED BY COMING IN CONTACT WITH HOISTING APPLIANCE — ORDERS TO FELLOW-SERVANT BY SUPERINTENDENT IMPROPERLY CARRIED OUT — DIRECTIONS IN LOUD VOICE — MASTER NOT LIABLE. — In **GRIFFIN v. GLEN MANUFACTURING CO.**, 67 N. H. 287 (*December, 1891*), it appeared that defendant was building a branch railroad from its mills to the Grand Trunk Railway's yard, employing a gang of men under the direction of one Perry, the superintendent. Plaintiff, with others, was engaged in raising stone blasted in the cut to the bank above, eight or ten feet. The machinery used consisted of a portable engine stationed on the bank and managed by an engineer, a derrick supplied with ropes, chains, and hooks, and a scale-board with rings of iron for con-

1. *When master not bound to warn or instruct servants.* — In **COLLINS v. LACONIA CAR CO.**, 68 N. H. 196 (*December, 1894*), where plaintiff, a man about fifty-two years old, in reaching for his apron on a shelf behind a machine used by defendant's employees who operated the machine for placing their aprons, clothing, etc., was injured by his hand in some way catching in the gearing of the cog-wheels, the wheels being in plain view, verdict for plaintiff was set aside and judgment rendered for de-

fendant, on the ground that plaintiff assumed the risks. Citing *Bancroft v. Boston & M. R. R.*, 67 N. H. 466; *Henderson v. Williams*, 66 N. H. 405; *Nash v. Nashua Iron & Steel Co.*, 62 N. H. 406, reported in this volume of AM. NEG. CAS. Opinion by BLODGETT, J. "A master is under no obligation to warn or instruct a servant as to dangers open to ordinary observation, except in cases of youth, ignorance, inexperience, or want of capacity."

necting it with the derrick. The hooks were two and a half or three inches long and slightly rounding, and had to be held in place when hooked to the rings in the scale-board till "the ropes took the strain," or they would become unhooked. The machinery was operated by power from the engine. The method of using the machinery was as follows: The scale-board was lowered into the cut, where it was filled by men stationed there for that purpose. When filled, they adjusted the hooks in the rings and signaled the engineer by raising a hand to hoist it, who did so slowly until the ropes became taut and the hooks were made tight in the rings, when the scale-board was taken up, unloaded, and returned. On the day of the accident, plaintiff, with three others, was in the cut loading the scale-board. When loaded the hooks were inserted in the rings and held in place by the workmen. Plaintiff, holding a hook in place with his left hand, gave the signal to the engineer with his right. While he was in this position, Perry came along, and in a loud and harsh voice halloed to the engineer with an oath, "Hoist her! hoist her! there is a team waiting!" The engineer applied the steam, and the scale-board went up on a jump, without the ropes "taking the strain," or plaintiff having time to get out of the way. The hook opposite him became unfastened, and the scale-board coming in contact with him he was thrown against the wall and injured. No question was raised but that the engineer and the four men in the cut were co-servants. Defendant moved for a nonsuit, which was denied, subject to exception. At the close of the evidence, a motion that a verdict be ordered for defendant was also denied, subject to exception. Verdict for plaintiff, which defendant moved to set aside. TWITCHELL & GOSS, and ROBERT N. CHAMBERLIN, appeared for plaintiff; DREW & JORDAN, LADD & FLETCHER, WILLIAM P. BUCKLEY, and DANIEL J. DALEY, for defendant. The opinion by SMITH, J., was as follows:

"The question has been elaborately argued whether Perry, in giving the order to the engineer for hoisting the scale-board, was acting as vice-principal, or as a fellow-servant of the plaintiff. In the view we take of this case that question need not be considered. Assuming as most favorable for the plaintiff that he was vice-principal, there was no evidence of negligence on his part competent to be considered by the jury. No question is made of the competency of the fellow-servants, and there is no allegation of defective machinery or appliances, nor of lack of instruction of the plaintiff as an inexperienced employee. The only negligence claimed is the harsh and loud tone of voice in which the direction to the engineer was given.

"The direction to the engineer was not a command to hoist the scale-board improperly, nor more quickly than usual. He could

not reasonably understand he was to act in such manner as to endanger the safety of others. He was not commanded to do an unlawful act, nor a lawful act in an improper manner. There was nothing in the fact that a team was waiting that required undue haste in hoisting the board. That was the only reason given by Perry to the engineer to attend to the duty assigned to him. There was no danger of injury to the team nor from it, by collision or otherwise. The negligent manner of hoisting the board was the act of the engineer, and not of Perry. The motion for a nonsuit should have been granted. Exceptions sustained."

Workman injured by fall of timber from scaffold in mill — Fellow-servant.

In *LEBARGE v. BERLIN MILLS Co.*, 68 N. H. 373 (June, 1895), it appeared that "plaintiff while in the employ of defendants was injured by the falling upon him of a piece of blocking timber. At the time of the accident, plaintiff was at work upon a wooden tank located in the basement of the defendant's mill, then in process of building, upon which a large number of workmen were employed under the superintendence of one Norcross. The blocking in question was laid along and upon the south sill of the mill, and upon the blocking there was a temporary plank flooring, extending northerly some twenty feet and constituting a staging which was adequate for the purposes for which it was intended and had been used. The blocking was not nailed or otherwise fastened to the sill. While the flooring was being removed by some of the workmen, the blocking was drawn or caused to fall off the sill upon the plaintiff who was thereby injured. The staging was put up and taken down by order of the superintendent." Nonsuit ordered, and plaintiff excepted. Exceptions overruled. Negligence of fellow-servant. Opinion by WALLACE, J.

Workman tearing down building struck by falling timbers — Assumption of risk.

In *NOURIE v. THEOBALD*, 68 N. H. 564 (June, 1896), where plaintiff, an employee of defendant, a contractor for moving and taking down buildings, etc., was injured while working under the direction of a fellow workman in pulling down a building, some timbers falling and striking him, nonsuit was sustained and plaintiff's exceptions overruled, the injury being one of the risks of the employment which must have been known to plaintiff if he exercised due care. It was not a question for an expert as to whether taking down a building was a dangerous operation requiring skill and judgment, it being a matter of common knowledge of which the jury could judge as well as any one upon being informed of the situation. Opinion by CHASE, J.

Workman injured by wheel of machinery — Accident — Presumption.

In *FOSS v. BAKER, TRUSTEE*, 62 N. H. 247 (June, 1882), plaintiff's exceptions to nonsuit were overruled, the case being stated in the syllabus to the report (per opinion by SMITH, J.) as follows: "Negligence in the defendants is not to be presumed as matter of law, or as a fact, by proof that the plaintiff, while in the employment of the defendants (a Shaker

family) as head farmer, by direction of their general agent, entered the wheel-pit of their pail factory to remove obstructions therein; that the wheel was raised eight or nine inches by a prop placed under the gearing on the floor above which the agent promised to keep in place; and that, while at work in the wheel-pit, the plaintiff put his hands upon the wheel, causing it to turn a little, and it came down on his fingers and injured him." There was no presumption of negligence from the fact that the accident happened.

Liability for tort of servant resulting in injury to third person.

In *HILL v. CAVERLY ET AL.*, 7 N. H. 215 (1834), it was held that "where a servant, by the command of his master, does an apparent wrong to a third person, both the master and the servant are liable. But a servant or deputy is not liable to a third person merely for not doing that which it was the duty of the master to do. Thus, where a master, having an unsafe and insufficient dam across a stream of water, ordered his servant to shut the gate and keep it shut until ordered to raise it, and the servant obeyed the order, by means of which the water was raised so high that the dam broke away, and an injury was done to a third person, it was held that the servant was not liable."

HARRISON V. CENTRAL RAILROAD COMPANY.

Supreme Court, New Jersey, November Term, 1865.

[Reported in 31 N. J. Law, 293.]

COLLAPSE OF RAILROAD BRIDGE—BRAKEMAN KILLED—LIABILITY OF RAILROAD COMPANY.—A master who has used due diligence in the selection and employment of his servants, is not responsible for an injury done to one of them by the carelessness of another, in the course of their common employment.

A railroad company is responsible to an employee for all damages resulting from its own misconduct; but to warrant a recovery, the fault or misconduct must be that of the company itself and not simply the negligence of a fellow-servant.

An employer contracts with his employee to use reasonable diligence to protect him from unnecessary risks; and for the omission of such diligence, which is equivalent to negligence or want of care, he will be answerable to the action of such employee for all the damages that may ensue.

So *held*, in an action to recover damages for the death of a brakeman caused by the breakdown of a railroad bridge over which a heavily-loaded train was passing (1).

1. See, also, *HAGGERTY v. CENTRAL* defendant for death of his son who R. R. Co., 31 N. J. Law, 349 (Supreme Court, November Term, 1865), was killed at the time and under the circumstances set forth in the *HARRISON* case (the case at bar). The an action brought by a father against

The declaration in this case contained three counts. The first was to the effect following, viz., that the defendants were the owners and proprietors of a railroad bridge in the township of Greenwich, in the county of Warren, the same being a part of their railroad; that Philip Harrison, deceased, in his lifetime, was in the service and employ of the defendants in the capacity of brakeman. The count then proceeded in these words: "And it then and there became and was the duty of the said defendants to provide, have, maintain and keep over and across the said Musconetcong creek, at the point where the said railroad so crosses the said creek, a good, strong, safe and secure bridge, etc., and to have, keep up and maintain the same in good condition." The breach is in these words, viz., "yet the said defendants, not regarding their duty in that behalf, behaved and conducted themselves so wrongfully, negligently and improperly, that by and through the gross carelessness, wrongful acts, neglect and default of the said defendants and their servants, who then and there had the oversight, supervision and care of the said defendants' said railroad bridge, in having, keeping and maintaining, and in then and there using the said railroad bridge, knowing the said bridge to be unsafe, defective, and weak and insecure, and in a bad and dangerous condition, and wholly unfit for the purpose of safely and securely carrying and conveying and bearing the weight and burthen of the said railroad trains, cars, carriages

CHIEF JUSTICE said: "This case, in most of its features, is identical with that of Harrison against the same defendants, in which judgment was given in favor of the plaintiff, at the present term. The only essential point in which the two actions differ is in the circumstances that, in the present instance, the suit is brought by the father of the deceased, who was killed by casualty on the road of the defendants, for his own benefit as next of kin, whereas, in the other case, it appeared there was a widow as well as next of kin who would be entitled to the avails of the suit. The action is founded on the statute giving the right to sue for damages where the death of any person is

caused by wrongful act, neglect, or default. Nix. Dig. 211." * * * Judgment was rendered for plaintiff. The Chief Justice construed the statute and ruled that: "Where death ensues to a party by the wrongful act or default of another, and the deceased leaves no widow, him surviving; an action may be maintained under our statute by the personal representatives of the deceased, for the benefit of the next of kin. The Act is in its highest sense remedial and is entitled to receive the liberal construction which appertains to such statutes. It should not be restricted to cases where the deceased leaves a widow."

and locomotive engines, having to go and run over, upon and across the same as aforesaid," etc. The count then concluded with a statement that the bridge being in the condition above described, broke down with a train, on which the said Philip Harrison was a brakeman, and that he was thereby killed within twelve calendar months next before the commencement of the suit, etc.

The other two counts were substantially the same as the first, with the exception that they did not contain any allegation that the defendants had knowledge of the unsafe condition of the bridge above mentioned. There was also an averment at the close of the declaration, that the plaintiff brought her suit for the benefit of herself, as the widow of the said Philip Harrison, and certain persons named as next of kin, etc.

To this declaration there was a general demurrer.

DUMONT and DEPUE, for plaintiff.

ATTORNEY-GENERAL for defendants.

The Chief Justice.—The first count of the declaration in this case discloses that the defendants, who are a railroad company, were aware that one of the bridges on the line of their road was out of repair and was unsafe; that they ran a train of cars, heavily loaded, over it while in this condition, and that it consequently gave way, occasioning the death of the husband of the plaintiff. That these facts would constitute a ground of action in favor of a stranger to the company is not denied, but it is insisted they do not have that effect with regard to one of their own employees. The person who lost his life by the accident above mentioned was a brakeman in the employ of the defendants, and this suit is brought by his administratrix in conformity with the statute making provision for the recovery of damages in cases where death is caused by a wrongful act. Nix. Dig., 211. The case raised on this demurrer, therefore, presents for consideration, in one of its aspects, the doctrine which is of but recent development, how far and in what mode the general rule that a party is answerable for his neglects which are injurious to another is modified by the circumstance that the relationship of employer and employee exists between the doer of the wrong and him who is affected by it. That this relationship must materially and in many respects restrict the rights of the servant and diminish the responsibility of the master, has been already settled by

repeated decisions of courts whose opinions are possessed of every title to respect.

The demurrer to the declaration in this case appears to have been intended to raise the question, whether the defendants are responsible to one of their employees for damages resulting from their carelessness or neglect in keeping their bridge in repair.

That a master who has used due care in the selection and employment of his servants, is not responsible for an injury done to one of them by the carelessness of another in the course of their common employment, may now be regarded as a rule of law completely established. For this subject has already received, on the part of the judiciary, that thoroughness of discussion and exhaustive consideration which its importance so eminently demanded; and the conclusion arrived at is sustained by a concurrence of judicial opinion seldom occurring, when the application of ancient principles is so entirely novel, and the subject to be affected is one of the ordinary relations of business life. Prominent among these cases thus referred to is that of *Farwell v. Boston & W. R. R. Corp.*, (Mass.) 4 Metc. 49, 15 Am. Neg. Cas. 407, in which Chief Justice Shaw examines this question, and in an argument of great force and clearness, places, as it seems to me, the non-responsibility of the master on the most stable foundation. The suit was brought by an engineer against the company for an injury received by him, while running the cars in the course of his duty, in consequence of the carelessness of the switch-tender, who was careful and trusty in his general character. In the solution of the problem thus before them the court resorted to general principles, and were thus led to the conclusion that the duties of the master and the correlative rights of the servant are altogether the creatures of the contract, express or implied, which exists between them. And it was accordingly held that the servant, when he undertakes to perform any particular service, assumes, as a part of his conventional obligations, the ordinary perils which, in the nature of things, are incident to such service. The argument was put upon the grounds that the servant was as likely to know, and could as effectually guard against these perils as the master; that they were such as could be distinctly foreseen and as well provided for in the rate of compensation as any others; that

where several persons are employed in the prosecution of a common enterprise, each of such persons has a supervision over the conduct of the others and can give notice of any misconduct, carelessness or neglect. These considerations induced to the result that the servant stipulated to encounter, at his own risk, the dangers to be apprehended from the carelessness of his fellow-servant, and that he, consequently, could not claim from his employer indemnification for any loss occasioned by such cause. Most of the other authorities adopt the same general principle. *Priestley v. Fowler*, 3 M. & W. 1; *Couch v. Steel*, 3 Ell. & Bl. 402; *Wigmore v. Jay*, 5 Exch. 352; *Seymour v. Maddox*, 16 Ad. & El., N. S., 327; *Hutchinson v. York, Newcastle & Berwick R'y Co.*, 5 Exch. 343 (2).

It will be perceived that the guide to the conclusion reached in these cases was the contract which the law, from the relation

2. In *PRIESTLEY v. FOWLER*, 3 Mees. & W. 1 (Exch., 1837), a declaration in case stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding, and being carried and conveyed by the said van, with the said goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of the neglect of which duties, the van gave way and broke down, and the plaintiff was thrown to the ground and his thigh fractured.

Held, on motion in arrest of judgment, after verdict for the plaintiff, first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van; but, secondly, that, even in that case, the action was not maintainable.

In *PRIESTLEY v. FOWLER*, *supra*, Lord Abinger, C. B., in delivering the opinion, said: "It is admitted that there is no precedent for the present action by a servant against a master;" and then proceeded to discuss the extent to which the principle of liability of a master to his servant would go, were it applied to the present case. "The mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself."

In *COUCH v. STEEL*, 3 Ell. & Bl. 402, it was held that there is no implied warrant of seaworthiness in a contract between an owner of a ship and a seaman to serve on board it for a particular voyage. Applied in an action by a seaman against a ship owner for negligently fitting out

of master and servant and on grounds of public policy, implies to exist between them; and, as it seems to me, the solution of the present question is to be obtained, and without difficulty, by a reference to the same criterion. Was it the understanding of the parties to the contract to hire and to serve, in the present case, that the company, as to their servant, were to be exempt from responsibility for their own neglect and want of care?

The first consideration which naturally arises on an examination of this proposition is, that the hazard, which it is insisted the servant agreed to incur, is not, so far as the master is concerned, one necessarily inherent in the business. It appears but just and fair and every way reasonable, that the servant should agree to take upon himself the usual perils of

the ship, rendering it unseaworthy, the plaintiff being unable to sleep, and obliged to undergo excessive labor, thus injuring his health. There being no allegation of knowledge by the ship owner of such unseaworthiness nor any personal blame on the owner's part, the action could not be maintained.

In *WIGMORE v. JAY*, 5 Exch. 354 (Exch. of Pleas, 1850), it appeared that defendant, a master builder, having contracted to build a certain building, employed W. as a bricklayer. The scaffolding was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger pole, in consequence of which the scaffold broke while W. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman. *Held*, that no action could be maintained against the defendant under the 9 and 10 Vict. c. 93, there being no evidence that the foreman was an improper person to employ for that purpose.

In *SEYMOUR v. MADDOX*, 5 Eng. L.

& Eq. 260, 265, the defendant, proprietor of a theatre, was sued by an actor for an injury suffered through an insufficient lighting of the stage, and an unguarded opening in the floor, into which he fell and was injured. He did not recover in the suit, the court holding that as he was not obliged to enter or remain in the defendant's service if he was not satisfied with the existing condition of things, he voluntarily exposed himself to the danger, of which he had the same knowledge as the defendant himself.

In *HUTCHINSON v. YORK, N. & B. R'y Co.*, 5 Exch. 343, where a servant of a railway company, who was proceeding in the discharge of his duty in a train belonging to the company, and guided by their servants, was killed by a collision between it and another of their trains guided by others of their servants, it was held that no action was maintainable by his personal representative against the company, and that it made no difference in this respect whether the accident was occasioned by the negligence of the servants guiding the train in which the deceased was, or of those guiding the other train, or of both.

the employment, and over which the party whom he serves has no control. He knows that there will be risk from the want of skill or from the inadvertence and neglect of those associated with him in the conduct of the common business; but these dangers are the necessary, inseparable concomitants of the employment, and there is, certainly, every appearance of justice in the legal implication, that as to injuries arising from such causes over which his employer possesses no power, and for the effects of which he is not morally responsible, they shall be borne by the servant. But upon what plausible pretense can it be said that the servant consents to abide the consequences of his employer's neglect? The misfeasance of his fellow-servants are, as between himself and his employer, the inalienable incidents of the thing undertaken, while it would be hardly admissible for a master to predicate that an injury to the servant, arising from his own want of care, was one of the necessary consequences of the servant's employment. The only view consistent with reason is, that the servant undertakes to bear the risks naturally attendant on the business he assumes, and both sound morals and common justice forbid the master to allege that one of those risks is the probability of his own default. Carelessness, which works an injury to another, is, in the eye of the law, civil misconduct; and a stipulation that a party shall have the privilege of committing such misconduct with impunity, will not be incorporated into a contract by intendment. Every rational implication is opposed to the existence of such an understanding. The claim to such exemption is inconsistent with morality and public policy, so much so, indeed, that it might be somewhat questionable whether, if such contract existed in point of fact and by express stipulation, it would not be, on that account, void. The facts of the present case exhibit, in a striking point of view, the exorbitance of the proposition claiming immunity for the consequences to the servant, of the master's negligence. The demurrer, in this case, admits that the servant lost his life by reason of want of care in the master, that is, that the latter was guilty of the commission of a grave misdemeanor. It would be singular, indeed, if the law, in annexing incidents to the relationship of master and servant, should clothe the former with the privilege to commit this criminal act, so far as the private rights of the servant are concerned, with impunity.

If the rights of the parties, then, are to be regulated on the basis of a contract, in my opinion, upon the plainest rules of law, the defendants were responsible to their employee for all damage which was the product of their own misconduct.

Nor will this result, as it seems to me, be varied if we consider this matter on the broader ground of general convenience and public security. That the master should be careful in the conduct of a business to which peril to life attaches, is important not only to the servant, but, in an equal degree, to the community also. It is of public interest, therefore, that no motive to the exercise of care on the part of the principal mover of such business should be taken away or impaired, and this would be the effect of declaring him irresponsible for his negligence to his employee. It is also of moment, that those who are employed in carrying out the details of an undertaking which is at all hazardous, should have an interest in observing and detecting the lapses of those at the head of such business; for it is, in most cases, impracticable for such subordinates to protect themselves against the consequences of such misconduct without, at the same time, contributing something to the safety of the citizens at large. The interest of the servant to bring to light the neglects and omissions of duty of the employer should be coincident with that of the community. All considerations of welfare to the public, therefore, seem to lead to the same result as that reached by an examination of the contract which the law implies from the connection of master and servant.

And in favor of the same view will be found the body of the cases heretofore decided. Indeed, even in most of the decisions which exonerate the master from the consequences of the injury done to one servant by the carelessness of another, the doctrine is generally accompanied with assumptions or intimations that, for hurtful results from his own omission of a reasonable and proper care, the master would be responsible to his servant. Thus in *Tarrant v. Webb*, 37 Eng. L. & Eq. 281 (1), both the principle of the master's responsibility to his servant, when in default himself, and his exemption when the

1. In *TARRANT v. WEBB*, 18 C. B. 797 (37 Eng. L. & Eq. 281), it was held that a master is not generally responsible for an injury to a servant from the negligence of a fellow-servant, but the rule is subject to this qualification, that the master uses reasonable care in the selection of the servant. It was also held that the master is not bound to warrant the

default is that of another servant, is forcibly exemplified — for it was there held that if a master use reasonable precautions and efforts to procure safe and skilful servants, but, without fault, happen to have one in his employ through whose incapacity damage occurs to a fellow-servant, the master is not liable. And in *Noyes v. Smith*, 28 Vt. 59, the principle to be settled in this case was presented for consideration, and the decision, sustained by great weight of argument, was in favor of the liability of the master to the servant for the consequence of the culpable negligence of the former. The most recent case upon this subject is that of *Snow v. Housatonic R. R. Co.*, (Mass.) 8 Allen, 441, 15 Am. Neg. Cas. 417, in which the same view of the responsibilities of the master is taken; and although the general reasoning which led the court to that result appears to me to be correct, yet it is proper that I should say that I do not altogether concur with some parts of the opinion in which the liability of the master is carried to such an extent, as practically to abrogate the rule which exempts him from responsibility to his servant for injuries occasioned by the faults of a fellow-servant.

On the whole, therefore, on principle as well as upon the decided weight of authority, I conclude that an employer contracts with his employee to use reasonable diligence to protect him from unnecessary risks, and that, for the omission of such diligence, which is equivalent to negligence or want of care, he will be answerable to the action of such employee for all the damages which may ensue.

To apply, then, the foregoing doctrine to the pleadings contained in this record.

I think it clear that, in strictness, in all the counts the duty of the company to keep up and maintain the bridge in question is laid down or averred in a form much too broad and unqualified. From the relation between the company and their brakeman, the legal consequence seems to have been deduced by the pleader that the former, with regard to the latter, was bound to keep the bridge in a safe condition. This is not a true statement of the obligation of the company. It was not

competency of his servants; and in whether the servant is incompetent, an action against him for an injury but whether the master did not exercise due care in employing him. done by one of his servants to another, the question for the jury is, not

near so absolute; for if the bridge was insecure from a secret defect which the company was not able to discern by the exercise of reasonable diligence and skill, no responsibility would have fallen on the defendants on account of its defective state. If, as was stated on the argument, the company, in point of fact, directed its agents, who were possessed of competent skill, to examine at stated periods the bridge in question, and such agents reported to the company that the structure was in a secure condition, and no circumstances existed which were calculated to impair a reasonable confidence in such report, I think it is plain, upon the principles of law above propounded, that even if the agents making such report acted carelessly in the discharge of their duties, or even falsely reported their conclusions to the company, that under such a state of facts the plaintiff could not sustain this suit. To warrant a recovery in this case in favor of the employee, who is here represented by the plaintiff, the fault, which forms the basis of the action, must be that of the company and not simply the negligence of a fellow-servant. And in that point of view it is that the duty of the defendants is set out in too general a manner in the various counts. But notwithstanding this defect, as in the first count there is an explicit charge that the unsafe condition of the bridge was known to the defendants themselves, I think a legal liability is sufficiently shown. The other counts allege carelessness in the defendants in general terms, omitting to charge a *scienter* with regard to the state of the bridge, and in the case of *Wigmore v. Jay*, 5 Exch. 354, *supra*, a similar form of pleading appears to have been considered sufficient. But as the effect of sustaining the first count will be to overrule the demurrer, that being general to the whole declaration, it is not necessary to express any opinion on the legal propriety of these other counts.

Judgment should be in favor of the plaintiff on the record as it now stands, with leave, etc.

PAULMIER v. ERIE RAILROAD COMPANY

Supreme Court, New Jersey, February Term, 1870.

[Reported in 34 N. J. Law, 151.]

COLLAPSE OF RAILROAD TRESTLE—FIREMAN KILLED—DEFECTIVE ROADBED—NEGLIGENCE OF FELLOW-SERVANT—LIABILITY OF RAILROAD—CONTRIBUTORY NEGLIGENCE—STATUTE—DEATH—NEXT OF KIN—DAMAGES.—In an action to recover damages for the death of plaintiff's intestate, a fireman in defendant's employ, who was killed by the trestle over which his engine was passing giving way, it appeared that the engineer had orders not to run his engine on the trestle as it was not strong enough to support it, but the plaintiff's intestate had no knowledge of such orders nor of the dangerous condition of the track. *Held*, that plaintiff was entitled to recover, the accident being caused in part by the want of care as to the safety of the roadbed on the part of the railway company.

Held, also, that where an injury to an employee is caused partly by the negligence of the master and partly by that of a fellow-servant, the master is liable.

Contributory negligence, to defeat a right of action, must be that of the party injured.

Under the statute giving a right of action where death is caused by wrongful act or neglect, an action is given in every case where a liability would have resulted if death had not ensued, and that such right exists for the benefit of all the next of kin who may be deprived of a reasonable expectation of a pecuniary advantage which would have resulted from a continuance of the life of the deceased (1).

Where deceased was about twenty-two years of age, a locomotive fireman earning two dollars a day, and paid his own board, and the evidence as to any assistance he gave his mother was of the most general character, and the mother was forty-one or forty-two years old and able to support herself, a verdict for about \$3,000 in action for benefit of next of kin, a mother and two brothers, was excessive, and was set aside.

1. In *DEMAREST v. LITTLE* (Receiver of Central R. R. of New Jersey), 47 N. J. Law, 28 (Supreme Court, February Term, 1885), action for death of plaintiff's testator, which occurred in the Parker's Creek Bridge disaster on the Long Branch Railroad, on June 29, 1882, on rule to show cause why new trial should not be granted, verdict having been rendered for plaintiff for \$27,500 (a former verdict for \$30,000 being set aside as excessive), the question of damages was discussed

by *MAGIE, J.*, (citing among other cases *Paulmier v. Erie R. R. Co.*, 34 N. J. L. 151, the case at bar), and the rulings are stated in the syllabus to the official report as follows:

"Damages recoverable for the death of any person are limited by the statute to such as arise from pecuniary injury, resulting from the death, to the widow and next of kin.

"Injury received by some of the next of kin, by the dissolution of a partnership relation between them and

THIS was a suit by an administrator, to recover damages for the death of the intestate, occasioned by the negligence of the defendants.

It appeared at the trial in the Hudson Circuit Court that the railroad of the defendants ran through their depot yard at Jersey City, and thence was projected over the water on trestlework for about 215 feet. From this extension of the track the cars were unloaded into boats. On the occasion in question, this part of the track gave way under the weight of the engine, which was thereby thrown into the water. The intestate was fireman on this engine, and was drowned. The defendants admitted that this trestlework was not safe for locomotives. Their defense was, that it was not built for the engines to run upon; that the orders in the depot yard were, that no engine should be run upon it, and that the practice was to push the loaded cars out over the water by means of other cars interposed between them and the locomotive. There was some evidence to show that the engineer in charge of the locomotive in question had orders not to permit his engine to go beyond the fast land. There was nothing in the case which indicated that the intestate had any knowledge of such orders.

There was a verdict for plaintiff, and a rule to show cause, etc.

ARGUED before BEASLEY, Ch. J., and WOODHULL, DEPUE, and VAN SYCKEL, JJ.

ISAAC W. SCUDDER, for the motion.

W. B. WILLIAMS, *contra*.

Beasley, Ch. J. — The principal ground on which a new trial is asked in this case is, that it was clearly shown by the evidence that the accident by which the intestate lost his life was occa-

the deceased, is not within the scope of the statute.

"Injury claimed to arise by the deprivation of such services and counsel as a father might probably give to his children, must be limited to such services and counsel as would be of pecuniary advantage, and must be determined with careful reference to the age, condition and relations of the parties.

"Where the injury claimed is the

deprivation of the probability of receiving such probable accumulations as deceased might have made if he had continued in life, income derivable from funds invested, and which the next of kin have received, should not be taken into account, and due weight must be given to contingencies which might diminish the probable accumulations or divert them from the next of kin."

sioned, not by the negligence of the defendants themselves, but by that of their employees. They say that their roadbed extending over the water was properly constructed, in view of the purpose for which it was designed, and that it was misapplied to another purpose by their servants, contrary to their express orders. If these were the facts of the case, the position would be well taken. The intestate, when he came to his death, was in the employ of the defendants, and the consequence is, no action would have arisen if such death resulted purely from the neglect of one of his fellow-servants. This rule at this day is admitted law, and was sanctioned by this court in the case of *Harrison v. Central R. R.*, 2 Vroom, 293, 16 Am. Neg. Cas. 633, *ante*.

But this case was tried and expressly submitted to the jury on the ground that, to entitle the plaintiff to a verdict, there must be satisfactory proof of negligence on the part of the company. The charge was clear upon the point that the existence of negligence merely in the fellow-servants of the intestate would not support the suit. There can be no doubt, therefore, that the jury was satisfied that the defendants had not exercised that kind or degree of care for the safety of their employees which the law exacts. This conclusion, I think, was fully warranted by the facts proved. Admitting on this subject the whole contention of the defendants, the structure in question subjected their servants to unnecessary danger. Stripped of all verbal disguises, the argument is this: That by their arrangements they required their employees almost hourly to run their engines to the brink of danger, and that their orders were to stop there. The roadbed over the water was supported by woodwork, which the defendants admit was dangerous to a locomotive, and what they required was, that the locomotive should be stopped on the fast land. As occasion called for it, in pushing the loaded cars out over the water, the engines were brought necessarily to this line between the water and land. Here was a danger constantly recurring — just as imminent as though the requirement had been to run these engines up to the edge of a precipice. And, to make the matter worse, the danger in this case was entirely latent, for there was nothing to indicate that this part of the road extending beyond the land would not support a locomotive. It is obvious that it required the constant exercise of skill and vigi-

lance to avoid this unnecessary risk, and yet it is not pretended that there was any notification to the engineers and other employees of the insecurity of this part of the roadbed. All that is claimed is, that from time to time the engineers were told not to run their engines beyond the edge of the fast land. These orders were merely verbal, and proceeded from the yard-master, who appears himself to have been ignorant of the greatness of the danger. It is manifest, from the evidence on both sides, that adequate means to inform the parties in charge of these locomotives of the peril at hand were not used, for several of the engineers themselves testify that occasionally they put their engines upon this insecure structure. Some of them said that they were not aware of its insecurity. These circumstances seem to me to constitute a legal default in the defendants. To require their servants, in the ordinary routine of daily duty, to run these engines up to the margin of this covert danger, was subjecting them to an unnecessary hazard. This of itself would be sufficient to sustain this action. So, likewise, I think the omission to use any means of making the danger known to those who were to incur it, would have a like effect. On either of these grounds the jury could rightly rest their verdict.

But, in the second place, it was said that even on the assumption of the presence of negligence on the part of the defendants, there was contributory negligence on the other side, and that, therefore, there should be no recovery. The negligence thus invoked was not that of the intestate, but that of one of his fellow-servants. The intestate was the fireman on the locomotive, and it is not asserted that he knew of the insecurity of the trestlework, or of the orders not to go upon it. But it is claimed that the engineer in charge had received such orders, and that he disobeyed them, and that, by his so doing, the accident occurred. I shall not go aside to inquire whether the disobedience of such an order would have the effect of depriving the next of kin of this engineer of a right of action against the company, though it is obvious that the disobedience of an order must often be quite a different thing from the legal notion of contributory negligence, which always involves the circumstance of knowingly exposing the person to the hazard from which the damage results; for whatever may be thought of the position of the engineer, and on the assump-

tion that a right of suit, on account of his misconduct, does not exist in his behalf, still, in my apprehension, the foundation of this action remains undisturbed. The jury has found the negligence of the defendants, and if we add to this, negligence in the engineer, we reach the conclusion that the injury to the intestate was the result of these two conjoint causes. For an injury so caused, I think the defendants are liable. The rule already referred to is, that the master is not responsible to one servant for the ill consequences of the negligence of a fellow-servant, in the course of the common employment. The reason for this rule is, that as the master cannot prevent carelessness in his servants, it is reasonable to presume each servant agrees to run the risk of that which he knows, in the nature of things, to be inevitable. But the servant does not agree to take the chance of any negligence on the part of his employer; and no case has gone so far as to hold that where such negligence contributes to the injury, the servant may not recover. It would be both unjust and impolitic to suffer the master to evade the penalty for his misconduct in neglecting to provide properly for the security of his servant. Contributory negligence, to defeat a right of action, must be that of the party injured.

Another objection to this verdict involves the proper construction and application of the statute relating to the recovery of damages in cases where the death of a person is caused by wrongful act or neglect. Nix. Dig. 234. In the present case the deceased left, as his next of kin, a mother and two brothers, and the jury were instructed that they should admeasure the damage by the probable pecuniary loss sustained by each of the three. Consequently, the question is presented whether, within the purview of this Act, a person can be said to sustain a pecuniary loss by the death of his brother. The argument on the negative side of the proposition is, that no person, in any legal sense, can be said to sustain a pecuniary injury by the death of another who has not a right in law to support or assistance from the deceased. Thus, it is argued, a wife or child, and that class of persons who, under the law relative to the poor, have a claim to maintenance, will suffer a pecuniary loss by the death of the husband, father, or other person respectively, who, by the general principles of law, or by positive enactment, can be compelled to provide a main-

tenance, but that, where such legal liability does not exist, a mere possibility of pecuniary loss arises. The subject is not devoid of perplexity. The language of the statute is so general and indefinite that it leaves wide room for judicial construction. But I am satisfied that the interpretation just indicated is not admissible. It is in opposition to the generality of the provision contained in the first section of the Act, and to the special provision of the second section. Thus: an action is given in every case where a liability would have resulted if death had not ensued; whereas, the construction contended for insists upon a liability only when a certain class of persons survive the deceased. In the second section, the Act directs a distribution of damages "in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate;" but this provision is obviously impracticable on the hypothesis that particular classes of persons are alone entitled. For example: in the present case the mother, if impoverished, would have been entitled to support from her son; the two brothers had no such claim, and therefore, according to the view under consideration, had no right to a share of the damages occasioned by the death, the result being that under these circumstances the mother would take the whole sum recovered. But such a distribution of the proceeds of the suit is entirely inconsistent with the distribution of the property among the next of kin of an intestate. The contention of the counsel of the defendants would make the mother the sole recipient of the benefits of this action; but the statute authorizing the action declares, in clear terms, that the moneys recovered shall go to the next of kin as in case of intestacy, and by this rule each of the brothers would have an equal interest with the mother. It seems to me it is not possible to effectuate the Act upon this basis. It also seems to me that the literal language of the statute is to be followed, that is, a right of action exists in all cases in which such right would have existed in the party injured if death had not ensued, and that all the next of kin who would take in case of intestacy belong to the class of persons who, it is competent for a jury, under the given circumstances, to say, have sustained a pecuniary injury resulting from the death of their kinsman. By force of the English

statute on this subject, 9 and 10 Vict., ch. 93 (1), it has been settled by construction that in estimating damages, mental suffering, or the loss of the society of the person killed, cannot be taken into consideration, but that the compensation must be confined to the pecuniary loss only. *Blake's Adm'x v. Midland R'y Co.*, 18 Q. B. 93; *Franklin v. S. E. R'y Co.*, 3 H. & N. 211; *Dalton v. S. E. R'y Co.*, 4 C. B. (N. S.) 296 (2). This construction appears to assimilate, on the point in

1. The section in Lord Campbell's Act, 9 and 10 Vict., c. 93, relating to damages, after reciting that no action at law is now maintainable against a person who by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him, enacts, that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

By section two, every such action shall be for the benefit of the wife, husband, parent and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased. And in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death; to the parties respectively for whom and for whose benefit such action shall be brought; and the

amount so recovered, after deducting the costs not recovered from the defendant, shall be divided among the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

2. *BLAKE v. MIDLAND R'y Co.*, 18 Q. B. 93, 10 Eng. L. & Eq. 437, was an action for death of plaintiff's intestate as a result of defendant's negligence. There was no question as to defendant's liability, and the only contention was as to the rule of damages to be applied. *Held*, that only such damages can be awarded as can be considered to compensate for the loss of the deceased in a pecuniary sense; and that there can be no recovery for mental grief and anguish.

FRANKLIN v. SOUTH EASTERN R'y Co., 3 H. & N. 211, was an action by a father for the death of his son. The father was an old man, getting infirm, who lived in the lodge of a hospital, and was employed to carry coals round the wards, for which he was paid three shillings and sixpence a week — whether under contract or by way of gratuity did not appear. The son was a young man, earning good wages, who did not live with his father, but was in the habit of gratuitously assisting him by carrying the coals round the wards for him; but the father, not being in need, was not supported by him in any other way. *Held*, that the father had such reasonable expectation of pecuniary

question, the English statute to our own, and consequently the action of the English courts in the enforcement of their law becomes important. The principle there adopted is thus stated in a recent case, viz., "to consider whether there was evidence of a reasonable probability of pecuniary benefit to the parties if the death of the deceased had not occurred, and was it lost by reason of that death caused by the wrongful act, neglect, or default of the defendants?" *Pym v. G. N. R'y*, 4 B. & S., Q. B. 396 (1).

It will be observed that this rule assumes that the pecuniary

benefit from the continuance of his son's life as would enable him to maintain the action. But the jury having found a verdict for him with £75 damages: *Held*, excessive. In such action it was also held that damage of a pecuniary nature must be shown; but the damages are not to be given merely in reference to the loss of a legal right; they should be calculated in reference to a reasonable expectation of pecuniary benefit, as of right or otherwise, from the continuance of the life of the deceased.

In *DALTON v. SOUTHEASTERN R'y Co.*, 4 C. B. (N. S.) 296, it was held that legal liability alone is not the test of injury in respect of which damages may be recovered, but the reasonable expectation of pecuniary advantage by the relation remaining alive, may be taken into account by the jury; and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss thereby occasioned. *Held*, also, that compensation for the funeral expenses or for family mourning is not recoverable.

1. *PYM v. GREAT NORTHERN R'y Co.*, 4 B. & S. 396, affirming 2 B. & S. 758, was an action for injury resulting from death where it was held that the expectation of a reasonable probability of pecuniary benefit from the income of the deceased was a

sufficient damage to render the action maintainable. The intestate, who was killed by a runaway accident, was possessed of personalty amounting to about £3,400, and was tenant for life of an estate in land worth nearly £4,000 per annum, with remainder to his eldest son in tail; and a jointure of £1,000 per annum was settled on his wife, and £20,000 secured to his youngest children on his death. *Held*, that the widow and younger children had a sufficient expectation of pecuniary interest from the continuance of the life of the deceased to maintain an action against the railway company for injury by the death; held, also, that the 9 and 10 Vict., ch. 93, gives to the personal representative a cause of action beyond that which the deceased would have if he had survived, and based on a different principle. In such an action no compensation can be given by way of solatium for grief or loss of the society of the deceased. The remedy given is to individuals, not to a class; and therefore, on the death of a person whose income arose from land and personalty, and independently of any exertion of his own, no portion of which was lost to his family by his death, an action is maintainable if, in consequence of that death, the mode of its distribution among the members is changed.

injury designated by the statute is nothing more than a deprivation of a reasonable expectation of a pecuniary advantage which would have resulted by a continuance of the life of the deceased. And it is upon this principle that our statute is to be applied. The jury must weigh probabilities, and to a large extent form their estimate of damages on conjectures and uncertainties. The office is a difficult one, and many errors will probably be committed. The rule, therefore, that was given on this subject to the jury in the trial of the present case was in all respects correct. The verdict cannot be invalidated on this ground. But in the present case I think the verdict so exorbitant in amount that it ought not to stand. I can see no theory of probabilities, based on ordinary experience, which will justify this finding. The deceased was about twenty-two years of age. The mother was forty-one or forty-two, and was able to support herself by her needle; her other two sons were severally sixteen and nineteen. The deceased, as fireman, got two dollars a day, and paid his own board. The evidence as to any assistance which this son had ever given to the mother was of the most general character. When asked what had been the dependence of the family since her husband's death, she replied, "my eldest son, together with my own exertions." It seems to me, judging by probabilities, there is no sense in saying that this son would contribute over \$3,000 to the support of the family. The mother was equal to her own maintenance, and the two brothers were of ages to earn their own living. According to the rule relied on by this jury, this widow would receive from her three sons during her life, in the way of support, in the neighborhood of \$9,000 — for there is no ground to suppose that each of the other sons would not have contributed nearly as much as the one who was killed. Such a verdict is in the face of every-day's experience, and is contrary to the spirit of the charge of the judge who presided at the trial, and in my opinion it should be set aside.

WOODHULL, DEPUE, and VAN SYCKEL, JJ., concurred.

NEW YORK, SUSQUEHANNA AND WESTERN RAILROAD COMPANY v. MARION.

Supreme Court, New Jersey, June Term, 1894.

[Reported in 57 N. J. Law, 94]

BRAKEMAN ON TOP OF CAR COMING IN CONTACT WITH IRON BAR OF RAILROAD BRIDGE.—LIABILITY OF RAILROAD COMPANY.—In an action to recover damages for injuries sustained by plaintiff, a brakeman in defendant's employ, who while on top of a freight car in performance of his duties came in contact with an iron bar which connected the tops of the trusses of a railroad bridge while the train was passing the same, it appeared that on some cars brakemen could pass in safety while standing thereon while on others they could not. *Held*, that whether notice of the danger had been given to plaintiff or whether he had acquired knowledge thereof, were questions for the jury and refusal to nonsuit was proper. *Baylor v. Del. L. & W. R. R. Co.*, 11 Vr. (40 N. J. L.) 23, *distinguished*.

ACTION to recover damages for an injury received by Marion by reason of his coming in contact with a bar of iron which connected the tops of the trusses of a railroad bridge constructed by the railroad company while he was passing the bridge upon a freight car in the performance of his duty as a brakeman in the employ of said company. The case is stated in the opinion. *Judgment affirmed*.

JOHN W. TAYLOR, for plaintiff in error.

ZEBULON M. WARD, for defendant in error.

Magie, J.—Counsel for the railroad company has confined his argument to the assignment of errors, which is directed at the refusal of the trial judge to nonsuit the plaintiff below. His contention is that the facts of this case are identical with those disclosed in *Baylor v. Del., L. & W. R. R. Co.*, 11 Vroom, 23, in which this court held there should have been a nonsuit, and that, in refusing the motion, the trial judge in this case disregarded the legal rule there laid down. This contention cannot prevail (1).

1. In *BAYLOR v. DELAWARE, LACK-
AWANNA & WESTERN R. R. Co.*, 11
Vr. (40 N. J. L.) 23 (February Term,
1878), brakeman, while on top of cars,
struck by bridge under which train

was passing, verdict for plaintiff was
set aside. The opinion rendered by
BEASLEY, Ch. J., is as follows:

"I think the plaintiff should have
been nonsuited. He was, according

In the Baylor case a brakeman was injured by coming in contact with a solid, overhanging bridge, by which a road was carried over the railroad on which he was passing in the employ of the railroad company.

The legal rule laid down in that case was that a railroad company owed to its brakeman no duty to build such bridges at an elevation sufficient to permit a man standing on a car to pass in safety. Since it may be, in some cases, impracticable for the company so to construct such bridges, and in other cases it may be unreasonable to require such construction, the general proposition laid down is not objectionable.

to his own showing, an employee of the defendant, injured by one of the dangers of the business in which he voluntarily engaged. There was no evidence to show, nor was there pretense, that it was customary for railroad companies to build the bridges spanning the public roads with an elevation sufficient to admit of a man to pass under who is standing upright on top of a car. Such is not the practice of this company, nor of any other, so far as appears. Such structures would often be inconvenient, and sometimes, perhaps, impracticable. It is, therefore, quite plain that the defendant did not owe any duty to this plaintiff not to subject him to the danger into which he fell. This being so, it is also plain that the plaintiff is chargeable, from the mere fact of his entering upon this employment, with a knowledge that this danger existed. Of what, then, can he complain, and what has the defendant done that can in any sense, either legal or moral, be called wrongful?

"It was said that the defendant was bound to apprise the plaintiff, when he entered into this employment, that the bridges along the line of this road were dangerous under certain conditions. It seems to me that it might as well be insisted on, that the plaintiff ought to have been

notified that the usual rate of speed with which the cars ran on the road was a hazard; for the bridges were as usual and obvious a source of risk as was the celerity of the trains. Besides, it appeared in the case that the plaintiff had passed this bridge in daylight on previous occasions.

"Nor does there seem any weight in the suggestion that the plaintiff was called upon suddenly to take part in the operation of switching off these cars at the time in question. There was nothing unusual in this act; it was part of the ordinary duty of the brakeman to perform it. As to the pretext that the call upon the plaintiff to perform this service was sudden, and that he was thrown off his guard, it is certainly a conclusive answer to say that it was a part of his bargain when he undertook this business, that he subjected himself to the risk of such emergencies. He did not stipulate that there should be no exigencies or unexpected demands upon him for services, and in the ordinary course of things he was liable to be placed in these situations that were full of danger to a heedless person.

"I have read the testimony with attention, and it has fully satisfied me that the injury of which the plaintiff complains is the product, purely, in a legal sense, of his own carelessness."

It was unnecessary to qualify the proposition in that case, for, upon the evidence, it appeared that Baylor entered upon his employment with a knowledge of the danger to which he would be exposed; and that he had, on previous occasions, passed the bridge by daylight, when the danger, which was clearly an obvious one, must have appeared to him.

In the case before us, the dangerous element in the construction of the bridge was a slender bar crossing the track at a height which permitted brakemen standing on some cars to pass in safety, while on other cars they would come in contact with the bar. It cannot be said that such a danger was necessarily an obvious one. Upon the evidence, it might well be deemed difficult, if not impossible, for a brakeman to calculate the distance of the bar from the roof of a car and to determine whether or not it was a danger to his safety.

The duty of a railroad company in the construction of bridges falls within the line of duty of a master to a servant, requiring the master to take reasonable care to have and maintain the places in which, and the appliances with which, the servant is to perform his services, free from those dangers, the risk of which the servant has not assumed by his acceptance of employment. If a bridge constructed with the required care presents a danger obvious to the senses of the employed, the danger is one incident to the employment, and for injuries received therefrom the company would not be liable. But if, notwithstanding the exercise of the required care, the bridge, as constructed, presents a concealed or non-obvious danger, then a duty devolves on the company to give its brakeman sufficient notice thereof. For injuries received from such a construction, the company would be liable unless such notice had been given to the injured or he had otherwise acquired knowledge of the danger.

Upon the evidence in this case, questions arose as to whether such notice had been given to Marion and whether he had otherwise acquired knowledge of the danger to which he was exposed by this bridge. These were clearly questions for the jury, and the refusal to nonsuit was proper and in no respect antagonistic to the law announced in the Baylor case.

There are other assignments of error contained in the printed book, but they will not be dealt with, because counsel for the plaintiff in error had not argued them, and, upon examination of the files of the court, we find no bills of exception.

The judgment should be affirmed. DIXON, J., concurred.

GARRISON, J. (*dissenting*). — I cannot unite with my colleagues in ignoring the bill of exceptions in this case. The cause was argued by the defendant in error upon these exceptions without questioning their validity. Indeed, such a suggestion has not been at any time made by any party in interest. The fact that, upon examination of the files after the argument, no bill of exceptions is found, does not, in my judgment, authorize the court, of its own motion, to reject a substantial part of the printed case used upon the argument, without criticism.

I am furthermore unable to join in the view that the omission of the plaintiff in error to argue a given assignment is equivalent to its abandonment. The assignment of error in the bill of exceptions is argued *in extenso* by the defendant in error in his printed brief, and is, for all purposes, part of the case.

Regarding the exceptions as up for review upon the errors assigned by the plaintiff and argued by the defendant, I think there was error in the charge of the trial court with respect to the legal effect of the omission of the railroad company to provide a certain mechanical contrivance called "tell-tales," to warn the plaintiff, its servant, of the approach to the low bridge.

The language of the trial judge was as follows: "The plaintiff says if they (the railroad company) had constructed the bridge so low as likely to strike the brakeman upon the top of the car, then reasonable judgment and reasonable care would have directed that in advance of that bridge they should hang these 'tell-tales' so as to warn the brakeman that he was approaching a dangerous structure. Now, it is for you to say how that is. The law lays down the rule to you that you shall exact of the company reasonable judgment and reasonable care, and then the law asks you to say whether in this particular instance reasonable judgment and reasonable care were exercised. If they were not, then the company is held responsible. If that bridge, so constructed without 'tell-tales,' was dictated by reasonable judgment and reasonable care on the part of the company, then there is no responsibility and the defendant must be acquitted; but if you think the company failed, then you come to another inquiry, and that in-

quiry is this, was the plaintiff informed substantially of this condition of things before he entered the service of the company or in time for him to quit it before the accident?"

This statement premises the law to be that the company owed to the plaintiff the duty of providing the device called "tell-tales" if reasonable judgment and care dictated its employment for his safety at the point in question. Assuming the term "reasonable judgment and care" to be used in the sense in which it is ordinarily employed in defining the duties of masters in the original selection and subsequent inspection and repair of implements furnished to their servants, it is evident that the instruction in question was to the effect that a master might also be held to the same standard of duty with respect to the adoption of a particular mechanical contrivance in use elsewhere as a precautionary signal. I do not think the master's liability is correctly embodied in this proposition, or that it may properly be left in this form to the jury. However derelict in a moral sense an employer may be for his failure to guard his workmen by procuring such mechanical appliances as tend to diminish the dangers of their employment, the legal rights of the parties are altogether the creature of the contract that the law, from the relation of master and servant or on grounds of public policy, implies to exist between them. *Farwell v. Boston & W. R. R.*, 4 Metc. 49, 15 Am. Neg. Cas. 407; *Harrison v. Cent. R. Co.*, 2 Vr. 293, 16 Am. Neg. Cas. 633, *ante*.

It is not within the scope of this memorandum to inquire whether by the contract of hiring the master undertakes to better his service by the addition of such appliances as may tend to enhance the safety of his servants while at work, or to lay down any rule with respect to the proof upon which such a liability may be submitted as a question of fact to the jury. It suffices to say that if such an implied undertaking on the part of the master be assumed to exist, his liability arises only when it is shown that the efficiency of the contrivance in question has been established by actual use under circumstances of such notoriety that it is negligence for him not to recognize it as within the purview of his implied undertaking. *Smith v. N. Y. & H. R. Co.*, 19 N. Y. 127; *Patt. R'y L.* 302.

To submit to a jury the defendant's liability to adopt new

contrivances as one of ordinary care or reasonable judgment seems to me to be, under any view of the law, an injurious error. A verdict found in accordance with this instruction would rest upon the proposition that the defendant corporation owed to the plaintiff, its servant, the legal duty of adopting the given contrivance if, in the opinion of the jury, the exercise of reasonable care dictated such a course. I am unable to find any warrant for such a doctrine as part of the law of master and servant. On the contrary, the law is that a master may carry on a business that is dangerous either in itself or in the manner of conducting it without being liable to one of his servants who is capable of contracting for himself and who knows the danger attending the business in the manner in which it is conducted. *Priestley v. Fowler*, 3 Mees. & W. 1 (1); *Ladd v. New Bedford R. Co.*, 119 Mass. 412, 15 Am. Neg. Cas. 491; *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669; *Marsh v. Chickering*, 101 N. Y. 396; *Harrison v. Cent. R. Co.*, 2 Vr. 293, 16 Am. Neg. Cas. 633, *ante*.

The case of *Wallace v. Cent. Vt. R. Co.*, 138 N. Y. 302, decided in the New York Court of Appeals in 1893, and cited in the argument before us, was based upon a statute of that State requiring railroad companies to erect "tell-tales" in advance of dangerous overhead structures. It is therefore valueless as an authority.

Much as it is to be deprecated upon moral grounds that trainmen are tempted to expose themselves to the dangers of these low bridges unaided by automatic warnings, the law is that they may contract to do so, and that having done so they cannot, in the absence of express agreement, hold their employer to any duty that is not, in contemplation of law, inherent in the relation of master and servant.

1. In *PRIESTLEY v. FOWLER*, 3 Mees. & W. 1, the defendant was sued by his servant, injured by the breaking down of a van, in which he and a fellow-servant were carrying goods for his master, by reason of its weakness and excessive loading. Defend-

ant was held not to be liable. The court said that the principal was under no implied obligation to his servant for the sufficiency of the van, as he had no more knowledge of its condition than the servant himself.

WORKMAN ENGAGED IN ERECTING RAILROAD BRIDGE INJURED BY TRAIN — NEGLIGENCE OF ENGINEER — RELATIONS OF PARTIES — QUESTION FOR JURY — FELLOW-SERVANT. — In **HARDY v. DELAWARE, LACKAWANNA & WESTERN R. R. CO.**, 57 N. J. L. 505 (*Supreme Court, February Term, 1895*), judgment of nonsuit was *reversed*, the case being stated in the syllabus to the official report (opinion by VAN SYCKEL, J.) as follows:

“1. The Passaic Rolling Mill was employed by defendant to do the work of erecting a bridge. No price was agreed upon other than that skilled workmen were to be furnished by the rolling mill to do the work, the defendant to pay the rolling mill for their work at a price stated in the contract. The plaintiff, while working on the bridge in the performance of the contract of the rolling mill, was injured by the carelessness of the engineer of the railroad company in running a train of cars over the bridge. *Held*, that it should have been left to the jury to say who the plaintiff's employer was (1).

“2. To constitute the relation of fellow-servants, the service must be not only under the same master, but the employment must be one having a common object.”

The judgment of the Supreme Court in the HARDY case was *affirmed* by the Court of Errors and Appeals. See 29 Vr. (58 N. J. L.) 205.

1. The trial court nonsuited the plaintiff on the authority of **EWAN v. LIPPINCOTT**, 18 Vr. 192. In commenting on this case the Supreme Court (per MAGRE, J.) in the subsequent appeal in the HARDY case, 59 N. J. Law, 35, said: “The case of **EWAN v. LIPPINCOTT**, has, as I conceive, been misunderstood. It came to this court upon a rule to show cause. It appeared in the case that Ewan was a machinist, employed by D. & W., master machinists. Lippincott was a mill-owner, who employed D. & W. to alter the gearing of a wheel. D. & W. sent Ewan to do the work, and he and Lippincott arranged how it was to be done, and particularly that, at times when Ewan was not at work on the wheel, it should be run by Lippincott's engineer, to furnish power for the mill. The trial judge charged that, upon this evidence,

Ewan and the engineer (whose negligence had injured Ewan) were not servants of a common master. Obviously this ruling was erroneous, if the evidence either established, or tended to establish, that they were fellow-servants. In the former case, a nonsuit should have been granted; in the latter case, the question should have been submitted to the jury. The verdict was set aside and a new trial granted. The opinion of Mr. Justice Reed clearly indicates that, in his view, the evidence established the co-service of Ewan and the engineer, and in that opinion I concur. But it is unnecessary to go so far, in order to support that case, for there was clear evidence from which a jury might infer that Ewan had assented to the transfer of his services to Lippincott and submitted therein to his control.” * * *

The action was again tried in the Essex Common Pleas and verdict and judgment rendered for plaintiff. The defendant appealed and the Supreme Court *affirmed* the judgment. Opinion by MAGIE, J., who stated the facts as follows: "Hardy, the defendant in error, was a workman furnished under the contract. While a bridge in the vicinity of the station at Newark was being rebuilt, employees of the railroad company drew a train upon it from the west, detached the locomotive, which passed on to the east, and left the train standing without any locomotive attached. Hardy was at that time directed by a foreman to drive in some wedges to wedge up the falsework. In doing this he stood beside and below the train, with his left hand grasping one of the rails of the track and his right using a mallet. While in this position a locomotive engineer of the railroad company backed a locomotive down from the west. Other employees attached it to the standing train, which was then drawn by it toward the west. The wheels of the train passed over Hardy's left hand, injuring him permanently." * * * See Delaware, Lackawanna & Western R. R. Co. v. Hardy, 59 N. J. Law, 35 (*June Term, 1896*). The rulings are stated in the syllabus to the official report as follows:

"1. A general servant of one person may, for a particular work or occasion, become, *pro hac vice*, the servant of another person, so that the latter will not be liable to him for an injury occasioned by the negligence of other servants engaged with him in a common employment.

"2. To establish the relation of master to such a servant it must appear that the servant has, expressly or by implication, consented to the transfer of his services to the new master and to accept him as his master, *pro hac vice*, and has entered upon such service and submitted therein to the direction and control of the new master."

FENDERSON V. ATLANTIC CITY RAILROAD COMPANY.

Court of Errors and Appeals, New Jersey, March Term, 1894.

[Reported in 56 N. J. Law, 708.]

BRAKEMAN INJURED BY COLLISION OF ENGINE WITH CAR — DEFECTIVE COUPLING — PROOF — NONSUIT. — 1. In an action by an employee against his employer to recover damages by reason of an injury resulting from the use of appliances and machinery furnished, it must appear by affirmative proof on the part of the employee that the employer had failed in the exercise of reasonable care in providing

safe and suitable appliances and machinery, and if it does not so affirmatively appear the employee will be nonsuited in his action against his employer.

2. If a railroad company exercises reasonable care in providing a safe and suitable coupler for the connection of the cars of its train, and also exercises reasonable care in inspecting and keeping the coupler safe and suitable, it will not be liable for an injury resulting from its becoming suddenly out of repair and before an opportunity can be had to remedy its defective condition. [In this case a brakeman in the employ of defendant while upon an engine in the performance of his duties was injured by the engine running into the rear car of a part of a train ahead which became detached into two parts.]

(Syllabus by the court.)

ON ERROR to the Supreme Court. The case is stated in the opinion. *Nonsuit affirmed.*

JOHN W. WESCOTT, for plaintiff in error.

JOSEPH THOMPSON, for defendant in error.

Lippincott, J.— The plaintiff below, who is plaintiff in error, sued the Camden and Atlantic Railroad Company, the defendant in error, to recover damages for personal injuries. At the trial, after the evidence for the plaintiff was submitted, the trial court directed a judgment of nonsuit to be entered. Upon this judgment error has been assigned, and it is now before this court for review.

The plaintiff was an employee of the defendant and in its service as a brakeman on one of its engines at Atlantic City, and it is alleged that the injury occurred by reason of the negligence of the defendant in failing to provide a proper coupling attaching the cars of the defendant company together, whereby the cars became detached and came in contact with the plaintiff, who was on the engine, and seriously injured him (1). The pleadings in the cause allege this neg-

1. *Fireman injured in collision.*— In *DEREMER, ADM'X, ETC. v. DELAWARE, LACKAWANNA & WESTERN R. R. Co.*, 54 N. J. Law, 407 (Supreme Court, June Term, 1892), fireman fatally injured by locomotive leaving track and colliding with a car, on demurrer to declaration, the Supreme Court ruled, as per syllabus to the official report (opinion by BEASLEY, Ch. J.), as follows:

“1. In a suit against a railroad in

consequence of the death of an employee, a count which charges that a switch having been misplaced in the night-time, and ‘by reason of the want of proper signals, and a proper signal lamp on said switch,’ the accident and death occurred, etc., is good against a demurrer.

“2. In such a statement the want of proper signals is made the proximate cause of the injury.” Judgment for plaintiff with leave to plead anew.

lect as the sole ground of action, and the evidence in the cause at the trial was directed to the proof of this point.

The facts, as developed on the trial, are that the plaintiff was working in the terminal yard of the defendant, at Atlantic City, and on the 3d day of July, 1892, met with this accident. A train of cars, forming a heavy passenger express train from Philadelphia, had just arrived at the depot at Atlantic City. After its passengers had been discharged, the shifting engine upon which the plaintiff was employed as a brakeman ran into the depot and attached itself to the train, for the purpose of pulling the train, with the train engine following, out of the depot and off the main track and out upon a street called Baltic avenue, for the purpose of having the main track clear for another section of the train or for another train. Baltic avenue runs at right angles across the terminal yard at Atlantic City, and the connection with the track on that street with the main track is made with a switch and a curved connecting track, and it became necessary to pull this train with the shifting engine, beyond the switch which made connection with the curve. This was done, and then the shifting engine was detached from the train, to allow the train engine to draw the train upon the curved track, and thus upon Baltic avenue. Whilst this was being done it became the duty of the engineer of the shifting engine to follow the train upon the curve to Baltic avenue, or to some distance towards it, so as to leave the main track perfectly free for the next train to run into the depot. Whilst the train was being drawn along the curve, with the shifting engine following at a short distance, at a very slow pace, the cars of the train ahead of the shifting engine became detached into two parts, and the shifting engine ran into the rear car, injuring the plaintiff, whose duty required him to be at that end of the shifting engine which came into contact with the car. He was quite seriously injured. The proof in the case shows clearly that, upon the two parts of the train separating or becoming detached, the air brakes did their proper work instantly and brought the rear detached car to an immediate standstill, and that the injury occurred by reason of the shifting engine not stopping, but continuing to go on until it ran into the rear detached car. It is in proof that the cars of this train were connected with each other by what was known as the "Miller" coupler, or

the system known as the "Miller" coupling, a well-known appliance for this purpose, operating automatically to some extent. It appeared in the case that, upon some of the cars of this train or in use upon the defendant's road, what is known as safety chains were used in aid of the "Miller" coupler. These safety chains are two or three links of chain attached to the side of a car and to a hook and link on the side of the next car, and the chain thus attached, when connected, is called a safety chain. It appeared in the evidence that when the rear detached portion of the train stopped the shifting engine was following quite slowly about a car length behind. It does not appear by what sort of coupler the two cars which parted were attached to each other. It is contended that they were connected by the "Miller" coupler, but with no safety chain. It also appeared quite clearly in the evidence that had the engineer or those in charge of the shifting engine kept a careful watch over the movements of the engine it could have been stopped before it came in contact with the rear car of the detached portion of the train. The condition of affairs seems not to have been observed until the moment of contact, when the plaintiff endeavored to save himself from injury, but was unable to prevent himself from being caught between the car and engine.

The trial court found, from the undisputed evidence, that the kind of coupler upon the car when the train parted was not identified; that the evidence of the witnesses was very general on this subject, and that when dissected, this assertion that the coupler was a "Miller" one was founded on hearsay only, and that this failure to identify any particular car as the one having a defective coupling demanded that judgment of nonsuit be directed. The trial court also rested the judgment upon the ground that the only evidence adduced was the mere occurrence of the accident, and that, in this case, was not *prima facie* proof of negligence of the defendants towards the plaintiff, its employee.

Upon a review of the evidence it clearly appears that there was an entire want of any identification of the cars which were detached from each other, and the entire want of any identification of the character of the coupling by which the cars were attached to each other, and an entire want of proof against the defendant tending to show negligence in not supplying a reasonably proper appliance for coupling the cars together.

There is also evidence indicating beyond contradiction negligence on the part of the engineer of the shifting engine causing the accident, also evidence of negligence on the part of the plaintiff contributing to the injury. There is no evidence, so far as it appears in the case, showing that the coupler was in anywise defective, unless the mere separation of the cars can be considered evidence tending in that direction, and even if this conclusion was conceded, no evidence that the defendants or their agents had any knowledge of such defectiveness, or ought to have had knowledge of it. There is no evidence of the want of reasonable inspection, nor is there any affirmative proof that the plaintiff had no knowledge of the defective coupling, if it existed. A careful consideration of the evidence reveals only the barren fact that there was an accident to the plaintiff, caused by the separation of the train of cars into two parts and a collision of the rear portion with the shifting engine.

These facts require only the application of familiar principles of law in order to sustain the conclusions of the trial court.

The rule is that the company is bound to use only reasonable care to prevent accidents to its employees, and to this end is bound to exercise reasonable care in furnishing suitable machinery and appliances, and to use a like reasonable care in keeping them in proper repair, as the risks assumed by the employees are not those which are brought about by the negligence of the company in these respects. A railroad company is not held to the exercise of extraordinary care towards its employees, as in the case of passengers; but it is only required to furnish such appliances as are reasonably calculated to insure the safety of its employees; nor is the company responsible for an injury resulting from what is otherwise a suitable appliance becoming suddenly out of repair, unless it has been guilty of negligence in not ascertaining the defect and remedying it. Thus, if the coupling of a freight car suddenly becomes out of repair, the company using the same will not be liable for an injury to an employee in consequence thereof, unless its attention has been called to the defect, or the company, by the exercise of a reasonable degree of care, should have discovered the defect and had an opportunity to make the needed repair. 3 Wood Railw. L. 1451, sec. 373. The

measure of the master's duty is to exercise reasonable care in providing instrumentalities for the servant in the prosecution of the business, and *prima facie* he is presumed to have done so; and if he has done so, no liability attaches for defects therein, unless negligence can be imputed to him in reference to these inspections and repairs. He is not bound to adopt the latest improvements in machinery, nor is he liable for an accident which would not have occurred if such improvements had been adopted. He is not required to furnish the best appliances possible to be obtained, but they must be reasonably safe, and kept so.

Applying these principles to the proof here in this case, in order to sustain a recovery it must have affirmatively appeared that the injury resulted from an unsound or defective coupler; that the master had had, or ought to have had, knowledge of the defect; that is, that the company had failed to furnish such a coupler as was reasonably calculated to insure the safety of the plaintiff, or had been guilty of negligence in not keeping it safe, or ascertaining its defects and repairing it or supplying another which was reasonably suitable.

Now, in this case, no proof exists, directly or by attendant circumstances, in the case of the plaintiff, of these affirmative propositions necessary to a recovery, unless it be that the circumstances of the mere occurrence of the accident fills the necessary measure of proof.

But upon this point there exists the conclusive authority of this court. In the case of *Bahr v. Lombard et al.*, 24 Vr. 233 (1), Mr. Justice Garrison, delivering the opinion of the court, says: "The principle is quite institutional, that whenever a right of action springs from the conduct of a defendant, the plaintiff must present proof of the facts necessary to the recovery which he seeks. It is, furthermore, the general rule of law that the mere proof of the occurrence of an accident raises no presumption of negligence."

The trial court determined that there were no facts and circumstances which indicated any negligence on the part of the defendant. The case being devoid of such proof, the judgment of nonsuit ought to be affirmed on that ground. But the conclusion of the court is also that the plaintiff was him-

1. *BAHR v. LOMBARD*, 24 Vr. 233, is reported with the New Jersey cases in this volume, *post*.

self guilty of negligence contributing to the accident. The facts also tend very strongly to the result that the negligence of the engineer of the shifting engine was one of the causes of the injury of the plaintiff. The engineer's negligence was the negligence of a fellow-servant of the plaintiff and would debar him from a recovery.

I shall vote for an affirmance of the judgment of nonsuit.

FOR AFFIRMANCE: — THE CHIEF JUSTICE, DEPUE, LIPPINCOTT, MAGIE, VAN SYCKEL, BROWN, SMITH (7).

FOR REVERSAL: — THE CHANCELLOR, ABBETT, DIXON, BORGERT (4).

COLLYER, ADM'X V. PENNSYLVANIA RAILROAD COMPANY.

Supreme Court, New Jersey, November Term, 1886.

[Reported in 49 N. J. Law, 59.]

DUTY OF MASTER TO FURNISH SAFE MACHINERY AND COMPETENT EMPLOYEES. — A master is bound to take reasonable care and precaution to guard his servants against danger. If he fails to exercise reasonable skill in furnishing machinery or buildings for the use of his servants while in his service, he is responsible for the consequent damage. He cannot claim immunity on the ground that he has exercised due care in selecting mechanics of competent skill in the construction of such machinery and buildings, but assumes the burthen of seeing that such mechanics actually exercise reasonable care and skill in the execution of their work.

FALL OF SLIDING DOOR — NEGLIGENCE OF FELLOW-SERVANT.

— There can be no recovery by the servant against the master for injury caused by the careless handling of machinery by a fellow-servant. In this case the plaintiff was injured by the fall of a sliding door which was carelessly opened by the men who had charge of it.

FELLOW-SERVANT. — If the party injured was lawfully in the building where the injury was received, in the course of his employment, he was a fellow-servant with those whose negligence produced the injury, and he cannot recover therefor.

TRESPASSER — ASSUMPTION OF RISK. — If he was there as a trespasser or by sufferance, no duty with respect to him rested on the master, except to refrain from acts wilfully injurious; he assumed all the ordinary risks incident to the character of the place and is without remedy. *Vanderbeck v. Hendry*, 5 Vr. 467 (1).

1. In *VANDERBECK ET AL. v. HENDRY*, 5 Vr. (34 N. J. L.) 467 (February Term, 1871), boy about ten years old, injured by fall of lumber piles while in defendant's lumber yard looking for wood, judgment for plaintiff

ON RULE TO SHOW CAUSE. The case is stated in the opinion. *Verdict set aside. New trial granted.*

ARGUED at June Term, 1886, before BEASLEY, Ch. J., and DEPUE, VAN SYCKEL and KNAPP, JJ.

JAMES FLEMMING, for plaintiff.

VREDENBURGH & GARRETSON, for defendants.

Van Syckel, J. — This action is instituted by the administratrix of George Collyer, deceased, to recover damages for injury inflicted upon the decedent in his lifetime by the alleged negligence of the defendant. The death of the decedent was not produced by the injury. Our statute has saved the right of action to his personal representative.

Collyer was in the employ of the defendant company and was injured by the falling of a sliding door in the company's storehouse at the foot of Laight street, in the city of New York. The plaintiff insists that the injury resulted from the negligent and unskilful manner in which the door was constructed, and from the careless manner in which the door was handled at the time of the accident.

A master is bound to take reasonable care and precaution to guard his servants against danger. If he fails to exercise reasonable skill in furnishing machinery or buildings for the use of his servants while in his service, he is responsible for the consequent damage.

He cannot claim immunity upon the ground that he has exercised due care in selecting mechanics of competent skill in the construction of such machinery and buildings, but assumes the burthen of seeing that such mechanics actually exercise reasonable care and skill in the execution of their work. The evidence shows that this door was constructed with ordinary skill, and that the injury was caused by the careless and negligent manner in which the door was opened by the men who had charge of it.

The evidence also is that the company exercised due care in the selection of these servants.

was reversed, the ruling (per opinion by BEDLE, J.) being stated in the syllabus to the report as follows:

"1. A mere permission to pass over dangerous lands, or an acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the party giving such per-

mission except to refrain from acts wilfully injurious.

"2. One who enjoys such permission is only relieved from being a trespasser, and must assume all the ordinary risk attached to the nature of the place or the business carried on."

If Collyer, at the time of the injury, was lawfully in the vicinity of the building in the course of his employment, he was a fellow-servant with the men whose negligence inflicted the injury upon him, and he therefore cannot recover.

If he was there as a trespasser or by sufferance, no duty with respect to him rested upon the company, except to refrain from acts wilfully injurious; he assumed all the ordinary risk incident to the character of the place, and is without remedy. *Vanderbeck v. Hendry*, 5 *Vroom*, 467.

The verdict should be set aside, and a new trial granted.

DERAILMENT OF TRAIN — PASSENGER KILLED — LIABILITY OF RECEIVER OF RAILROAD. — LITTLE (Receiver of Central R. R. of New Jersey) v. DUSENBERRY, Adm'r, 46 N. J. Law, 614 (*Court of Errors and Appeals, November Term, 1884*), was an action of trespass on the case against the Receiver for damages for death of plaintiff's intestate, who while riding as a passenger on the Central Railroad was killed by the car of the train being thrown from the track, caused by an imperfect switch, on the New York and Long Branch Railroad. The case was tried in the Circuit Court of Essex county and verdict was rendered for plaintiff for \$25,000. Judgment was entered for the same in the Supreme Court and writ of error was brought to the Court of Errors and Appeals to reverse the judgment. The judgment was affirmed unanimously, thirteen judges being for affirmance and none for reversal. The question of the liability of a receiver was the leading point in issue and the question is ably and exhaustively treated in the briefs submitted by counsel for the parties (John W. Taylor, for the Receiver, the plaintiff in error, and H. C. Pitney, for defendant in error), and in the opinion of the court, delivered by SCUDDER, J., numerous American and English cases being cited and reviewed. The rulings of the court are set out in the official syllabus to the report of the case as follows:

" 1. A receiver of an insolvent railroad company, empowered by statute to operate the railroad for the use of the public, acting as a common carrier, in the carriage of passengers, is not a public officer, entitled to immunity as such, but may be sued at law, in his representative capacity, by leave of the court appointing him, as the company might be, for negligence of his agents in operating the road, resulting in the death of a passenger (1).

1. The learned judge cited the statute of February 11, 1874, which enacts "that whenever any incorporated railroad company in this State shall become insolvent, and the property of such company shall have passed into

"2. The sale of a ticket to a railroad passenger is an undertaking that due care for his safety shall be used during the whole course of his journey over that and other roads, both in the management of the trains and the construction and maintenance of the lines in a condition fit for his passage over them.

"3. This liability is not changed by leases and agreements between the companies having connecting lines, apportioning the charges, expenses and fares between them, of which the passenger had no notice."

PERSON KILLED BY EXPLOSION OF NITROGLYCERINE — INDEPENDENT CONTRACTOR — ACT OF THIRD PERSON — PROXIMATE AND REMOTE CAUSE — NEGLIGENCE OF EMPLOYEE OF SUBCONTRACTOR — RAILROAD COMPANY NOT LIABLE. — In **CUFF, Adm'r, v. NEWARK & NEW YORK R. R. CO. et al.**, 35 N. J. Law, 17 (*Supreme Court, February Term, 1870*), action to recover damages for the death of plaintiff's husband who was killed by explosion of nitroglycerine oil used for blasting purposes in constructing a railroad, rule to show cause why new trial should not be granted, verdict in the Hudson Circuit being against all the defendants for \$3,000, was

the hands of a receiver by order of the Chancellor, in accordance with the Act to which this is a supplement, the receiver shall, and he is hereby empowered to, operate said railroad for the use of the public, subject, at all times, to the order of the Chancellor; and all expenses incident to the operation of said railroad shall be a first lien on the receipts, to be paid before any other incumbrance whatever." Rev., p. 196, § 106.

The court cited and reviewed the following cases bearing on point 1: *Freeholders v. Strader*, 3 Harr. 108; *Cooley v. Freeholders*, 3 Dutcher, 415; *Livermore v. Freeholders*, 5 Dutcher, 245, s. c., 2 Vroom, 507; *Pray v. Jersey City*, 3 Vroom, 394; *Marvin Safe Co. v. Ward*, 17 Vroom, 19; *Hill v. Boston*, 122 Mass 344; *Klein v. Jewett*, 11 C. E. Green, 474, s. c., 12 C. E. Green, 550 (5 Am. Neg. Cas. 1); *Palys v. Jewett*, 5 Stew. Eq. 302; *Meara v. Holbrook*, 20 Ohio St.

137; *Blumenthal v. Brainard*, 38 Vt. 402; *Cardot v. Barney*, 63 N. Y. 281; *Kain v. Smith*, 80 N. Y. 458; *Barton v. Barbour*, 104 U. S. 126; *Farlow, Rec'r, v. Kelly*, 108 U. S. 288 (10 Am. Neg. Cas. 571); *Sprague v. Smith*, 29 Vt. 421.

On points 2 and 3 the court cited *Great Western R'y Co. v. Blake*, 7 H. & N. 986; *John v. Bacon*, L. R., 5 C. P. 437; *Pierce on Railroads*, 282; *R. R. Co. v. Barron*, 5 Wall. 90; *Penn. R. Co. v. Roy*, 102 U. S. 451 (10 Am. Neg. Cas. 593).

As to liability of Receiver, see, also, *DEMAREST v. LITTLE* (Receiver of Central R. R. Company of New Jersey, 47 N. J. Law, 28 (1885), and *WOODRUFF'S ADM'R v. LITTLE* (Receiver, etc.), 17 Vr. (46 N. J. L.) 614, actions for deaths of persons in the Parker's Creek bridge disaster on the Long Branch Railroad, on June 29, 1882, in both of which actions the Receiver was held liable.

made absolute and *new trial granted* (1). The question of independent contractor was passed upon in the opinion by DEPUE, J., and the case and its rulings are set out in the syllabus to the official report as follows:

"The rule is now firmly established, that when the owner of land undertakes to do a work which, in the ordinary mode of doing it, is a nuisance, he is liable for any injury which may result from it to third persons, though the work is done by a contractor exercising an independent employment, and employing his own servants; but when the work is not itself a nuisance, and the injury results from the negligence of such contractor or his servants in the manner of executing it, the contractor alone is liable unless the owner is in default in employing an unskillful or improper person as the contractor (2).

1. CUFF *v.* NEWARK & N. Y. R. R. Co., 35 N. J. Law (6 Vroom), 17, is a leading case on the subject of independent contractor, and the liability of the employer for negligence of such contractor, and the liability of an owner for persons employed on his land, and the question is exhaustively treated in the opinion delivered by Mr. Justice Depue, with a large number of American and English authorities cited and reviewed in support of the rulings of the court.

2. *Damage to property—Master and servant—Independent contractor—Rule of law.*—In THE STATE (REDSTRAKE, prosecutor) *v.* SWAYZE, 52 N. J. Law, 129 (Supreme Court, November Term, 1889), on *certiorari* to Salem Pleas, judgment for plaintiff in the Court of Common Pleas was affirmed. The action was originally brought in the court for the trial of small causes. The justice who heard the case rendered a judgment for the plaintiff in the sum of \$50.50. Upon an appeal to the Court of Common Pleas, this judgment was set aside, and a judgment entered for plaintiff in the reduced sum of \$40, with costs below, but without costs in the Pleas. The record from the Common Pleas

shows the following state of facts: James J. Redstrake, the plaintiff, was the owner of a house and lot in front of which were shade trees standing in the sidewalk, near the curb, which trees were unsafe and required trimming. A telephone wire was so placed that the trees could not be trimmed without some of the limbs falling on it. Redstrake employed two men to trim the trees and while they were so doing a limb fell on the wire and bent it down. His attention was called to the danger to passers-by in wagons. He had the wire tied up. Another man afterwards continued trimming the trees and again a limb fell on the wire. Before the same could be removed the wife of the defendant came along in a buggy and the wire caught the top of the buggy and broke it. The action was brought for the damage thereto. Redstrake was present part of the time while the man was trimming the trees. The Supreme Court (per GARRISON, J.) said: "It is undoubtedly a rule of law, that where one employs a contractor exercising an independent employment to do a work not in itself a nuisance, the contractor alone is liable for an injury resulting from the negligence of himself or of servants hired by

"The principle upon which the *superior*, who has contracted with another, exercising an independent employment for the doing of the work, is exempt from liability for the negligence of the latter in the execution of it, applies as between the contractor and his subcontractor.

"Damages to be recovered must be both the natural and proximate consequence arising from the wrong complained of, and not from the wrongful act of a third party remotely induced thereby.

"The intervention of the independent act of a third person between the wrong complained of and the injury sustained, which act was the immediate cause of the injury, is made a test of that remoteness of damage which forbids its recovery.

"The Newark and New York Railroad Company contracted with F. & Co. [Flanagan & Sage] for the gradation of their roadbed. With the consent of the company, F. & Co. subcontracted the rock

him, provided the employer is not in default in selecting as a contractor an unskilful or improper person. *Cuff v. Newark & N. Y. R. Co.*, 6 Vr. 17. In the case before us, however, the defendant can derive small benefit from the abstract existence of this rule of law. The facts agreed upon present, in the clearest manner, *prima facie*, a case of employment as master and servant. If the employer seeks to avail himself of the protection afforded him by the less intimate relation of employer and contractor, it is incumbent upon him, by proof, to establish the facts essential to the applicability of the rule of law he invokes."

Property damaged by blasting—Explosion—Nuisance—Liability of contractor constructing tunnel—Storage of explosions.—In *McANDREWS v. COLLERD*, 42 N. J. Law, 189 (Errors and Appeals, March Term, 1880), the syllabus by the court (opinion by the Chancellor) states the case as follows:

"1. The Delaware, Lackawanna and Western Railroad Company having legislative authority to construct a tunnel through Bergen Hill, contracted with M. to do the work. The

tunnel was driven through rock, was begun in 1873, and completed in 1877. M. constructed near the eastern end of the tunnel, and within the limits of Jersey City, a magazine for the explosive materials which he used in blasting. In 1876, at night, the materials exploded, doing great damage to property, and injuring, among the property, some houses belonging to C. In a suit brought to recover damages for the injury. *Held*: 1. That the legislative authority to a private corporation, or an individual, to do a work for its own or his own profit, does not include authority to use, at whatever hazard to the persons or property of others, dangerous materials, even though they are necessary to the convenient prosecution of the work. 2. They will be liable for the injury, although no negligence or want of skill in executing the work is proved, and liable for actual damages, even though they show that they have done the work in the most careful manner. 3. Where a nuisance complained of is a public nuisance, no degree of care will relieve a party from liability to respond for damages arising from it."

excavation with one S. [Shaffner]. Before the subcontract was made, it was understood by the contractors and by the officers of the company, that the rock would be removed by S., by blasting with nitro-glycerine; a magazine for storing the nitro-glycerine necessary for that purpose, was located on the company's land, under the direction of their engineer. By the contract between the company and F. & Co., the contractors were forbidden to sublet without the company's consent, and were required to discharge incompetent and disorderly workmen, when required so to do by the company's engineer. S., without the knowledge or consent of the company, stored in the magazine certain cans of glycerine which belonged to the United States Blasting Company, and which he kept there for sale on the orders of the blasting company. An order for glycerine being sent to S. by the blasting company, his foreman directed B. [Burns], one of his employees, to fill the order. B., in doing so, removed one of the blasting company's cans from the magazine a distance of one hundred and fifty yards, but not off the railroad company's lands, and there, by his negligence, an explosion occurred, by which the deceased was killed. B. was employed by S. specially to take charge of the nitro-glycerine in the magazine, and was an incompetent person for that business. In an action against the railroad company and F. & Co., the contractors, by the administratrix of the deceased, to recover damages for his death, *held*:

"That the stipulations in the contract between the railroad company and the contractors, as to subcontracting, and the removal of incompetent employees, did not create the relation of master and servant of the subcontractor, nor raise a duty for the non-performance of which an action could be maintained by third persons against the railroad company, or F. & Co., for injuries resulting from the negligence of an employee of the subcontractor.

"That the permission of the company that S. might use their lands for a magazine in which to store oil necessary for the operation of blasting on the work, did not authorize him to use them for the purpose of engaging in a traffic in oil which belonged to others.

"That the company was not answerable for injuries to third persons, which happened through the negligence of a servant of S. in the management of nitro-glycerine, which belonged to another company engaged in the manufacture of that article, and which had been clandestinely stored in the magazine by S., and was kept by him for sale on the order of its owners, without the knowledge of the company."

Workman in railroad subway injured in cave-in.

IN *WENDELL v. PENNSYLVANIA R. R. Co.*, 57 N. J. L. 467 (*Supreme Court, February Term, 1895*), the syllabus to the official report states the case as follows: "The declaration showed that plaintiff was in a subway beneath the track of the defendant, both defendant and plaintiff knowing that the earth on the sides and top of the subway was liable to cave in when jarred by the passing trains. The plaintiff was doing work beneficial to the defendant, but it did not appear that he was in the employ of the company. Under these circumstances, the defendant promised to give plaintiff notice of the approach of its trains, which it failed to do, and, consequently, the plaintiff was injured. *Held*, in this statement a legal cause of action was shown." Opinion by BEASLEY, Ch. J. The judgment was: "Unless defendant pleads *de novo*, let plaintiff take judgment."

Licensee struck by car — Contributory negligence.

IN *DIEBOLD, ADM'X, v. PENNSYLVANIA R. R. Co.*, 50 N. J. Law, 478 (*Supreme Court, June Term, 1888*), rule to show cause, after verdict for plaintiff, was made absolute, the case being stated in the syllabus to the report (opinion by GARRISON, J.) as follows:

"1. Where a railroad company provides offices for the transaction of its business, accessible from the public streets, the presence in the freight yard of the company of a person having business with such offices is not a necessary incident of his business with the company. He is at best a licensee, toward whom the company owes no special duty.

"2. D., who had business with the freight department of the Pennsylvania Railroad Company, whose freight offices are on Market and Alling streets, is struck by a car while he is standing on a track in the drilling yard of the company, with his back towards the only direction of danger. *Held*, that he was guilty of contributory negligence.

"3. 'An Act to prevent accidents on railroads' (Pamph. L. 1869, p. 806; Rev., p. 920, § 67), is not limited in its application to the main tracks of railroads."

CONDUCTOR ON RUNNING BOARD OF STREET CAR COMING IN CONTACT WITH POLE — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — In *PIERCE, ADM'X, v. CAMDEN, GLOUCESTER & WOODBURY R'Y CO.*, 58 N. J. Law, 400 (*Court of Errors and Appeals, November, 1895*), the case is stated in the syllabus to the official report as follows: "The intestate, who had been in the employ of the defendant com-

pany for about one month as an extra conductor, and had only run a car for one day over that part of the road where the accident happened, and at the time of his entering the company's service had no knowledge of its road, the method of construction or the company's way of operating it, was collecting fares from the platform step running the car's length, and, reaching up for the registry rope to mark a fare, struck his head against a pole which was only six and one-half inches from the outside of the platform step, and was killed, the pole next to the one which caused the accident being ten inches from the step. *Held*, that it was for the jury to determine whether the intestate was guilty of contributory negligence, there being no direct evidence that he had any knowledge of the pole in question or of the danger and risks therefrom." Opinion by LUDLOW, J. On error to the Supreme Court. *Non-suit reversed*.

THE NORD DEUTSCHER LLOYD STEAMSHIP COMPANY V. INGEBREGSTEN (1).

Court of Errors and Appeals, New Jersey, November Term, 1894.

[Reported in 57 N. J. Law, 400.]

STEVEDORE KILLED WHILE UNLOADING STEAMSHIP AT DOCK — DUTY OF MASTER AS TO MACHINERY AND APPLIANCES.

- 1. A master's duty to his servant requires of the former the exercise of reasonable care and skill in furnishing suitable machinery and appliances for carrying on the business in which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections and tests at proper intervals.
2. If the master selects an agent to perform this duty for him, and the agent fails to exercise reasonable care and skill in its performance, the master is responsible to his servants for the fault. But, if the employer's duty to inspect or repair apparatus is incidental to his duty to use the apparatus in a common employment with fellow-servants, then the master is not responsible to the fellow-servants for the default of such employee.
3. In the absence of notice to the contrary, a servant is entitled to assume that his master has exercised due care and skill in furnishing proper appliances for the work and in keeping them safe.

[In this case a stevedore in defendant's employ was killed while unloading one of defendant's steamships at its dock.]

(*Syllabus by the court.*)

ON ERROR to the Supreme Court. The case is stated in the opinion. *Judgment affirmed*.

1. This case is more frequently cited in the reports and text-books as *INGEBREGSTEN v. NORD DEUTSCHER LLOYD S. S. Co.*

SAMUEL A. BESSON, for plaintiff in error.

ROBERT L. LAWRENCE, for defendant in error.

Dixon, J. — In an action by an administratrix to recover damages resulting from the death of her intestate, it appeared that the deceased was a stevedore in the employ of the defendant and was killed while unloading one of the defendant's steamships at the dock in Hoboken (1). The circumstances of his death were as follows: The ship's cargo, consisting of bags of rice weighing about two hundred and fifty pounds each, was hoisted out of the hold by means of a wire rope fifteen-sixteenths of an inch in diameter, called a "hanger" suspended from one of the ship's masts and having its lower end held over the hatch by another wire rope called an "out-haul;" the lower end of the hanger was formed into a loop by being bent around an iron thimble and spliced upon itself

1. *Employee injured while unloading cargo of ice from vessel.* — In *MILLS v. THE MAINE ICE CO.*, 51 N. J. Law, 342 (Court of Errors and Appeals, March Term, 1889), on error to the Supreme Court, judgment of nonsuit was reversed, the *per curiam* stating the case as follows: "The plaintiff in error was employed by the defendant as a laborer to assist in unloading from a vessel a cargo of ice. At the commencement of the second day's work so much of the ice had been removed as to necessitate the use of a ladder in descending to and ascending from the vessel's hold. When the plaintiff reached his place of work on the morning of the second day he found that a ladder had been lashed perpendicularly in the vessel's forward hatch and was in use by his fellow-workmen, who prosecuted their labor under the direction of the defendant's superintendent. The plaintiff safely used the ladder until the afternoon of that day, when, upon his necessarily ascending it, the top rung, a strip which had been insecurely nailed across the sidebars of the ladder, pulled off and he fell to the bottom of the boat and sustained

severe injury. He brought suit against the defendant for damages. At the trial of the case before the Camden Circuit he was nonsuited, because it was not directly shown that the defendant had provided the ladder for its workmen. We think that the evidence established necessity for a ladder in the prosecution of the defendant's work, and the possession and control of the ladder referred to by the defendant, in a position where it could be and was used by the defendant's workmen, and hence made *prima facie* proof that the ladder was provided for the use of its workmen by the defendant. That the ladder was defective and unsafe was not controverted. The nonsuit was not granted upon the ground of contributory negligence on the part of the plaintiff, but such negligence was urged upon the argument here. The proofs of the plaintiff's negligence are so debatable that they should be submitted to a jury. The judgment below should be reversed, that a *verdict de novo* may be awarded." FOR AFFIRMANCE: None; for reversal, fourteen.

with hemp lashing for a foot or two above the thimble; the thimble was shaped like a horse's collar inverted, except that the upper ends were not quite closed; into this thimble were hooked the lower end of the outhaul, and also the upper end of the vertical hoisting apparatus, at the lower end of which was a sling to hold the bags of rice; the work of the deceased was to place the bags in the sling and fasten the sling to the apparatus for hoisting; as several slings were in use, he would frequently be engaged in filling one sling beneath the hatchway while another was ascending; and while he was thus occupied the hanger broke at the open end of the thimble and the bags fell upon him, inflicting injuries from which he soon died.

At the close of the plaintiff's case the defendant moved for a nonsuit, on the ground that the testimony did not indicate any negligence of the defendant and did establish contributory negligence by the deceased, which motion was denied and an exception sealed.

The plaintiff's evidence tended to prove that the hanger, if in good order, would sustain a weight of about fifteen tons, and had on it when it broke less than one ton; that it had been in use two or three times a week for about seven years; that before the accident it was rusty, and at the point of fracture had been abraded by the ends of the thimble; that these defects were discoverable on removing the lashing by which the splice was made, and that the apparatus was supplied by the defendant and kept in charge of Gerhart Schau, its storekeeper, whose duty it was to look after all the gear used at the dock and see that it was in good order.

Upon this evidence we think it became a fair question for the jury whether the accident had not happened because of a defect in the hanger which reasonable inspection would have discovered, and reasonable prudence have remedied. Supposing the jury might decide that question in favor of the plaintiff, the question of law arises whether the defendant had performed its duty as employer, by delegating to its storekeeper, Schau, the duty of inspection and repair.

The master's duty to his servant requires of the former the exercise of reasonable care and skill in furnishing suitable machinery and appliances for carrying on the business in which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections

and tests at proper intervals. *Union Pac. R. R. Co. v. Daniels*, 152 U. S. 684. So far the authorities are as one. Almost as unanimous are they in the proposition that, if the master selects an agent to perform this duty for him, and the agent fails to exercise reasonable care and skill in its performance, the master is responsible for the fault. *Northern Pac. R. R. Co. v. Herbert*, 116 U. S. 642, and cases there cited; *Bailey v. Rome, Watertown & Ogdensburg R. R. Co.*, 139 N. Y. 302; *Hankins v. N. Y., L. E. & W. R. R. Co.*, 142 N. Y. 416; *Toy v. United States Cartridge Co.*, 159 Mass. 313, 15 Am. Neg. Cas. 622*n*.

Discrepancies, however, have arisen in the application of the latter rule, because of another rule firmly established, that the master is not responsible to his servant for the negligence of a fellow-servant engaged in a common employment. In determining whether an employee, through whose negligence defects in the machinery have failed of discovery or repair, is a representative of the master in the discharge of the master's duty to the servant, or is a fellow-servant of the latter engaged in a common employment, many incongruous decisions have been rendered.

On this topic a rational distinction would seem to be that when the employee's duty to inspect or repair the apparatus is incidental to his duty to use the apparatus in the common employment, then he is not entrusted with the master's duty to his fellow-servant, and the master is not responsible to his fellow-servant for his fault, but that if the master has cast a duty of inspection or repair upon an employee who is not engaged in using the apparatus in a common employment with his fellow-servant, then the employee in that duty represents the master, and the master is chargeable with his default. This distinction is noticeable in *McAndrews v. Burns*, 10 Vr. 117; *Smith v. Oxford Iron Co.*, 13 Vr. 467; *Collyer v. Penn. R. R. Co.*, 20 Vr. 59, 16 Am. Neg. Cas. 665, *ante*; *Ross v. Walker*, 139 Pa. St. 42; *Moynihan v. Hills Co.*, 146 Mass. 586, 15 Am. Neg. Cas. 602; *Daley v. Boston & Albany R. R. Co.*, 147 Mass. 101, 15 Am. Neg. Cas. 453, and many other cases (1).

1. *Bailey v. R., W. & O. R. Co.*, 139 N. Y. 302; *Hankins v. N. Y., L. E. & W. R. Co.*, 142 N. Y. 416; *McAndrews v. Burns*, 10 Vr. 117, and *Smith v. Oxford Iron Co.*, 13 Vr. 467, cited in the case at bar, are reported with the New York and New Jersey cases in this volume of AM. NEG. CAS., *post*.

Applying this principle to the case in hand, it is manifest that Schau, the storekeeper, who was charged with the duty of seeing that the apparatus was in good condition before it was delivered to the stevedores for use, but was not himself to be engaged in using it, was in that service the representative of the defendant, and was not serving in a common employment with the deceased. As the evidence tended to show that he had not carefully performed this duty, and that the accident had thence resulted, the plaintiff could not be nonsuited for want of proof of negligence chargeable to the defendant.

That the case did not present such indubitable proof of negligence on the part of the deceased as to justify a nonsuit, is, I think, too clear for discussion. The nonsuit was rightly refused.

The other exceptions relate to the charge and to the defendant's requests to charge.

These requests were that the court charge the jury that, if the accident was caused by want of sufficient examination of the hanger on the part of Schau, the plaintiff could not recover, and that the defendant's duty was discharged if proper appliances were procured and furnished by it, and it exercised due care in the employment of a fit person to take charge of the examination and repair of the same.

These requests rest upon the assumption that, in discharging his duty to examine and repair the hoisting apparatus, Schau was engaged in a common employment with the deceased. For reasons already stated, they should have been refused. But they were substantially complied with by the trial judge. He, however, further charged that it was the duty of the defendant to exercise reasonable care in the inspection of the machinery and to keep it reasonably safe and secure, and a neglect of this duty, if an injury occurred, would be actionable negligence. The meaning of these portions of the charge taken together seems to be that while the defendant would not be responsible for negligent inspection by Schau, yet if reasonable inspection had not been made by any person and through want of it the accident had occurred, the defendant would be responsible. Remembering that the master's duty required reasonable inspection to be made by some one, this charge was not injurious to the defendant.

The last exception is against so much of the charge as instructed the jury that, in deciding whether the deceased was guilty of contributory negligence, they should consider him as entitled to assume that his employer had exercised due care in furnishing proper appliances and in keeping them safe. In this there was no error. *Chicago & Erie Ry Co. v. Branyan* 37 N. E. Rep. 190, 10 Ind. App. 570, 14 Am. Neg. Cas. 542*n*.

Counsel for the defendant, in argument, laid stress upon the fact that the trial judge frequently referred in his charge to the master's duty of using proper care to employ competent co-servants, although there was no evidence that the defendant had failed in that duty. What was said by the judge on this point was not intrinsically erroneous, and seems to have been induced by the request of the defendant's counsel at the trial. It was not then excepted to, nor was any request made for instructions to the jury that there was no evidence of a breach of that duty. Under these circumstances the defendant has no substantial grounds of complaint.

The judgment should be affirmed.

Beasley, Ch. J. — This suit was brought by the defendant in error, as the administratrix of her late husband, who was in the employ of the plaintiff in error and who was killed while so working by reason, as it was alleged, of the carelessness of such employer.

At the trial it appeared that, at the time of the accident in question, the deceased was engaged in unloading of its cargo of rice a certain vessel belonging to the steamship company, and which work was effected by means of a spar erected over the deck of the vessel, in connection with a sling to which the bags of rice were attached, being hoisted from the hold by the use of steam power. The deceased was killed by the falling of a loaded sling, the spar having given way. The apparatus thus used for hoisting the cargo was the property of the steamship company, and the deceased and his associates engaged in unloading the vessel were its servants.

There was evidence tending to show that the spar in question was out of order, and in consequence the accident had occurred. The question in controversy was whether the steamship company was answerable for this imperfection. That the company had provided proper apparatus for the execution of its business neither was nor could be denied. The appa-

ratus that collapsed, together with other of the same kind, and which was new and unused, was, at the time of the accident, in the charge of one Gerhart Schau, who thus describes the situation. He says: "I am in the employ of the North German Lloyd Steamship Company; have been in their employ thirteen years; have been on the dock ten years; my duties are to look after all the gear used on the dock — the blocks and the spars and such things, to make them and to repair them, and see that they are in good health; if they are in bad order it is my duty to repair them or to put them aside and get new ones." He had charge of the spars when not in use, and he selected the one to be used. He had under his control the particular spar that broke, but said that he did not "have it up" on the ship on the day in question. He was asked "whether he looked after the men," and his answer was: "When any of the foremen are sick I look after the men;" and to the question, "Isn't it very often the case that these spars are put up without your knowing it?" he replied: "Might be once in a while, but very seldom."

In the presence of this testimony, which was not in anywise impugned, the trial judge instructed the jury that this man Schau was a co-employee with the deceased, and that, consequently, the negligence of the former was not to be imputed to the company. This legal exposition seems to me plainly correct. These were fellow-servants, as they co-operated in a common business, under a common master.

Under these circumstances, I cannot agree to the idea that the negligence of Schau, in the particular in question, was the negligence of the master. The company had performed its entire duty with respect to the apparatus used, by having put into the hands of its agent, Schau, several of these spars, in good condition, and the want of care that led to the accident was in their use, and in that function the man Schau was no more the special agent of the company than his associates were. In the use of the apparatus, Schau and the men engaged in working with it were co-employees, and the master was not responsible to the others for an injury occasioned by the negligence of one of them. This was the view taken by the trial judge, and in this respect our opinions are in harmony.

After presenting the case to the jury in this aspect, the judicial instruction then was that the only ground on which a

verdict for the plaintiff could be legally rested was that the defendant company had been negligent in the selection of the man Schau to fill the station occupied by him, and the finding was in affirmance of the existence of such negligence. After some hesitation, I have concluded that there was enough testimony in that respect, in the case, to preclude this court from concluding, as a matter of law, that the jury erred in putting a liability on the defendant by reason of breach of duty in this particular.

I shall vote to affirm the judgment on this ground.

FOR AFFIRMANCE: THE CHANCELLOR, CHIEF JUSTICE, DIXON, GARRISON, REED, VAN SYCKEL, BOGERT, BROWN, KRUEGER, SMITH, JJ. (10); for reversal: NONE.

MCANDREWS v. BURNS, ADM'X.

Court of Errors and Appeals, New Jersey, June Term, 1876.

(Reported in 39 N. J. Law, 117.)

FELLOW-SERVANT RULE—WORKMAN KILLED IN TUNNEL—NEGLIGENCE OF FELLOW-WORKMAN. — 1. A master is not liable to a servant for the negligence of a fellow-servant, while the two are engaged in the same common employment, unless for negligence in the selection of the servant in fault, or in retaining him after notice of his incompetency.

2. A fellow-servant is any one who serves and is controlled by the same master; common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee when accepting it, that through the negligence of fellow-servants, it may probably expose them to injury.

[The ruling applied in an action for damages for death of a workman engaged in excavating a railroad tunnel, the negligence charged being held to be that of a fellow-workman.]

(Syllabus by the court.)

ON ERROR to the Supreme Court. *Judgment reversed.*

—— VANATTA, Attorney-General, for plaintiff in error.

JOHN LINN, for defendant in error.

Dalrimple. J.— This action is brought to recover damages alleged to have been sustained by the death of plaintiff's intestate, caused by the carelessness and neglect of the defendant. The deceased, at the time he was killed, was in the defendant's employ as a workman engaged in excavating a tunnel

for a railroad through Bergen Hill. The exact charge of negligence is, that the defendant failed to provide proper means whereby the laborers and workmen in his employ, of whom the deceased was one, could be safely and securely let down from the surface of the ground through shafts, into the tunnel, where the work of excavation was going on (1).

On the trial at the Circuit, the defendant gave evidence tending to show that he had supplied all the appliances necessary for the safety of the workmen engaged in making the excavation, and had directed their use by subordinates whose competency was not questioned.

The court, in reference to this ground of defense, charged the jury, in substance, that it was the duty of the defendant, personally, to deliver at the shafts the appliances in question, or to see that it was done, and that if he deputed this duty to an agent or servant, who failed to perform it, and thereby injury ensued to an employee, the defendant would be liable to an action for the damages. This legal proposition seems to be based on the doctrine that where the principal withdraws from the management of the work, he is liable for the negligence of his subordinates, in the employment of servants, and in the selection and provision of the necessary and proper means for the safety of the employed. It is said that, in such case, the master is liable to a servant who sustains an injury from the negligence of the agent in the performance of the duty of the principal, entrusted to the agent. But, assuming the rule to be as stated, it does not govern the present case. I am not prepared to say that the charge would not have been unexceptionable if the evidence had been that the defendant had personally withdrawn from the business, and had left its management, including the selection of workmen and the

1. See, also, *VAN STEENBURGH ET AL v. THORNTON*, ADM'X, 58 N. J. Law, 160 (Court of Errors and Appeals, June Term, 1895), action for damages for death of plaintiff's intestate while working in a trench for a sewer being constructed by defendants, the same caving in, judgment for plaintiff in the Hudson Circuit was affirmed. Opinion by VAN SYCKEL, J. The official syllabus is as follows:

"A master who employs a servant to work in a sewer trench must exercise reasonable care in the adoption of such means and appliances as will give reasonable safety and protection to the servant in his employment.

"The care which the employer is bound to use in such a case he can give through another only at his own risk; the negligence of such person will be imputed to the employer."

choice of appliances, to agents. But the facts, the legal effect of which was the subject-matter of discussion before the court, were quite different. They were, as the defendant's evidence tended to prove, that the defendant was in person engaged in the work, selected his superintendents and other employees, and furnished them with, and directed them to use, all the appliances necessary to ensure the safe conduct of the workmen through the shafts to and from the tunnel. If the fellow-servants of the deceased, whose duty it was to deliver and use, at the proper place, the appliances provided by the defendant, neglected to discharge their duty in that regard, whereby injury was sustained by a fellow-workman, no action against the master could be maintained, on the recognized principle that a master is not liable to a servant for the negligence of a fellow-servant, while the two are engaged in the same common employment, unless for negligence in the selection of the servant in fault, or in retaining him after notice of his incompetency. It was insisted on the argument, that the servants of the defendant, who were alleged to have been derelict in duty, could not properly be denominated the fellow-servants of the deceased, engaged with him in a common employment. A fellow-servant I take to be any one who serves and is controlled by the same master. Common employment is service of such kind that, in the exercise of ordinary sagacity, all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow-servants, it may probably expose them to injury. The ground on which rests the exemption of the master from liability to the servant for negligence of a fellow-servant, engaged in a common employment, is, that the servant is presumed to contract in reference to the risk incurred. These are familiar principles, extracted from the text-books, and supported by numerous adjudications of weight and authority. Whart. on Negl. 224-234; Shearm. & Redf. on Negl., ch. 6, and cases cited; *Harrison v. Central R. Co.*, 2 Vroom, 293, 16 Am. Neg. Cas. 633, *ante*.

Applying them to the case in hand, the instruction given to the jury in the particular under consideration, appears to be inaccurate. The deceased was a fellow-servant of him by whose negligence the injury was alleged to have been caused. They were engaged, at the time deceased was killed, in a common employment, as well because both were employees of

defendant in the construction of the tunnel, as because the presumption fairly arises that the deceased made his contract of service in view of the risk to which he might be subjected by the negligence of his fellow-servants. The risks which the deceased assumed embraced not only those arising from the negligence of fellow-servants engaged in the same kind of work, but those which might arise from the negligence of fellow-servants or employees of defendant whose labors in or on the surface of the tunnel tended to the construction of the work. The laborer whose duty it was to deliver on the surface at the shafts, or there use or keep in repair the instrumentalities provided by the defendant for the safe conduct of the laborers to and from the tunnel, was, in the view of the law, a fellow-servant of the deceased, whose place of labor was in the tunnel, and they were engaged in a common employment.

There having been error in the charge of the court to the jury on the point above stated, and exception duly taken for this reason, without deeming it necessary to consider the assignments of error on other points, the judgment brought up must be reversed.

For affirmance, none; for reversal, fourteen.

MINER INJURED BY EXPLOSION OF GIANT POWDER — FELLOW-SERVANT RULE — LIABILITY OF CORPORATION FOR NEGLIGENCE OF OFFICERS AND AGENTS. — In **SMITH v. OXFORD IRON CO.**, 42 N. J. Law, 467 (*Supreme Court, November Term, 1880*), miner in defendant's employ injured by an explosion of giant powder, verdict for plaintiff was sustained and rule to show cause was discharged. The opinion was rendered by VAN SYCKEL, J., who stated that "the plaintiff while engaged in the service of the Oxford Iron Company, as a miner, in September, 1874, lost his eyes, and was otherwise seriously injured, by an explosion of giant powder. The plaintiff charged the company with negligence in introducing the new explosive without informing his superior or instructing him as to the proper manner of using it, and without advising him fully of its dangerous character. The verdict below was for the plaintiff, and the case is here on rule to show cause why a new trial should not be granted." The learned judge then discussed the fellow-servant rule, citing numerous cases (1). *Paulmier v. Erie R. Co.*, 5 Vr. 151, 16 Am. Neg.

1. The case of *Smith v. Oxford Iron Co.*, 42 N. J. Law, 467 (the case at bar) was distinguished, on the fellow-servant rule, in *O'BRIEN v. AMERICAN DREDGING Co.*, 53 N. J. Law, 291 (*Supreme Court, February*

Cas. 643, *ante*; McAndrews *v.* Burns, 10 Vr. 117, 16 Am. Neg. Cas. 680, *ante*; Charles *v.* Walker, 38 L. T. N. S. 773; Searle *v.* Lindsay, 11 C. B. N. S. 429; Morgan *v.* Vale of Neath R. Co., L. R. 1 Q. B. 149; Feltham *v.* England, L. R. 2 Q. B. 33; Howell *v.* Landore Co., L. R. 10 Q. B. 62; Wright *v.* N. Y. Cent. R. Co., 25 N. Y. 562; Wilson *v.* Merry, 1 H. L. Sc. App. 326; Warner *v.* Erie R. Co., 39 N. Y. 468; Charles *v.* Taylor, 3 L. R. C. P. Div. 492; Lehigh Valley Coal Co. *v.* Jones, 86 Pa. St. 432.

[See, also, the authorities cited to the point next discussed by the learned judge.]

As to the liability of a corporation for the negligence of its officers in the discharge of those duties which the corporation owes

Term, 1891), where plaintiff was injured by his foot being drawn into the machinery of a steam dredge, on which he was employed as a deck-hand. The dredge was owned by defendant and was being used in dredging the James river, near Richmond, under a contract with the U. S. government. The machinery had stopped because the chain had jumped from the drum and plaintiff took a position which exposed him to injury if the machinery moved. There was conflicting evidence whether he had been ordered to take that position by one Cannon, who was called captain of the dredge. Cannon set the machinery in motion which caused plaintiff's injury. There was a conflict of evidence whether Cannon or other workmen gave notice to plaintiff of the danger, or of the proposed movement of the machinery. Plaintiff had a verdict and the case was taken to the Supreme Court by defendant on rule to show cause. The Supreme Court (per MAGIE, J.) held that the verdict could not be sustained and rule was made absolute. On the question of fellow-servant the syllabus to the report states the ruling as follows: "A master will not be liable to a servant in his employ for injuries occasioned by the negligence of a superior servant, who is also employed as a boss or foreman of other workmen

with whom he labors, in the execution of work designed and directed by the master or his vice-principal."

The learned judge in discussing the fellow-servant doctrine said: "The general rule, that servants employed by or under the control of the same master, in a common employment, obviously exposing them to injury from the negligence of others so employed or controlled, although engaged in different departments of the common business, are fellow-servants who assume the risk of each other's negligence, and cannot have recourse to the master for any injury resulting therefrom, as announced and established in a series of cases in our courts (Harrison *v.* Central R. Co., 2 Vr. 293, 16 Am. Neg. Cas. 633; Paulmier *v.* Erie R. Co., 5 Vr. 151, 16 Am. Neg. Cas. 643, *ante*; McAndrews *v.* Burns, 10 Vr. 117, 16 Am. Neg. Cas. 680, *ante*; Ewan *v.* Lippincott, 18 Vr. 192 [16 Am. Neg. Cas. 706]; Rogers Locomotive Works *v.* Hand, 21 Vr. 464, (16 Am. Neg. Cas. 707) is not brought in question, but its correctness is conceded by plaintiff's counsel.

"On the other hand, it is also conceded that a master may employ and put in his place a representative, for whose negligence occasioning injury to a servant, also in his employ, he will be liable. The rule thus con-

to its servants, the court said: "Authorities of great weight have held that if the master places the entire charge of the business in the hands of an agent, exercising no authority therein, he may be liable for the negligence of such agent to a subordinate employee, and that this rule prevails, whether the master be an individual or a corporation. Otherwise, corporations would escape liability, owing to the fact that their business must necessarily be transacted by agents." Citing and reviewing many authorities on this point. *Mullan v. Phila. & So. Mail S. S. Co.*, 78 Pa. St. 25; *Frazier v. Penn. R. Co.*, 38 Pa. St. 104; *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 146; *Patterson v. Pitts. & Connellsville R. Co.*, 76 Pa. St. 389; *Huntington & Broad Top R. Co. v. Decker*, 84 Pa. St. 419; Cleve-

ceded has been applied by our courts only in the case of *Smith v. Oxford Iron Co.*, 13 Vr. 467 [above reported.] The question there was, whether an incorporated company was liable to an injured servant whose injury was occasioned by the neglect of its president. The case showed that the superintendence of the business of the company had been committed to its president. He introduced the use of a highly dangerous explosive without instructing the workmen directed to use it in respect to its dangerous qualities. This court held that under such circumstances a duty devolved on the company to give notice of the qualities of the explosive, a failure to perform which would be negligence, and that, having entrusted to its chief executive officer the superintendence of its business, it became his duty to give the required information, and his failure or neglect in that respect was imputable to the company and rendered it liable to its servant injured in the use of the explosive. The superintendent of the business was thus held to be, in respect to this duty owed by the company to its servants, a representative of the company, whose negligence was its negligence.

"The question to be solved in the case before us concerns the relation between the defendant company on

the one hand and Cannon and the plaintiff on the other hand, and the rule to be applied in respect to plaintiff's injury, if occasioned by the negligence of Cannon in the relation to the common employer disclosed by the evidence. If that relation comes within the doctrine of *Smith v. Oxford Iron Co.*, *supra*, defendant's liability will be settled; if, however, the relation is different from that then considered, it must be next determined whether it comes within the principles of that case, or whether, upon that or other principles, the liability of defendant is shown.

"In determining the relation of the parties we are bound to assume as proved whatever the jury was warranted in finding from the evidence to sustain plaintiff's action.

"Thus considered, the evidence establishes the following, viz.: That defendant is an incorporated company engaged in the business of dredging by steam dredges; that Albertson is the general superintendent of the company, having power to direct where the dredges are to operate, to supervise the employment of workmen and to discharge them; that the steam dredge, whereon plaintiff's injury was received, was directed to be worked in the James river, near Richmond, under a contract with the United States, the control of gov-

land, etc., R. Co. *v.* Keary, 3 Ohio St. 201; Berea Stone Co. *v.* Kraft, 31 Ohio St. 287; Whaalan *v.* Mad River R. Co., 8 Ohio St. 249; Cook *v.* Hann. & St. J. R. Co., 63 Mo. 397, 16 Am. Neg. Cas. 512, *ante*; Whalen *v.* Centenary Church, 62 Mo. 326, 16 Am. Neg. Cas. 424, *ante*; Chicago & N. W. R. Co. *v.* Bayfield, 37 Mich. 205, 16 Am. Neg. Cas. 87, *ante*; Louis, etc., R. Co. *v.* Bowler, 9 Heisk. 866; Nashville R. Co. *v.* Jones, 9 Heisk. 27; Washburn *v.* Nashville R. Co., 3 Head, 638; Laning *v.* N. Y. Cent. R. Co., 49 N. Y. 521; Flike *v.* Boston & A. R. Co., 53 N. Y. 549; Ford *v.* Fitchburg R. Co., 110 Mass. 240, 15 Am. Neg. Cas. 427; Brickner *v.* N. Y. Cent. R. Co., 2 Lans. 506; 49 N. Y. 672; Malone *v.* Hathaway, 64 N. Y. 5; Howell *v.* Landore Steel Co., L. R. 10 Q.

ernment engineers and the supervision of an inspector stationed thereon; that Cannon, who was called 'captain' of the dredge, was authorized to employ men on it, subject to the approval of the general superintendent, who had power to disapprove and discharge them; that the duty of the captain was to operate the dredge in said dredging; that plaintiff was employed by Cannon as a 'deckhand' on the dredge, and his duty was to aid in the operation of the dredge, and that Cannon had charge of the men so employed and they were under him.

"From this it is obvious that the case in hand does not present the same features as that of *Smith v. Oxford Iron Co.*, *supra*. The relation which its president and superintendent bore to that company is here paralleled by the relation of Albertson to the defendant. While Cannon was entrusted with some authority to employ workmen, yet, in respect to the operation of the dredge in the prosecution of defendant's business, he was not a general superintendent, but a mere foreman of the gang of workmen engaged with them in the execution of the master's work. He was a superior and they were inferior workmen, but all were employed in a common operation, though in different grades of service.

Numerous authorities on the fellow-servant rule were cited and reviewed, many of which are cited in *Smith v. Oxford Iron Co.*, *supra*. The learned judge said: "My conclusion is, that the fact of superiority in grade of service is not a conclusive test in determining the liability of the master. That liability will arise when the negligent employee has been put in the place the master would otherwise occupy, but it will not arise when the negligent employee is a mere boss or foreman in the prosecution of the master's work, such as the master, if controlling and managing his own business, would necessarily employ, and such as a contracting workman would contemplate being employed. The result is, that the verdict in this case cannot be sustained. The trial judge left to the jury the determination whether the act of Cannon, which caused plaintiff's injury, was done by Cannon as a representative of defendant, or as a fellow-servant of plaintiff. But it was clear, upon the evidence, that Cannon's act was not within the scope of his agency as representative of defendant. If any such agency existed, it was limited to the employment of men in defendant's service. But the act fell within his authority as foreman of the men on the dredge in the prosecution of work

B. 63; *Wilson v. Merry*, L. R. 1 H. L. Sc. 326; *Feltham v. England*, 2 Q. B. 33; *Murphy v. Smith*, 19 C. B. N. S. 361.

The court, after reviewing the foregoing cases, said: "Inasmuch as a corporation cannot act personally, responsibility for negligence cannot exist unless it is held for the act of some agent or employee. Without a voice of its own, it must speak through another. Inanimate, and without capacity to act by itself, its functions must be performed, and its obligations to its agents discharged through some representative, whose act is its act, whose control is its control, and whose negligence is its negligence. The board of directors, the president — every one in employment, from the highest to the lowest — is an agent and servant of the company." * * *

for the master in which all were employed, and in respect to which Cannon was a fellow-servant. Therefore, there should have been a nonsuit, or a direction for a verdict for defendant."

See, also, *GILMORE v. OXFORD IRON & NAIL CO.*, 55 N. J. Law, 39 (Supreme Court, November Term, 1892), where judgment of nonsuit was *affirmed* and rule to show cause discharged, on the ruling in *O'Brien v. American Dredging Co.*, 24 Vr. 291 (the case reported in the preceding paragraph herein). REED, J., in rendering the opinion, said: "The plaintiff was employed in a mine operated by the defendant. The work consisted in drilling holes in the walls of the mine, in filling the holes with an explosive substance, and in firing the same by means of a fuse. The work was done by gangs of workmen who drilled and fired several holes simultaneously. Two men worked a single drill, one holding the drill and the other striking it and changing work with each other each successive hole. Gilmore, the plaintiff, was striking when a piece of stone or ore fell and broke his leg.

"The insistence of counsel of plaintiff is that the injury occurred by reason of the neglect of one Quin to exercise a proper degree of care.

Quin was a boss employed in the mine, who was accustomed to employ and discharge workmen and to direct the miners where the holes were to be drilled in working the mine. It is insisted that there was evidence to go to the jury that it was Quin's duty to see that no loose stuff or fragments of ore, loosened or dislodged by previous explosions, was likely to fall upon the workmen. It is further claimed that, by reason of his neglect to exercise proper vigilance in this respect, the present injury resulted.

"I think the plaintiff fails to make out a case against the defendant, and that the defect in the plaintiff's case was two-fold. First: The testimony does not display a condition of affairs from which a jury could have reasonably inferred that Quin neglected to do anything within the line of his duty. Secondly: Quin was a fellow-servant engaged in a common employment with the plaintiff. The general superintendent of the mine was Lukens. Quin's duties were no more extensive and almost entirely similar to those of Cannon in the case of *O'Brien v. American Dredging Co.*, 24 Vroom, 291. The present is directly ruled by the last-mentioned case."

Continuing, the court said: "It is not necessary, for the decision of the case in hand, to adopt a view as rigorous against corporations as that expressed in the cases cited, nor is it necessary to establish a rule applicable to all cases that may arise. No rule more favorable to the corporation can be adopted than to hold that it is present and acting in the person of its chief executive officer, the president. His neglect to perform those duties which devolve upon the company should be regarded as the neglect of the company itself. To this extent, at least, it is safe to carry the doctrine. While the master is not held as guaranteeing the absolute safety of machinery or appliances provided for his employees, or the fitness of co-servants, he is bound to observe such care as the exigencies of the situation reasonably require in selecting them. Any injury resulting to a co-servant from the failure of the company positively to perform this duty is actionable.

"When the plaintiff engaged in the service of the defendant, the ordinary blasting powder was used, and, under his contract with the company to labor as a miner, he assumed the risk of personal injury, in blasting with the ordinary agency used for that purpose. He did not agree to subject himself to the hazard attending the use of an unusual and highly explosive substance, of the dangerous quality of which, as well as of the proper manner of applying it, he was wholly ignorant. It appears that Seldon T. Scranton, the president of the defendant company, to whose care was committed the superintendence of the business of the corporation, in April, 1874, introduced the use of giant powder. It is clearly shown that it was a highly dangerous explosive, and that the proper manner of using it was not made known to the plaintiff, although printed instructions were in the possession of the company. Before allowing this new compound to be introduced, it was a duty which the company owed to the plaintiff to ascertain and make known its properties and the mode of using it, either to the plaintiff himself or those under whose direction he worked. The obligation to do so rested upon Scranton, as the head officer of the company, and his neglect in that respect was the neglect of the company itself. It was gross negligence in the company to furnish such an article for a laborer's use without giving him the requisite information. Whether the company was aware of its dangerous quality, or furnished it for use without having taken steps to obtain such knowledge, it is equally liable. It was a duty which the company, through Scranton, was bound to perform, to see that such reasonable care as the exigency of the case demanded was taken, and to impart to the subordinates full information as to the manner of applying the new compound, before placing it in the hands of an ignorant laborer. This obligation resting on the company itself, the president could

not shift their liability by referring the matter to one of his subordinates. The effect of such a rule would be to substantially absolve a corporation from all liability. There was a clear failure on the part of the president to use the care which, under the circumstances of the case, the law exacted from the defendant, and his neglect must be imputed to the company." * * *

BAHR V. LOMBARD, AYRES & CO.

Court of Errors and Appeals, New Jersey, November Term, 1890.

(Reported in 53 N. J. Law, 233.)

EXPLOSION IN OIL WORKS — PRESUMPTION — PROOF OF ACCIDENT — DEFENSE. — 1. As a general rule, the proof of the occurrence of an accident does not raise a presumption of negligence.

2. Where the testimony which proves the occurrence by which the plaintiff was injured discloses circumstances from which the negligent conduct of the defendant is a reasonable inference, a case is presented which calls for a defense.

3. If, however, the plaintiff's case shows him to be possessed of material but undisclosed evidence, the mere proof of the occurrence of an accident raises no presumption of negligence, to rebut which the defendant can be called upon to offer testimony.

4. *Res ipsa loquitur* commented upon and applied (1).

[Plaintiff was an employee of defendants and was injured by an explosion of an oil pipe in defendants' oil works.]

(Syllabus by the court.)

1. On the maxim, *Res ipsa loquitur*, see *SHERIDAN v. FOLEY*, 58 N. J. Law, 230 (Supreme Court, November Term, 1895), where *Bahr v. Lombard*, 53 N. J. Law, 233 (the case at bar) is referred to as fully commenting upon the maxim. *Sheridan v. Foley*, was an action for injuries received by the plaintiff while at work upon a building which was being erected in the city of Hoboken. On the trial it appeared, according to plaintiff's evidence, that the defendant, Foley, had a contract with the owner to do the mason work upon the building, and that the plaintiff's employer had the contract to do the plumbing. That while the plaintiff was at work laying a sewer pipe at

the foot of one of the walls of the building which the defendant's employees were then engaged in erecting, he was struck upon the head and seriously hurt by a brick, which fell either from the scaffold upon which certain of the defendant's employees were at work engaged in laying the wall or else from the hod of one of the defendant's hodcarriers, as he was ascending the ladder to the scaffold with a hod of bricks. Upon this evidence the trial judge (Hudson Court of Common Pleas) nonsuited the plaintiff, on the ground that, as he viewed the case, there was nothing in the law or facts that would justify the court in allowing the case to go to the jury. Afterwards a rule to

ON ERROR to the Hudson Circuit Court. The case is stated in the opinion. *Nonsuit affirmed.*

WILLIAM F. ABBETT and LEON ABBETT, for plaintiff in error.

BEDLE, MUIRHEID & MCGEE, for defendants in error.

Garrison, J.—The plaintiff was a servant of the defendants in the business of refining crude oil, and while at work upon his employer's premises received injuries, to recover damages for which this action was brought. The occurrence by which he was injured is thus described by the plaintiff, the only witness thereto: "On August 21, 1882, a pipe which was being fixed exploded and threw me into the yard; I came around from the stills; if the stills don't run properly I have to see to the fires and open the drafts; I saw two men standing there,

show cause was allowed, and was certified to this court for its advisory opinion whether said rule should be made absolute and a new trial granted. *Rule absolute.*

"The opinion was delivered by GUMMERE, J., who discussed the maxim, *res ipsa loquitur*, and cited several leading cases. The learned judge said: "While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases the maxim *res ipsa loquitur* is held to apply, and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care.

"A leading case on this subject is *Kearney v. London, etc., R'y Co.*, L. R. 5 Q. B. 411, 6 Q. B. 759. The facts were that the plaintiff was passing along a highway under a railway bridge when a brick fell from one of the piers on which the girders of the bridge rested and injured him. A

train had passed over the bridge shortly before the accident, but the evidence failed to disclose whether it was a train of the defendant company or of another railway company which also used the bridge. The bridge had been built and in use for three years. The Court of Queen's Bench held that the maxim *res ipsa loquitur* applied; that as the defendants were bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, so unusual an occurrence as the falling of a brick was *prima facie* evidence from which the jury might infer negligence in the defendants, and the principle was unanimously affirmed by the Court of Exchequer Chamber on the argument of the appeal.

"Another case, quite similar in its facts to the one now before us, where this principle was applied, is that of *Byrne v. Boadle*, 2 H. & C. 722. In that case the plaintiff was injured by the falling of a barrel from the window of the defendant's shop; there was no evidence to show what caused the barrel to fall, nor was there any direct evidence to connect the defendant or his servants with the

but I didn't take any notice of what they were doing; I didn't hear that these men said anything to me; when I went into the tail-house I had a thermometer with me; just as I was going to pull it down there was a terrible explosion, like the report of a gun, and threw me out of the tail-house, and the cap from my head, and my hair and my beard, and everything, was burned away; I didn't know then what I was doing; I ran out, in my great fear, and the fire came flying out of the building."

Upon cross-examination these questions were put and answered: "Q. What was the pipe that exploded used for?

A. Used for conducting the oil from the crude stills to the other stills. Q. Did the pipe which exploded run into the still-house, where you were working? A. No. Q. Did your work have anything to do with that pipe? A. Nothing at all.

Q. You said that this pipe exploded; how do you know that?

A. The walls had been thrown away and one of the tanks was

occurrence. POLLOCK, C. B., in discussing the question of the defendant's liability, said: "There are certain cases which it may be said are *res ipsa loquitur*, and this seems one of them. * * * It is true that there are many accidents from which no presumption of negligence can arise, but this is not so in all cases. Suppose, in this case, the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out; and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence, seems to me preposterous. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident alone could be *prima facie* evidence of negligence.

"In our own State, in the case of *Bahr v. Lombard, Ayres & Co.*, 24 Vroom, 233, this maxim was fully commented upon and applied.

"The facts in the present case bring it within the application of this principle. The bricks were in the custody of the defendant's servants at the time when this one fell, and it was their duty to so handle them as not to endanger others who were engaged in other work upon the same premises. This brick could not have fallen of itself, and the fact that it fell, in the absence of explanation by the defendant, raises a presumption of negligence. If there are any facts inconsistent with negligence, it is for the defendant to prove them."

Res ipsa loquitur. See note on the doctrine, in 3 AM. NEG. REP. 488-496, where numerous American and English authorities are collated by Mr. ALFRED J. HOOK, librarian of the Law Library in Brooklyn, N. Y., a reference to which will materially aid the practitioner in his search for cases, applicable or otherwise, on the doctrine.

moved. Q. You mean that there was an explosion, but you don't know that the pipe exploded, do you? A. Perhaps somebody else would know that. Q. Did you see it? A. No, I didn't see that. Q. Don't you know that the pipe was not broken? A. I don't know whether it was broken. Q. Then you do not feel sure just what was the immediate cause of the accident, do you? A. I heard that the pipe exploded; some people told me that this pipe exploded, and that it had been taken away from its original position and put into another position. Q. Then all you know about the explosion is that an explosion occurred, and somebody told you that this pipe exploded, and, therefore, you think that was so? A. Yes. Q. If oil leaks into the ground it generally forms a gas, don't it? A. Yes. Q. And that gas, if it comes in contact with the fire, will explode? A. Yes. Q. Those pipes frequently get to leaking, don't they? A. They don't leak very often; sometimes; yes, a little. Q. Were not these two men that you speak of trying to find out what was the matter, and where the leak was? A. I didn't see anything about that. Q. Who were these two men? A. Tom Winter and Mike Bernard. Q. Isn't it likely that the explosion was caused by gas, formed from the oil which saturated the earth, and which gas came in contact with the fire and then exploded? A. I cannot insist upon that."

The foregoing is all of the testimony which, at the close of the plaintiff's case, had been given as to the occurrence of the accident, or that in any way bore upon the negligence of the defendants in respect to it.

In this state of the proofs, the trial court directed a nonsuit, upon the ground that a judgment against the defendants could not be sustained by this evidence. The main stress of the argument before us to take off this nonsuit was upon the duty which an employer owes to his servants, a subject to which plaintiff's brief was almost wholly directed, and in respect to which conclusions were reached in entire harmony with the accepted rule of law, viz., that employers must adopt and maintain all reasonable means for the safety of their servants while at work. The plaintiff's case, however, was withdrawn from the jury, not from any misapprehension as to this rule of law, but because there was, in the opinion of the trial court, no testimony as to any fact by which the conduct of these

employers towards this servant could be ascertained. When, in an action for negligence, the standard of duty can be predicated as matter of law, the only question for the jury is, whether the conduct of the defendant fell short of that standard. What the conduct of the defendant was must appear in the case. If, from the facts in evidence, two inferences as to the defendant's conduct may legitimately be drawn, one favorable and the other unfavorable to its negligence, a question is presented which calls for the opinion of a jury. If, however, there is no proof of any fact by which the conduct of the defendant can be ascertained, there is nothing for a jury to pass upon. In the present case, giving to the plaintiff's testimony its fullest significance, the only inculpatory circumstance is that an explosion occurred, which injured the plaintiff while he was at work upon the defendant's premises. The case, therefore, presents, in the most direct manner, the question, whether proof of the occurrence of an accident raises a presumption of negligence.

The principle is quite institutional, that whenever a right of action springs from the conduct of a defendant, the plaintiff must present proof of the facts necessary to the recovery which he seeks. It is, furthermore, the general rule of law, that the mere proof of the occurrence of an accident raises no presumption of negligence. These doctrines, which, if strictly applied, would lead to a nonsuit in every case in which the plaintiff's proof failed to demonstrate the specific act of negligence which he deemed the proximate cause of his injuries, have in practice an application which, while not losing sight of their normal character, leads to an intelligent adaptation in keeping with the requirements of the modern law of negligence. It may be safely asserted that no other department of jurisprudence presents so marked an illustration of the growth of a simple rule of conduct into a principle so widespread in its application to relationships which have grown and must continue to become more and more complex. A single illustration will suffice. The employment of each new mechanical force in commerce or manufacture must tend, not only to increase the already existing complexity of these relationships, but also to give rise to new and peculiar duties, which, in turn, must be met by rules of law characterized, not by novelty in principle, but by flexibility in application. That the development of

the law of negligence has been, in these respects, both harmonious and consistent, evinces the soundness of the foundations upon which it rests. Keeping pace with the law, whose function it is thus to declare the nature of the duties arising from these new relationships, there has been a corresponding growth in the legal rules which guide the production of evidence and weigh the sufficiency of proof. It could not have been otherwise. The use of instrumentalities of enormous power, and of complicated structure and operation, not only raises the standard of duty proportionately with the increase of danger; it also gives rise to obligations springing from the exclusive control of these complicated agencies, and from the almost exclusive knowledge of their structure and mode of operation. The reason is obvious. When all labor was manual, each workman knew, or could easily learn, the various processes incident to his employment. To-day a single plant will comprise a multitude of diverse appliances, the operators of one being, for the most part, totally ignorant of all others; while not one citizen in thousands knows anything in regard to the character and construction of any of the new mechanical processes with which he is met at every turn, still less of the dangers incident to their operation. Under these changed conditions, to compel plaintiffs in every case to ascribe some specific act as negligence, would be to make a recovery for injuries dependent upon the possession of a special technical knowledge, and to grant immunity to the users of dangerous agencies in proportion to the success with which the special element of danger was concealed from the public. From these considerations, it follows that the *quantum* of proof which a plaintiff must give in order to draw from the defendant explanatory evidence, must, with certain limits, be dependent upon the circumstances of each case—a rule which finds current expression in the phrase “*res ipsa loquitur*” — a free paraphrase of which is thus given by Mr. Smith in his treatise on Negligence (p. 246): “There is a class of cases,” says this author, “in which there has been no direct evidence of any particular act of negligence beyond the mere fact that something unusual has happened which caused the injury. In such cases each will depend upon its own facts, with this understanding, that where a certain course of action has been pursued by any person without injury to others, and he, upon

changing that course, injures another, the thing (unexplained) speaks for itself, that such person has been negligent; or, if something unusual happens with respect to the defendant's property, or something over which he has control, which injures the plaintiff, and the natural inference on the evidence is that the unusual occurrence is owing to the defendant's act, the occurrence, being unusual, is said to speak for itself that such act was negligent."

Notwithstanding the generality of the language here used, it is evident that this phrase clearly imports that there must, in each case, be something in the facts that speaks of the negligence of the defendant. Accepting this construction — which is as favorable to the plaintiff as can be found — the question before us is, do the proofs in the present case speak of the negligent conduct of the defendant? Inasmuch as the plaintiff's proofs are silent as to the conduct of the defendants personally, or through their agents, either before or during the accident, and from the further consideration that there is no proof of any of the circumstances preceding, attending or following the explosion from which its cause or location could be ascertained, it is evident that if the defendants were required to offer testimony in their defense it was not because the proofs pointed to any unusual conduct upon their part, but because the plaintiff had presented a case in which all of the relevant facts were so exclusively within the knowledge and control of the defendants that the law imposed upon them the duty of offering explanatory, if not exculpatory, testimony. The existence of such a rule is among the unsettled matters of the law, being asserted in guarded terms in some jurisdictions and emphatically denied in others. In the present case it is not necessary to discuss either the existence of such a doctrine or its harmony with the accepted canons of proof, for the reason that its application, in any event, must depend upon whether the party invoking it had adduced all of the testimony reasonably within his power, for it is in such cases only that the rule in question is applied by those who maintain its soundness. Thus, for instance, Mr. Best, speaking of this rule, confines it to cases "where the question is of such a character as from its very nature almost all the evidence which could be adduced on the subject must lie in the possession of one of the parties." *Best's Right to Begin & Reply* (Am. Ed.),

74. In any aspect of the law, therefore, it must be conceded, that unless a plaintiff has presented the testimony which was reasonably within his power he can derive no benefit from the proposed doctrine.

In the present case it is clear that the plaintiff has not brought himself within the rule thus stated. He was the only witness who testified to an occurrence of the circumstances which he admitted he knew nothing except by hearsay. At the time it occurred he had been in the employ of the defendants for about one year. After a few weeks' absence he returned to the same employment and continued therein, at the same wages and at the same work, for a period of over three years. To my mind it is inconceivable that during these three years, after the injured man returned to work, he never inquired into the particulars of the accident by which he had been hurt, or, that having inquired, he never learned a single circumstance concerning it, or the name of a single witness in respect to it. The two workmen he saw standing in the yard were known to him, and in his testimony he calls them by name. He must also have known others of his fellow-workmen. From these he must have learned something of the occurrence upon which his action is based. His own testimony shows conclusively that material facts respecting this accident were communicated to him with more or less detail. If he had called to the witness stand his informants he could doubtless, by them, have shown the location and, perhaps, the nature of the explosion — certainly its results, and possibly its cause — whether it was upon the premises of the defendants or in respect to some matter under their control, whether it occurred, as he himself stated, while a pipe was being fixed by his fellow-workmen. In fine, facts could have been presented which, if they spoke of the defendants' negligence, would have called for a defense; or circumstances have been detailed showing that plaintiff had exhausted the sources of evidence open to him and was therefore entitled to the consideration of the court in calling upon the defendants for explanatory evidence. In the present case neither was done; the facts showed simply that the plaintiff was injured, while the circumstances pointed conclusively to the possession by him of a mass of undisclosed testimony highly pertinent to the *gravamen* of his action. If this plaintiff, upon the meagre proof thus offered, is entitled

to go to the jury, then, in such cases, all that any plaintiff need show, no matter what his actual knowledge of the facts may be, is that he was injured by some unusual occurrence while at work for his employer. This is not the law. On the contrary, when the plaintiff's case shows that he has not produced material evidence clearly within his reach, the mere proof by him of the occurrence of an accident by which he was injured does not raise a presumption of negligence which the defendant can be called upon to rebut. A judgment of nonsuit ordered in such a case will not be disturbed.

Beasley, Ch. J. (dissenting). — In my opinion there was a *prima facie* case made when this nonsuit was ordered.

The plaintiff was the only witness testifying to the circumstances embracing the accident.

His narration was a brief one. He said he worked for the defendants in a building that was called a "tail-house," his function being to weigh the oil that came there through certain pipes. These are his words with respect to the accident: "When I went into the tail-house I had a thermometer with me, and just as I was going to put it down there was a terrible explosion, like the report of a gun, and threw me out of the tail-house, and the cap from my head, and my hair and my beard and everything was burnt away; I ran out, in my great fear, and the fire came flowing out of the building."

With regard to the cause of the occurrence, he says it was occasioned by the bursting of a pipe. On cross-examination he was asked the question, "These pipes frequently get to leaking, don't they?" and he answered, "They don't leak very often, but sometimes." He further testified: "We have always gas in the tail-house." His further statement was that he saw some of his fellow-workmen near the point of accident, but did not know what they were doing. This is all the evidence having any pertinence whatever. Under this condition of facts, I think the matter ought to have gone to the jury.

The business was a dangerous one, unless carefully conducted. The defendants were bound to furnish, so far as possible, machinery and instruments appertaining to such business of approved strength and quality. So it was incumbent on them to see that they were kept in that degree of repair that would result from the highest degree of care and attention.

It is not to be lightly inferred that instruments of the kind thus specified, and which had been thus supervised, would, in the absence of all known special cause, give way and burst under the ordinary pressure to which in the course of business they would be subjected, and consequently the bursting of this pipe, under such circumstances, would reasonably lead in the direction of a conclusion that it was in an imperfect condition. It is true that such conclusion would not, of itself, render the defendants liable, for such disruption of the pipe might have proceeded from a defect altogether inscrutable upon the most careful examination. But when we add to the fact of the explosion, so improbable, in itself, in the absence of neglect, the further fact that their pipes had been leaking, more or less, and that there was constantly a smell of gas in their vicinity, it seems to me that there was plain proof to charge the defendants with the want of that high degree of care which the law exacted from them in an affair touching the safety of even the lives of their employees.

I cannot agree to the proposition, necessary to legalize this nonsuit, that a manufacturer can leave pipes containing a combustible so explosive if it escape as to be dangerous to human life, in a leaky condition, and be exempt from all liability to account for such seeming neglect.

In my opinion, the facts as proved, unless explained or controverted, would have legally warranted a verdict against the defendants. I am, therefore, compelled to vote to reverse this judgment.

FOR AFFIRMANCE: THE CHANCELLOR, DIXON, GARRISON, MAGIE, REED, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, SMITH, WHITAKER, JJ. (11). FOR REVERSAL: THE CHIEF JUSTICE (1).

Elevator cases.

In *CONWAY v. FURST*, 57 N. J. Law, 645 (*Court of Errors and Appeals, March Term, 1895*), the official syllabus states the case as follows:

"Conway was employed as watchman in the unfinished store building of Furst, and was injured by falling down the elevator shaft. Conway knew that the elevator was not finished, and that mechanics were still at work upon it. *Held*, that Conway could not recover damages from Furst, for two reasons:

"1. Because he knew of the danger which attended his employ-

ment, and he assumed, as part of his contract obligation, the risk which was incident to such service.

"2. Because the elevator, at the time of the injury to Conway, was in the course of construction by contractors who were exercising an independent employment." Judgment for defendant *affirmed*. Opinion by VAN SYCKEL, J. All concur.

In *SMITH v. VAN SCIVER*, 58 N. J. Law, 190 (*Court of Error and Appeals, June Term, 1895*), the official syllabus states the case as follows: "The plaintiff was engaged in taking bricks and mortar by an elevator up into a building being erected by a contractor or a subcontractor of the defendants, who were the owners of the building and the elevator. The plaintiff was employed by the contractor or subcontractor, and after the elevator had been unloaded by means of a wheelbarrow operated by the plaintiff, on and along a narrow plank leading from the elevator to the scaffolding, where other workmen were engaged, he walked hurriedly backward along the plank, without looking to see whether the elevator had descended or not, and fell into and down the shaft, and was injured. *Held*: that his conduct was such that he was chargeable with negligence contributing to his injury, such as debarred him from a recovery of damages for his injuries, whatever negligence may have existed arising from other sources in sending the elevator down at the time when it descended." *Nonsuit affirmed*.

FOLEY V. JERSEY CITY ELECTRIC LIGHT COMPANY.

(*Supreme Court. New Jersey, June Term, 1892.*)

(Reported in 54 N. J. Law, 411.)

EMPLOYEE FALLING FROM ELECTRIC-LIGHT POLE — BROKEN STEP — OBVIOUS DEFECT — ERRONEOUS INSTRUCTION. —

Where plaintiff, an employee of defendant, was called upon to ascend one of the defendant's poles to trim a lamp at its top, and before climbing the pole he noticed a broken step on the pole, which he ascended safely, but in coming down his foot slipped at the broken step causing him to fall from the pole and break his leg. it was error for the trial court to direct the jury to inquire whether the danger arising from the absence of the step on the pole was of such imminent character that a person of ordinary prudence, having regard for his own safety, would have declined to use it, and if they so found, the plaintiff could not recover, but if it were otherwise, if the peril was not so imminent but that he might with safety go up to the light and trim it and get back again

by the exercise of extra care, then if he was injured he could recover. The danger being open and obvious plaintiff could not recover and verdict for him could not be sustained (1).

ASSUMPTION OF RISK. — When one enters upon a service, he assumes to understand it, and takes all the ordinary risks that are incident to the employment, and where the employment presents special features of danger, such as are plain and obvious, he also assumes the risk of those.

OBVIOUS DANGER. — The cases rigidly hold the doctrine, that the servant takes upon himself such definite and determinate risks as are obvious, and no action will lie against the master for injuries to the servant in such cases.

1. See, also, *ESSEX COUNTY ELECTRIC CO. v. KELLY*, 57 N. J. Law, 100 (Supreme Court, June Term, 1895), where plaintiff was injured by the breaking of a pole upon which he was working by direction of an officer of defendant company. Judgment for plaintiff was *reversed*, the liability of the defendant not having been made out, and it was error to submit the case to the jury. The opinion was rendered by MAGIE, J., who stated the master and servant rules (set out in the syllabus to the report) as follows:

“The liability of a master to a servant for an injury received in his employ will be established by proof that the injury was caused by the master’s wilful wrongdoing or resulted from his breach of a duty owed to the servant arising out of the relation between them.

“The duty of a master to a servant in his employ is to take reasonable care and precaution not to subject the servant to other or greater dangers than those which are obvious or naturally incident to the employment, the risk of which the servant takes by accepting employment.

“The master must take reasonable care to furnish tools and appliances with which, and places on or about which, the servant is employed to work, reasonably safe for the work.

“When a servant receives an in-

jury from a latent defect in such appliances or places, evidence to establish the master’s liability must justify the inference that he either knew or, by the exercise of the care required of him, might have known of the defect, but he will not be responsible for a defect which the most careful scrutiny would not have disclosed.”

See, also, *WESTERN UNION TELEGRAPH CO. v. McMULLEN*, 58 N. J. Law, 155 (Court of Errors and Appeals, June Term, 1895), lineman injured by electricity, where judgment for plaintiff for \$25,000 in the Essex Circuit was *affirmed* unanimously. Opinion by VAN SYCKEL, J. “In June, 1893, McMullen, who was plaintiff below, was in the employment of the Western Union Telegraph Company, engaged in helping to set poles, string wires, put up cross-arms and connect wires. While in the performance of his duty and as he was about to attach a new wire, he received such a strong current of electricity from the Western Union wire that he was knocked insensible, and received most painful injuries. The writ of error in this case is prosecuted to review the judgment recovered by McMullen below in compensation for the injuries received by him. The pole upon which McMullen was working at the time he was injured was the property of the telegraph company. It appeared in the case that in the

RULE TO SHOW CAUSE. The opinion states the case. *Rule absolute.*

ARGUED at February Term, 1892, before BEASLEY, Ch. J., and DEPUE and VAN SYCKEL, JJ.

WARREN DIXON and GILBERT COLLINS, for plaintiff.

J. HERBERT POTTS and CHARLES H. VOORHIS, for defendant.

Van Syckel, J. — The plaintiff, while in the service of the defendant company, was called upon to ascend one of the poles of the company for the purpose of trimming a lamp at

ordinary use of the telegraph wires the current of electricity was not sufficient to do injury to the person handling the wires. It further appeared that in various parts of Jersey City, and not far from where McMullen was injured, there were poles of the telegraph company to which were attached electric light wires heavily and dangerously charged with electricity, and that such electric light wires were in such close proximity to the wires of the telegraph company as to be dangerous, but no electric light wire was attached to the pole on which McMullen was injured. He had been in the employ of the company but one month and five days when he was injured, and had never worked in Jersey City before. It did not appear that the company gave any warning to McMullen of the danger in stringing its wires by reason of their close proximity to electric light wires at other points."

* * *

The official syllabus in the McMullen case states the rulings in the case as follows:

"A servant assumes the ordinary risks incident to his employment, and also risks arising in consequence of special features of danger known to him, or which he could have discovered by the exercise of reasonable care, or which should have been observed by one ordinarily skilled in the employment in which he engages.

"The employer is bound to use reasonable care to protect the servant from unnecessary risk, and is liable for damages occasioned to him through some latent danger of which he should have warned him."

See, also NEW YORK & NEW JERSEY TELEPHONE CO. *v.* SPEICHER, 59 N. J. Law, 23 (Supreme Court, June Term, 1896), lineman, in employ of city, injured by cross-bars of pole giving way, judgment for plaintiff below was reversed, the syllabus to the official report (opinion by MAGIE, J.) stating the case as follows: "A telephone company used the lower two cross-bars attached to a telegraph pole to carry its wires. The city of Jersey City used the topmost cross-bars attached to the same pole to carry the wires of a fire alarm. A lineman, in the employ of the city, in descending the pole, supported himself by one of the lower cross-bars, which gave way with him, causing him to fall. *Held*, that assuming that the telephone company invited the agents of the city to use the poles for the purpose of putting up or repairing the city wires, it owed no duty to them to maintain the cross-bars (the purpose of which is to carry wires) of sufficient strength to support them in ascending or descending the pole."

On the point decided in the SPEICHER case, *supra*, the court cited PHILLIPS *v.* LIBRARY CO., 55 N. J. Law (26 Vr.), 307 (1893), the rulings

its top. One of the steps used for climbing the pole was broken off. The plaintiff, before he attempted to go up the pole, saw the defect. He ascended the pole safely, but in descending his foot slipped when he reached the broken step, causing him to fall from the pole, by reason of which his leg was injured. This suit is prosecuted to recover from the company damages for this injury.

The trial judge charged the jury that when one enters a service, he assumes to understand it, and takes all the ordinary risks that are incident to the employment, and further, where the employment presents special features of danger, yet of such a nature that they must be known to the employee, such

in which case are stated in the official syllabus as follows:

"1. Mere permission to pass over dangerous lands, or acquiescence in such passage for the benefit or convenience of the licensee, creates no duty on the part of the owner, except to refrain from acts wilfully injurious.

"2. But the owner or occupier of lands, who, by invitation, express or implied, induces persons to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for such purposes, or at least to abstain from any act that will make the entry upon or use of the premises dangerous.

"3. The gist of the liability in such cases consists in the fact that the person injured did not act merely on motives of his own, to which no sign of the owner or occupier contributed, but that he entered the premises because he was led by the acts or conduct of the owner or occupier to believe that the premises were intended to be used in the manner in which he used them, and that such was not only acquiesced in but was in accordance with the intention or design for which the way or place was adapted and prepared or allowed to be used.

"4. The liability of the owner or occupier of premises for their condition is only co-extensive with his invita-

tion, and a person on private grounds by invitation of the owner, going of his own volition into other parts of the premises, exceeds the bounds of his invitation and if he does not thereby become a trespasser, goes out of his way to create a risk for himself. In this aspect of the case, evidence of the usual custom with respect to the parts of the premises into which persons were admitted who enter for the purpose for which the invitation was extended, is competent to show the extent of the implied invitation.

"5. A person entering premises of right or by invitation, expressed or implied, and using a path which for many years had been used with the acquiescence of the owner, is not precluded from recovering damages for an injury caused by a danger placed by the owner across the path, solely on the ground that the owner has provided another that was safe and might have been used by the plaintiff. In such a case it is a question of fact whether the path taken by the plaintiff has, by its accustomed use, with the knowledge of the defendant, become a way which by its use and appearance indicated a way that persons so using the premises were invited to use."

as are plain and obvious to one ordinarily skilled in the employment, he also assumes the risk of those. Obvious dangers, which he enters upon voluntarily, are impliedly assumed by him if he continues in the service.

It is conceded that this was a correct statement of the general doctrine which applies to the relation of master and servant.

The contention arises upon the qualification of this rule, which the trial court instructed the jury to apply to this case. The jury was directed to inquire whether the danger arising from the absence of the step on the pole was of such imminent character that a person of ordinary prudence, having regard for his own safety, would have declined to use it. If so, the jury was told that the plaintiff could not recover; but if it were otherwise, if the peril was not so imminent and threatening but that he might with safety go up to the light and trim it and get back again by the exercise of extra care, then if he was injured in the exercise of such extra care, he could recover. Under these instructions, the jury rendered a verdict for the plaintiff.

In this case the danger was open and obvious; the plaintiff could have been in no doubt as to the extent of the risk he assumed. In this respect it differs from the cases relied upon to support the distinction upon which the verdict rests.

In *Hawley v. Northern Cent. R. Co.*, 82 N. Y. 370, the plaintiff, a locomotive engineer, in the employ of defendant, was injured by the overturning of his engine, in consequence of the bad condition of the road. It appeared that the plaintiff knew that the road was somewhat out of repair, but he did not know how badly out of repair it was, or that the danger was great. The plaintiff and other engineers had frequently run their engines over the road, and it did not appear that any accident had previously happened.

In *Kain v. Smith*, 89 N. Y. 375, the plaintiff was not familiar with the work in which he was engaged at the time of his injury, nor with the use of the implement which injured him. The risk was not obvious, and the extent of the danger was unknown to him.

Patterson v. Pittsburg R. Co., 76 Pa. St. 389, was a case where the danger was indeterminate, and the new trial was granted because the trial court had refused to admit evidence

on the part of the plaintiff, that before the injury he had notified the superintendent of the company of the danger and he had promised to remove it.

It was upon this ground that these cases were submitted to the jury to determine whether the plaintiff was to be charged with the want of due care for his own safety.

If the servant knows of the defect, and it is of such a nature that a prudent person will not abandon the service on account of it, then no negligence can be charged to the master for permitting the defect to continue. If the plaintiff was justified in concluding that he could ascend the pole and return with safety by using extra care, the defendant had the right to draw the same conclusion, and, in that event, the defendant was in no fault.

If the peril was of such imminent character that it was imprudent on the part of the plaintiff to attempt to ascend the pole, then, under the rule laid down by the trial judge, the verdict is wrong. If the plaintiff acted as a prudent man in undertaking to ascend the pole, the injury must be ascribed to mere accident, the casual slipping of his foot. In that case neither he nor his employer is to be held guilty of a want of care.

The servant and the master had equal means of forming a correct judgment. Therefore, whatever want of prudence in taking the risk is chargeable to the one must be imputed to the other. The attempt to engraft this exception upon the general rule introduces the element of the absence or presence of due prudence on the part of the servant into this discussion, which is a circumstance, in my judgment, wholly foreign to it.

The immunity of the master rests upon the contract of hiring, and not upon the absence or presence of negligence in either party. The master says to the servant: You understand fully the nature of the employment and the danger attending it. Will you enter upon it? The servant says: I accept it. And the law implies that he accepts it, with all the risk incident to it, without regard to the magnitude of the danger.

The question is not whether it was prudent on his part to encounter the peril. In contemplation of law, his undertaking to assume the apparent risk of the work was general and unqualified. He might have restricted his assumption of danger by stipulating that he would take upon himself such liability

to injury only as could be avoided by due care on his part. In the absence of such a term in the engagement it cannot be introduced, by implication, without changing its purport, and importing into it a condition unfavorable to the master and which has not his consent.

The rule upon which this verdict is based appears to be not only illogical, but also impracticable. It is quite impossible to define extra care with any approach to accuracy. A jury may have some understanding as to what constitutes the care which a man of prudence and caution should exercise under the circumstances presented to them, but by what standard extra care shall be measured is a riddle I shall not attempt to read. The inference seems unavoidable, that if more care was requisite to avert injury than a man of reasonable prudence and caution would be required to exercise, the plaintiff's loss must be attributed to the want of a due regard for his own safety in undertaking the ascent of the pole.

The cases rigidly hold the doctrine, that the servant takes upon himself such definite and determinate risks as are obvious, and no action will lie against the master for injuries to the servant in such cases.

There is no circumstance present in this case to take the case out of this general rule. The plaintiff was under no undue pressure — he voluntarily accepted the employment. *Baylor v. Del., L. & W. R. Co.*, 11 Vroom, 23, 16 Am. Neg. Cas. 652, *ante*.

In *McQuigan v. Del., L. & W. R. Co.*, 126 N. Y. 618, the judgment below was reversed because it appeared that the plaintiff had knowledge of the defect which was the cause of his injury, and it did not appear that he was under any constraint to accept employment.

In *Odell v. N. Y. Cent. R. Co.*, 120 N. Y. 325, knowledge on the part of the plaintiff of the danger he would encounter proved fatal to his case.

The Supreme Court of Connecticut, in *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669, said that the employee, being acquainted with the hazards of the business in which he is engaged, must be understood to have voluntarily taken upon himself the risks to which he was exposed, and, consequently, the injury he received was non-actionable.

Assop v. Yates, 2 Hurl. & N. 768, was a case where the ser-

vant complained to the master of the danger before he was injured and voluntarily continued in his service, although he made no promise to repair. It was considered that there was no evidence to go to the jury of the master's liability.

This view of the law is fully supported by *Williams v. Clough*, 3 Hurl. & N. 258, and *Griffith v. Gidlow*, 3 Hurl. & N. 648.

The case of *Clarke v. Holmes*, 7 Hurl. & N. 937, was taken out of the general rule, by the fact that the plaintiff had complained of the dangerous state of the machinery, and the master had promised to make it safe.

The cases of *Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 562, and *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521, to which the court has been referred, involved the consideration of the negligence of a fellow-servant. In the latter case the New York Court of Appeals said that "where the servant has full and equal knowledge with the master that the machinery or materials employed are defective, or that the fellow-servant is incompetent, and he remains in the service, this may constitute contributory negligence; but if it appears that the master has promised to amend the defect, or other like inducement to remain has been held out to the servant, the mere fact of his continuing in the employment does not, of itself, as matter of law, exonerate the master from liability; but the question of contributory negligence is one for the jury."

The rule which applies to injuries resulting from the carelessness of fellow-servants has no relation to the case at bar.

The rule to show cause should be made absolute.

EWAN v. LIPPINCOTT,

Supreme Court, New Jersey, January Term, 1885.

(Reported in 47 N. J. L. 192.)

MACHINIST MAKING REPAIRS IN DEFENDANT'S MILL INJURED BY NEGLIGENT ACT OF DEFENDANT'S ENGINEER IN STARTING WHEEL — *RESPONDEAT SUPERIOR* — FELLOW-SERVANT.—In an action to recover damages for injuries sustained by plaintiff, a machinist, while working in defendant's saw-mill repairing the water-wheel of the mill, the wheel being suddenly started by defendant's engineer, it appeared that defendant gave an order to a firm of

machinists to make some alterations in the water-wheel, and plaintiff, with another workman, was sent to execute the order. It was understood between defendant and these workmen that the mill should not be started while they were at work upon the wheel. The trial court charged that if the engineer was negligent the defendant would be liable, and further charged that the engineer and plaintiff were not fellow-servants. *Held*, that such charge was erroneous, as the plaintiff and the engineer were fellow-servants engaged in common employment (1).

ON RULE to show cause why new trial should not be granted. The facts appear in the opinion. Rule absolute.
New trial

ARGUED at November Term, 1884, before BEASLEY, Ch. J., and DIXON, REED and MAGIE, JJ.

P. L. VOORHEES, for the rule.

T. B. HARNED, *contra*.

Reed, J.—This action was brought to recover damages for an injury received by the plaintiff in the mill of the defendant. The plaintiff is a machinist, and while at work upon the water-wheel of the defendant's saw-mill the wheel was suddenly put in motion by the engineer employed by the defendant and the hand of the plaintiff was crushed.

The trial justice charged the jury, *inter alia*, that if the accident was the result of the negligent act of the engineer then the defendant, the master of the engineer, was responsible for the result. In answer to the objection interposed by de-

1. On the fellow-servant question, see, also, *THE ROGERS LOCOMOTIVE AND MACHINE WORKS v. HAND*, 50 N. J. Law, 464 (Supreme Court, June Term, 1888), where judgment for plaintiff, Hand, was *reversed*, for erroneous instruction on fellow-servants. The opinion was rendered by MAGIE, J., and the case is stated in the syllabus to the official report as follows: "A. was employed in the blacksmith shop of a locomotive and machine works, and, upon the direction of an officer of the company, repaired a chain which had been used in raising locomotive driving-wheels, to be worked on by B., employed by the works for that purpose. When repaired, the chain was again fur-

nished to and used by B. for the same purpose, and B. was injured by its breaking at the link which had been repaired. *Held*, that A. and B. were fellow-servants in a common employment, and that an instruction to the jury that A. was the agent of the employer, who was responsible for any failure on A.'s part to actually exercise reasonable care and skill in making such repairs, was erroneous." The court cited several leading authorities on the fellow-servant question. *Harrison v. Central R. Co.*, 2 Vr. 293; *McAndrews v. Burns*, 10 Vr. 117; *Ewan v. Lippincott*, 18 Vr. 192; *Smith v. Oxford Iron Co.*, 13 Vr. 467, which cases are reported in this volume of *AM. NEG CAS.*, *ante*.

fendant's counsel that the engineer and machinist bore to each other the relation of fellow-servants, and so the master was not chargeable with the injury to one caused by the negligent act of the other, he charged that they were not serving the same master, and so were not engaged in a common employment.

It appears from the evidence that the plaintiff was employed in the regular business of a firm of machinists, named Derby & Weatherby, and that they, upon an order given to them by the defendant to make some alteration in the gearing of his water-wheel, sent the plaintiff with another of their workmen to execute the order.

Upon this appearing in the case it was urged below, and there accepted as the law and is now insisted here, that while the engineer was the servant of the defendant, the plaintiff was the servant of Derby & Weatherby, and as their employment was by different masters, they were not fellow-servants.

In respect to this phase of the plaintiff's case it would seem that if it be admitted that the service in which Derby & Weatherby were employed was a service in common with that of the engineer, then the service of the workmen sent by the firm was also a common service. And I think it would follow in that respect the rule which relieves the master from liability for injuries received by one of the hands of another fellow-servant, that the workman was to be regarded while doing his work as the servant of the defendant.

The owner of the mill had the control of the workmen to the same degree that he would have had over the masters of the workmen had they done the work personally. He had the power to direct the work in regard to the extent and character of the alterations, and in respect to the time at which and the circumstances under which it was to be done. He had the power to change, terminate or suspend the work at any moment. Had an injury resulted to a third person by reason of the negligent act of such workmen while acting within the line of the employment for which Derby & Weatherby had been engaged, there could be no doubt that the defendant would have been liable to the injured person. *Stone v. Coleman*, 15 Pick. 297.

An examination of the cases in which the character of a servant has been considered will, however, disclose the fact

that there is no legal test of service by which in all cases it can be determined whether an employee is a servant. He may be a servant for one purpose and a volunteer or contractor for a different purpose. He may be the servant of one master viewed in one aspect, and at the same time be considered as the servant of another person for the purposes of carrying out a legal policy.

Concerning this last remark, Mr. McDonnell, in his well-digested book on this branch of the law, speaking of the observation of Baron Parke that a man cannot be the servant of several masters at the same time, thus writes: "A cannot be the servant of B and C in the sense that he is bound to obey both. He may, however, be the servant of both in such a sense that he may be prosecuted for embezzlement by B or C as a clerk or servant; that B or C may be liable to strangers for his torts; and that while the servant of B he cannot claim damages against C for the acts of C's servants, inasmuch as he is in law their fellow-servant." McDonnell on Master & Servant, 46.

The accuracy of the last clause in the above observation is apparent from an examination of a number of cases in which this duality of service was recognized. In the case of *Wiggett v. Fox*, 11 Exch. 832 (1), the defendants, who had contracted with the Crystal Palace Company to erect a tower, made a subcontract with M. and four others to do by piece particular portions of the work. The workmen by the subcontractor were paid weekly by the defendants, according to the time which they worked. The subcontractor received from the defendant's foreman directions as to the execution of the piece-work. The persons who contracted with the defendants to do the piecework signed printed regulations by which they were not at liberty to leave their employment till after they had completed their work, and had given a week's notice. A man who was employed by a subcontractor was killed by a workman in the service of the defendants. The jury found that the deceased was the servant of the subcontractor. The court remarked that the subcontractor and all his servants must be

1. In *WIGGETT v. FOX*, 11 Exch. 832, it was held that a master is not responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant while they are acting in one common service, but this rule does not hold where the person doing the injury is not a person of ordinary skill and care.

considered, for this purpose, the servants of defendants whilst engaged in doing work, and working together for that purpose.

In the case of *Johnson v. City of Boston*, 118 Mass. 114, 15 Am. Neg. Cas. 534ⁿ, an action was brought against the city of Boston for an injury caused by the falling in of a sewer through the negligence of a servant of the city. The plaintiff was employed by one Tinkham, whose business was the blasting of rock for whomsoever employed him. Tinkham sent plaintiff to blast out the bottom of a sewer for defendants. The city employed Tinkham, paying him for each man *per diem*. The court, in holding that the plaintiff was a fellow-servant with the workman who caused the injury, remarks: "If Tinkham, the plaintiff's employer, had been the person injured while engaged in the same work, he would clearly have been in the position of a fellow-servant with those who excavated the earth. The only point of difference in the position of the plaintiff is that by virtue of a previous agreement between himself and Tinkham the latter was entitled to determine whether and how long he should be employed upon any part of defendant's work, and to receive from defendant the compensation due for such service. But while he was so employed he was in the service of the defendant doing the work of the defendant, of which Tinkham had not control, and in the result of which he had no further interest than to receive the reasonable or stipulated rate of wages as for a personal service. The existence of this personal relation of master and servant between the plaintiff and Tinkham does not exclude a like relation with the defendant to the extent of the special service in which he was actually engaged. This was conceded in *Kimball v. Cushman*, 103 Mass. 194, as to liabilities to a stranger for the negligence of one employed in a special service. The result of the discussion and the authorities cited in *Hilliard v. Richardson*, 3 Gray, 349, would seem to be that while engaged in the work of excavating the sewer the plaintiff was the servant of the defendant, so far as to make the defendant liable to strangers for the negligent conduct of that work." The liability of a master for the acts of a person employed by his servant is further exhibited in the cases cited by Mr. Wood in his work on Master and Servant (§ 308). The result of all these cases is to place the plaintiff in the position which would have been occupied by Derby & Weath-

erby, and, so far as concerns the work done upon defendant's mill, to place him in a position of servant of the defendant.

There is another condition required, however, beyond the fact that the injured and the injuring servant were in the service of the same master, to relieve the defendant from the operation of the rule of *respondeat superior*. The service must not only be under the same master, but the employment must be one having a common object. The most approved test of an employment of this character is whether the injured servant can be said to have apprehended the possibility of injury from another servant while engaged in the service for which he hires. It is not necessary that both be engaged in the same or even similar acts, so long as the risk of injury from the one is so much a natural and necessary consequence of the employment which the other accepts that it must be included in the risks which have to be considered in his wages. Underhill on Torts, 52.

Similar language was employed in the case of *Morgan v. Vale of Neath R'y Co.*, L. R., 1 Q. B. 149, and in the case of *Lovell v. Howell*, L. R., 1 C. P. Div. 161 (1), and this test was adopted by the Court of Errors in the case of *Burns v. McAndrews*, 10 Vroom, 117, 16 Am. Neg. Cas. 680, *ante*. The language used is this: "Common employment is service of such kind that in the exercise of ordinary sagacity all who engage in it may be able to foresee, when accepting it, that through the negligence of fellow-servants it may probably expose them to injury."

The two cases in the Court of Queen's Bench and Court of Common Pleas Division have been by me selected from a number of cases in the English courts in which the same test has been recognized and applied, and the facts to which this rule was applied in the first of those two cases are, in my judgment, much like the facts of the present cause.

In this case of *Morgan v. Vale of Neath R'y Co.*, *supra*, the facts were these: The plaintiff was in the employment of the railway company as a carpenter, to do any carpenter work

1. *MORGAN v. VALE OF NEATH R'Y* 'servant question, "that the servant Co., L. R. 1 Q. B. 149, is sufficiently must be assumed to have contemplated in the opinion in the case at bar. plated and tacitly assented to encounter the ordinary risks incident to the

In *Lovell v. Howell*, L. R. 1 C. P. Div. 161, it was held, on the fellow-service" at time of contracting.

for the purpose of the company. He was standing on a scaffolding, at work on a shed close to a line of the railway, and some porters in the service of the railway company shifted an engine on a turn-table so that it struck a ladder supporting the scaffold, by which means the plaintiff was thrown down and injured. The court held that the carpenter and porters were fellow-servants.

Not unlike this case is that of *Besel v. N. Y. C. & H. R. R. R. Co.*, 70 N. Y. 171. The plaintiff was a car repairer, and while under a car at work, an engine started to draw off from the repair track such cars as had been repaired. A coupling broke and some cars descended, struck the car which deceased was repairing, and killed him. It was held that the yardmaster and head brakeman were co-employees of the car repairer, and for the negligence of either of the two former the defending company were not liable to the plaintiff. To the same effect, and involving nearly the same facts, is the case of *Valtez v. Ohio & Miss. R'y Co.*, 85 Ill. 500, 14 Am. Neg. Cas. 343.

In respect to the rule that the common employments may be dissimilar and in different departments of the same business, the case of *Ross v. N. Y. C. & H. R. R. Co.*, 5 Hun, 488; s. c. 74 N. Y. 617, is instructive. The plaintiff was engaged in the capacity of a surveyor and was injured through the negligence of a conductor while he was being transported, free of charge, from his place of residence to his work. It is held that he was a co-employee of the conductor.

So, in the case of *McCosker v. Long Island R. R. Co.*, 84 N. Y. 77, a man employed by the yardmaster was killed through the negligence of the yardmaster. It was held that they were engaged in a common employment.

So, in the case of *Gillshannon v. Stony Brook R'y Corp.*, 10 Cush. 228, 15 Am. Neg. Cas. 413*n*, a common laborer engaged in repairing the roadbed was killed, while riding in a train to his work, by the negligent management of the train; it was held that there could be no recovery. To the same purport is the case of *Ryan v. Cumberland Valley R. R. Co.*, 23 Pa. St. 384.

In the English cases the remark of Mr. McDonnell that the courts have given a very wide signification to "fellow-servants" is illustrated by the cases cited by him. McDonnell on Master and Servant, 304.

Now, from this statement of the general principle upon which the determination of a common service rests, and in view of the cases in which it has been illustrated, let us turn to the position of the parties in the present action. The defendant was engaged in the business of cutting timber by means of a mill run by water or steam. He employed hands to operate the mill, among them an engineer. He called in the plaintiff to make some changes in the gearing of the machinery, and, while the latter was at work, he received the injury, by reason, as he claims, of the negligent act of the engineer in starting the wheel upon which he was at work.

If the mechanic had been engaged, generally, to keep the mill in repair, and had received this injury while engaged in general employment, would there exist a doubt that he was a co-servant with the others employed about the mill, engaged in a common service? The general object was the preparation of uncut timber for the market, by turning it into lumber.

Now, this mechanic was certainly as closely connected with the common object as the carpenter, car repairer or road repairer was to the common purpose of a railroad company. He would seem to be so clearly within the rule of a common service that discussion would be wasted.

Nor can I perceive in what way this case is variant from the fact that this service was an occasional or job service.

It is the quality, not the length of time or extent of the work, which fixes, in this respect, the character of the servant and service. The servant may be engaged by the day, week or year, or by piece-work, yet if his employment is in the way of accomplishing a result which other employees are also working to bring about, their service is common. In no case have I discovered a suggestion that the length of time in which the person is engaged in work determines the question of service in respect to the liability of the master for his acts, or for injuries to him at the hands of other servants.

In the argument at bar on this branch of the case, the point made was that the machinist was called upon to equip the mill for work, and that his employment was limited to that, and ceased when that was accomplished; that, on the other hand, the employment of the engineer was limited to running the mill.

But it must be kept in view that the mill had been running,

and was to continue running, at intervals, while the alterations were being made. The plaintiff knew this, for, according to his own story of his engagement, the danger of running the mill at all, while he was working, was discussed by himself and the defendant. He says that the defendant promised that the mill should not be started while he was below at work upon the wheel, but it was understood between them that it should run while he was preparing the work for its application to the wheel.

There was conflicting testimony as to what was said by the defendant, but there is no conflict in regard to the fact that the plaintiff understood that the mill was to be operated at such intervals of time as the plaintiff was not actually at work upon the work-wheel. The question is not presented whether the defendant made a promise, for not keeping which he became liable to the plaintiff, but whether the machinist was a fellow-servant of those who were operating the mill. In this aspect of the case, I am unable to distinguish this machinist from the railroad carpenter or the repairer of cars or roadbed of a railway company, who were employed to keep in working order the appliances by which the corporations were enabled to operate their multifarious business. They are each engaged in forwarding a common enterprise, and are, to all others concerned in the same undertaking, fellow-servants engaged in a common employment.

I think, in ruling otherwise at the trial, there was error, for which there should be a new trial.

MINOR EMPLOYEE INJURED BY CIRCULAR SAW — MASTER LIABLE. — In **SMITH v. IRWIN**, 51 N. J. Law, 507 (*Court of Errors and Appeals, June Term, 1889*), on error to the Supreme Court, judgment for plaintiff below was *affirmed*. Opinion by VAN SYCKEL, J. For affirmance, 11; for reversal, none. The learned judge said: "There are two suits involving the same questions of law, one brought by the father to recover damages for injury to his son, and the other brought by the son, in the name of the father, to recover compensation for injury to himself. Smith, the defendant below, was a manufacturer in the city of Newark. Robert J. Irwin, the son, then seventeen years old, was injured August 4, 1886, while working a circular saw on the said defendant's premises (1).

1. *Licensee injured by machinery* (Supreme Court, November Term, — *Defendant not liable*. — In **MATH- 1888**), an action to recover damages **EWS v. BENSEL**, 51 N. J. Law, 30 for the death of plaintiff's intestate

"The question for consideration on the trial of the cause was whether, under the evidence, the defendant below was liable in law to respond in damages for the injury which is the subject-matter of this suit.

"The only question to be determined in this court is whether the trial judge correctly stated to the jury the law pertaining to the case. * * *

"The evidence was uncontradicted that the boy was totally unacquainted with machinery, and had no previous experience in the running of a circular saw. * * *"

The court set out the instructions, and the rulings are stated in the syllabus to the report as follows:

"1. An employee takes upon himself all the risks that are naturally and fairly incident to the employment in which he engages. This rule is modified so far as to require the employer of an infant to explain to him fully the hazards and dangers connected with the business, and to instruct him how to avoid them.

"2. Minor servants are held to assume, by their contract of employment, those ordinary risks of their service which are obvious to them, or have been pointed out in a manner suited to their youth and inexperience.

"3. The law upon the subjects embraced in the requests to charge having been correctly declared by the trial judge in his charge to the jury, his refusal thereafter to charge otherwise than had been charged was not error.

"4. To conclude the plaintiff from maintaining his action, his conduct must have been negligent, and his negligence must have contributed to the injury in such a way that if he had not been negligent he would have received no injury from the negligence of the defendant."

FEMALE EMPLOYEE INJURED BY MACHINERY — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY — MASTER LIABLE. — In **THE CLARK THREAD COMPANY v. BENNETT**, 58 N. J. Law, 404 (*Court of Errors and Appeals, November Term, 1895*), judgment was affirmed, the PER CURIAM opinion being as follows:

"The argument was confined to the assignments of error based on

who, while lawfully in the manufactory of defendants, was fatally injured by the table of a planer machine catching and crushing him against a brick wall, it was held that the general allegation that plaintiff was lawfully on the premises was sufficient

to show that he had greater right there than that of a mere licensee. It was also held that defendants were not bound to fence their machinery in favor of a licensee. Demurrer to declaration ordered sustained.

the refusal to nonsuit, and the refusal to direct a verdict for the defendant below. No error is discoverable in these refusals.

" 1. There was evidence to go to the jury in respect to the liability of the company for Margaret Bennett's injury.

" 2. As to the negligence of plaintiff, which is alleged to have contributed to the injury, the claim is that it was established by inferences drawn from the construction of the machine, and from the mode in which her hand was pulled in between the cylinders from below (1). The contention is that she could not have been so injured unless she had put her hand in a place of obvious danger. But it was for the jury to draw inferences from the facts, and a peremptory instruction could not be given by the trial judge unless in a case where but a single inference could be drawn. It was so improbable that she received her injury in the precise manner she described, and so difficult to conceive how she was drawn in without her own negligence, that a new trial might well have been allowed on the ground that the jury's inference of no negligence on her part was against the weight of evidence. But as it was possible that her injury happened in a manner consistent with her description, and without negligence on her part, an instruction for a verdict against her ought not to have been given, for a second or subsequent verdict on the same evidence in her favor would doubtless not have been disturbed. *Crue v. Caldwell*, 23 Vroom, 215. The result is that the judgment must be *affirmed*." For affirmance: 10; for reversal; none. RICHARD V. LINDABURY, appeared for plaintiff in error; SAMUEL KALISCH, *contra*.

1. *Minor employee, a female, injured by machine—Erroneous instructions on damages.*—See, also, *THE CLARK MILE-END SPOOL COTTON CO. v. SHAFFERY*, 58 N. J. Law, 229 (Supreme Court, November Term, 1895), where female employee, a minor, was injured while operating defendant's machine. Judgment for plaintiff in the Essex Circuit was *reversed* for error on damages. The court said: "The plaintiff was an unemancipated minor, and the trial judge, in charging the jury on the subject of damages, gave them, among other directions, this instruction: 'And you are also to consider the loss of wages in the past, if there has been any proof of such loss.' There can be no doubt that this legal exposition was erroneous, inasmuch as the right

to such damages in part did not reside in her mother. That this was a mere slip is obvious, for the exception to the instruction was general and unspecific, so that the attention of the judge was not called to the subject. As was said in the case of *Crater v. Binninger*, 4 Vroom, 513, 520, 'such a bill ought not to be allowed, for, as has been repeatedly said by this court, exceptions, to be legal, must be specific. But as the bill in this case comes before us in this general form, this court has no power to limit the range of objections.' See, also, *Packard v. Bergen Neck R. R.*, 25 Vroom, 229. These wages are an unknown quantity, and must have been included in the verdict." This error being incurable judgment was *reversed*.

MAHER v. McGRATH.

Supreme Court, New Jersey, February Term, 1896.

(Reported in 58 N. J. Law, 469.)

FALL OF SCAFFOLD ERECTED BY MASONS AND LABORER DELIVERING BRICK INJURED — FELLOW-SERVANT — MASTER NOT LIABLE. — Plaintiff was a laborer in defendant's employ, engaged in attending upon masons, also employed by defendant, who were constructing the walls of a brick building, the defendant being the contractor for its erection. While plaintiff was delivering a hodful of brick to the masons upon a scaffold which the latter had erected, the scaffold fell owing to its defective construction, and plaintiff fell with it, sustaining severe injuries. *Held*, that the injury was due to the negligence of fellow-servants, for which the master was not liable.

ON RULE to show cause. *Rule absolute.*

ARGUED at November Term, 1895, before BEASLEY, Ch. J., and MAGIE and LUDLOW, JJ.

JOHN R. HARDIN, for the rule.

JOHN T. DUNN, *contra*.

Magie, J. — This cause was tried in the Union Circuit, in the May Term, 1892. Plaintiff obtained a verdict, and a rule to show cause was allowed defendant within the required time. This rule has only been brought to hearing at this term.

The action of plaintiff was brought to recover damages from the defendant, his employer, for injuries received by the fall of a scaffold on which plaintiff was working. The reasons assigned for a new trial are founded solely upon the alleged error of the trial judge in refusing to nonsuit plaintiff, or to direct a verdict for defendant.

The state of the case contains only the evidence given at the trial on behalf of plaintiff and the charge of the trial judge. It discloses that the evidence given on behalf of defendant was omitted therefrom by consent of counsel. In reviewing the alleged error of the trial judge, we are therefore confined to a consideration of the evidence appearing in the agreed-upon state of the case.

Plaintiff was a laborer in the defendant's employ, engaged in attending upon masons, also employed by defendant, and who were constructing the walls of a brick building. The evidence shows that when plaintiff delivered to the masons upon

a scaffold a hodful of brick, the scaffold fell, and he fell with it, and thereby sustained severe injuries.

The cause of the fall was plainly fixed by the evidence to have been the breaking of a "bearer," one end of which was fastened to a scaffold pole, and the other end was supported by the wall on which the masons were working. The bearer supported the scaffold planks on which the masons stood.

Plaintiff claimed to have established defendant's liability to him for his injuries on the ground that the evidence showed a dereliction of the duty which, as employer, he owed his servants in two respects, viz.: 1, as to the materials with which the scaffold was constructed, and, 2, as to the manner of its construction. His case was thus submitted to the jury, with instructions as to a master's duty, which are not complained of, and which seem unobjectionable, if applicable. The only question, therefore, is whether the evidence justified their application.

With respect to the materials used in the construction of the part of the scaffold that fell, the evidence does not show that they were furnished by defendant. On the contrary, it appears that the masons took lumber belonging to the carpenter engaged upon the building, and used it, without his knowledge, in the construction of that part of the scaffold. The bearer that broke was thus procured.

But it is unnecessary to consider whether defendant is charged with any liability for defects in materials thus procured; for the evidence makes it clear that the fall of the scaffold was due, not to defects in the material, but to defective construction. The bearer used was three by six and about ten feet long. It was so adjusted that the scaffold planks were supported by it on what the witnesses call "the flat," and the proof shows that if placed "on edge" it would have been sufficient for its purpose. The weight it supported was therefore imposed on its weakest side. This, it appears, is contrary to the usual mode of construction.

The only question, then, is whether defendant is liable for this error in construction.

It affirmatively appears that defendant personally took no part in its construction, but that it was constructed by the masons in accordance with the custom of the trade.

As the error of construction which occasioned plaintiff's injury was committed by workmen with whom he was working

in a common employment, subject to a common danger which all equally knew must result from a negligent construction of the scaffold, the rule which denies the liability of the master for injury received from the negligence of a fellow-servant was plainly applicable. As there was no evidence that defendant was negligent in the selection and employment of the masons engaged in the work, there was no evidence of defendant's liability sufficient to be submitted to the jury.

In a case where the evidence was sufficient to establish, *prima facie*, that a ladder was furnished by an employer to be used by his workmen, it was held that the master was bound to take reasonable care to have it safe for such use. *Mills v. Maine Ice Co.*, 22 Vroom, 342, 16 Am. Neg. Cas. 674, *ante*. But in this case the scaffold was not a permanent platform furnished by the employer on which he invited his workmen to stand in doing their work. *Mulchey v. Meth. R. Soc.*, 125 Mass. 487, 15 Am. Neg. Cas. 661. It was a temporary and movable platform, to be increased in height as the work progressed, by the workmen themselves, as their needs required. For an injury received by one workman from the negligence of others in increasing the scaffold's height, the employer would be no more liable than he would be for the fall of a ladder furnished by him to his workmen, when the fall was the result of one of them negligently placing it insecurely.

For these reasons, I think the rule should be made absolute.

COMBEN V. THE BELLEVILLE STONE COMPANY OF NEW JERSEY.

Court of Errors and Appeals, New Jersey, June Term, 1896.

(Reported in 59 N. J. Law, 296.)

LABORER IN QUARRY THROWN FROM ROCK AND KILLED — BLASTING OPERATIONS — DEFECTIVE MACHINERY — SAFE APPLIANCES AND PLACE TO WORK — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY. — 1. The duty of a master towards a servant in his employment is to exercise reasonable care and skill to provide safe machinery and appliances for carrying on the business for which he employs the servant, and in keeping such machinery and appliances in a safe condition for such use, including the duty of

making inspection and tests at proper intervals whilst the work progresses, to ascertain if it remains in such safe condition. The master is also bound to exercise reasonable care to provide a safe place for his servant to perform his work, and to the exercise of reasonable care to keep and maintain the place safe, and such duty as to machinery, appliances and place continues when his servant is changed from place to place upon the work in which he is engaged for his master when the danger of such change is not obvious, and the servant is without knowledge of it, and cannot observe and acquire the knowledge in the exercise of ordinary care in the employment (1).

1. *Falling from platform — Railing giving way — Defendant liable.* — In *ALEXANDER DYE WORKS v. ROUFOSSE*, 57 N. J. Law, 700 (Errors and Appeals, March Term, 1895), it was held that "the fact that the evidence was susceptible of a finding that the plaintiff was guilty of contributory negligence, was not ground for reversing a finding of the jury to the opposite effect." Opinion by GARRISON, J. Affirmance unanimous. It appeared that "William Roufosse was employed by the Alexander Dye Works to hang silk in the drying-room. The silk was festooned over rails near the ceiling, about sixteen feet from the floor. For this work the company furnished a ladder ten feet high, the platform of which was guarded, upon three of its sides, by a low wooden railing. From this platform Roufosse fell and injured himself. His testimony and his contention are that the railing gave way under ordinary pressure, owing to conditions which inspection and repair would have remedied. The defendants insisted that, both in law and in fact, the risk and the negligence were the plaintiff's." Judgment for plaintiff affirmed.

Falling of heavy stone — Employee killed — Machinery — Inspection — New trial. — In *ATZ v. THE NEWARK LIME & CEMENT MANUFACTURING CO.*, 59 N. J. Law, 41 (Supreme Court, June Term, 1896), rule to show cause for new trial, verdict being returned

for plaintiff, was made absolute. Opinion by MAGIE, J. It appeared that "plaintiff's intestate was in the employ of the defendant, a company engaged in the manufacture of cement. On May 5, 1892, defendant was using a machine for grinding broken rock called the Page mill. The mill had an upper stone which was fixed in a frame of hard wood, and a lower stone which revolved. The upper stone had a hole of about five inches in diameter in the centre, through which the rock to be ground was fed from a hopper. In that hole was the 'damsel,' inserted in the lower wheel and which, when the latter revolved, oscillated the trough leading from the hopper so as to produce a constant feed of rock. The frame in which the upper stone was fixed was hinged on one side upon a frame surrounding the lower stone. On the opposite side an iron lag-bolt was inserted having a ring attached. At intervals the grinding surfaces of the two stones required to be sharpened. To expose them for that purpose there was a traveling-block and pulleys over the mill, carrying a chain with a hook. When the hook was inserted in the ring the frame with the upper stone in it was raised by the use of the pulleys to a perpendicular and then lowered on the other side, leaving both grinding faces exposed. When sharpened the operation was reversed and the frame with the upper stone was let down upon the

2. Where there is a fair dispute in the evidence, or two classes of conclusion can reasonably be reached from it, whether the injury to the servant was the result of the negligence of the master to exercise the care required to provide proper machinery and appliances for the use of the servant, or a proper place in which to perform his work, or whether the injury was the result of obvious danger or risk to the servant, or the want of ordinary care on his part to observe dangers within his knowledge, or of which he ought to have known in the exercise of such care, then a case is made which should be submitted to the jury for their determination.

lower stone. On the day named deceased and another workman were engaged in lowering the upper stone after sharpening, the latter managing the pulleys. When the frame was nearly in place deceased directed the other workman to stop lowering, which he did. Thereupon the lag-bolt broke and the upper stone fell. Deceased had one arm and part of his head between the stones and was instantly killed. The administrator of deceased brought this action to recover for the pecuniary loss to the next of kin and obtained a verdict. This rule to show cause was allowed."

The rulings by the learned judge are stated in the syllabus to the official report as follows:

"1. When the duty which a master owes to a servant respecting machines furnished for the servant to work with requires inspection of the machines, the duty will be performed by such an inspection as ordinary prudence would dictate.

"2. A master is not liable for an injury occasioned by a defect which would not have been disclosed by such an inspection as it was his duty to make.

"3. Such inspection would require the use of practicable tests known to the master or so commonly used for that purpose that he might be presumed to have knowledge of them."

Miscellaneous cases.

Property damaged — Explosion of steam boiler — Liability of manufac-

turer. — In *VAN WINKLE v. THE AMERICAN STEAM BOILER COMPANY*, 52 N. J. Law, 240 (February Term, 1890), demurrer to declaration was overruled, the case being stated in the syllabus to the official report (opinion by BEASLEY, Ch. J.) as follows:

"1. The defendant having insured a steam boiler, which was in a building adjacent to the mill of the plaintiff, and which mill had been injured by the bursting of such boiler; and it appearing that the defendant had co-operated actively with the owner of the boiler in its management: *Held*, that the defendant was responsible for such damage, if the same was occasioned by its want of care and skill in such transaction.

"2. In such instances, the owner of the dangerous machine is liable for the immediate and obvious damage caused by its mismanagement, and all persons, whether servants or volunteers, who participate in such mismanagement, are also liable.

"3. There is a public duty to exercise great care and skill incumbent on those having charge of instruments which, if mismanaged, are highly dangerous to the lives and persons of men who happen to be in their neighborhood; and for the non-performance of such duty a person specially injured thereby is entitled to sue."

Dangerous premises — Fall of wall — Employee of another injured — Liability of person constructing building. — In *LECHMAN v. HOOPER*, 52 N.

3. When, at the close of the case of the plaintiff, there exists upon the evidence a substantial dispute whether the injury arose from the negligence of a fellow-servant or not, a motion to nonsuit on this ground cannot prevail.

(Syllabus by the court.)

ON ERROR to the Essex County Circuit Court. The facts appear in the opinion. *Nonsuit reversed.*

J. Law, 253 (February Term, 1890), rule to show cause for new trial, after verdict for plaintiff, was discharged, the syllabus to the official report (opinion by BEASLEY, Ch. J.) stating the case as follows:

"1. The plaintiff was in the employ of a person in the business of putting up an iron lintel, etc., and, in the course of his employment, went to a building that was being erected by the defendant, who was a mason; one of the walls having been just built was in a dangerous condition, and the defendant directed one of his men to make the wall safe; the wall, being neglected, fell upon the plaintiff, who therefor brought suit. There was some evidence which, it was contended, tended to show that the co-employee of the plaintiff, who was in charge of that particular job, was notified of the danger in question. *Held*, that notice of the nuisance was due to the plaintiff personally, and that notice to his co-employee would not affect him.

"2. The principle of decision is, that the tortfeasor owed to the plaintiff the duty to apprise him of the lurking danger, and that the plaintiff had not appointed his master, or any of the servants of such master, his agent to receive for him such notice."

Property damaged—Defective building—Liability of architect—Negligence of architect and contractor—Joint liability. — In *NEWMAN v. FOWLER*, 37 N. J. Law, 89 (Supreme Court, June Term, 1874), on writ of error to

the Essex Circuit, judgment was entered on the verdict for plaintiff, on the facts as stated in the opinion by BEASLEY, Ch. J., as follows: "The damages for which indemnification is sought in this suit, are the results of the negligence of another party as well as that of the defendant. The plaintiff employed the defendant to oversee, in the capacity of architect, the putting up of a building, and the verdict has established that this structure is defective in workmanship and materials, in consequence of the want of care or want of skill of the contractor engaged to do the work, and of the defendant as architect. The loss comprised in the present cause of action has arisen, therefore, by reason of the default of these two persons, the contractor and the defendant. The suit is against the latter, solely."

The rulings of the learned judge are stated in the syllabus to the official report as follows:

"1. When two or more persons, though not acting in concert, occasion an injury, they are severally liable for the consequences.

"2. When a house was badly built in consequence of the joint neglect of the architect and the contractor, a suit, founded on such neglect, will lie against the architect alone.

"3. Nor will the fact that the owner of the house refuses to pay the contractor a part of the money due to the contractor, on the ground that the house is badly built, bar such suit."

THOMAS J. LINTOTT, for plaintiff in error.

HAYES & LAMBERT, for defendant in error.

Lippincott, J. — On March 7, 1894, one Robert Comben, the intestate of the plaintiff in error, was employed by the defendant in error in working in its stone or rock quarry at Avondale, in the State of New Jersey, and whilst so working he was, by the operation of the machinery and appliances of the defendant in use in its quarry, thrown from a ledge of rock where he was working and killed. The plaintiff in error is his widow, and sues the defendant company for damages resulting to her as his widow, and to his two brothers, as his next of kin. At the trial below, at the close of the case of the plaintiff, the trial judge ordered a judgment of nonsuit, to a review of which this writ of error is directed.

At the trial it appeared that the intestate was a quarryman in the employment of the defendant, engaged in drilling holes in the rock for the purposes of blasting. At the time of the accident he was so engaged on a pinnacle or ledge of rock to which he had been removed from another part of the work. In about twenty minutes after he had been set at work at this place, the drag rope connected with the machinery for hoisting the rock and debris out of the quarry sagged and swept across the ledge of rock and carried the deceased into the quarry below, and by reason of the fall he was killed. It was the sagging of this rope which caused the accident and his death. Had the rope remained taut it would have been some eight or ten feet above his head, and he would probably have escaped injury. The machinery was operated by an engine and derrick, and the rock was hoisted up in carriages to which the rope was attached and by means of a stationary cable carried to the dumping ground. The drag rope which on this occasion sagged ran from a drum in the engine house up to an anchorage of the cable, and then passed through a pulley. This drag rope was regulated or controlled by the drum, which drum was operated by engine power, and its movements controlled by a friction brake, by which the rope could be released wholly or in part, and the friction increased or decreased by the engineer in charge of the machinery. There is some evidence that the proper manipulation of the friction brake would prevent to some extent the sagging of the rope. It is in evidence also, and, as it appears, undisputed,

that the sagging and swinging of the rope could have been prevented by the attachment of protectors or hangers from some portion of the machinery to the rope, and that thus it would have been rendered safe. There is also evidence tending to show that the rope was too long to be safe if operated without these protectors or hangers. The rope was from two hundred to two hundred and fifty feet in length, and without any protection from sagging save from the friction brake. The evidence shows that there was nothing connected with the rope to hold it from swinging or sagging at any point between the engine and the point of anchorage, where it passed through the pulley. There is evidence to show that when the rope was taut it would not only be from eight to ten feet above the head of the intestate, but also it would not approach nearer to him than from five to eight feet, but when it was slackened it was liable to sweep across the ledge or face of the rock where the intestate was at work. It is in evidence that in a quarry worked close by this one by similar machinery, this drag rope was held by hangers. It is also in evidence that the derrick by which the hoisting was done had stood on this ledge of rock for a long time previously, and that it had been removed about a week before the accident in order to allow the workmen to excavate the ledge. There is evidence tending to show that the foreman of the defendant had been warned, just before or about the time he set the intestate to work there, that the spot was a dangerous one to work in because of the liability to danger by reason of the sagging of this rope, and that in the face of this warning the intestate was placed there to work without this alleged defect being remedied. There is a question under the evidence whether the intestate knew of this danger or whether it could have been obvious to him. Previous to this time he had been at work upon another portion of the quarry where there existed no such danger as this, and it is questionable under the evidence whether before he was set at work at the place of the accident, at the time or afterwards and before the accident, he could have observed or could have known at all of the danger to be encountered there. There is evidence that another workman had warned the foreman of the danger and refused to do the work, which was to drill holes in the rock of the ledge for blasting, and that the foreman said there was no danger, and that the rope

would not come near them. The foreman then called the intestate and set him to work at this place, the doing of which in holding the drill or striking the same rendered it exceedingly doubtful whether the deceased could observe anything whatever but the drill he was using or striking.

The facts in connection with the conduct of the foreman are only referred to to show that the place at which the intestate had just been set at work was a very dangerous one. This was not so by reason of any of the tools with which he was working and which were within his control or in the use of which he had any choice, but because of the defective and unsafe machinery and appliances in there, of the danger of which he had no notice, knowledge or warning. Whilst he had been working in this quarry for some time, it was in another part thereof and at some distance away from this point, and there is no evidence, as I understand it, which shows that he had any knowledge, when he was set at work at this point, of the defect in the machinery or rope, or ever had the opportunity to discover such defects. Whether the danger was obvious to him does not appear from the evidence on the part of the plaintiff in this case. The danger did not arise from any direction of the foreman in the use of any tools or appliances with which the intestate was doing his work, but from the condition of the rope used in the general operation of the quarry.

It is not possible to cite the evidence in detail; there is some confusion in it and some contrariety about it, but the facts are generally as stated. Some exceptions were taken by the plaintiff in error upon the rulings of the trial judge in rejecting evidence, but they have not been considered, for the facts above stated appear from the evidence to which no objection was made or exception taken.

The declaration claims liability upon the averment that the defendant did not exercise reasonable care to furnish suitable and safe machinery and appliances in respect to said work, and that from the want of such reasonable care this rope was left and remained unguarded and unprotected and loosely swinging and vibrating in a manner dangerous to the safety of the intestate and rendering the place unsafe for the deceased, and thus the accident and his death occurred; and that whilst the intestate was without any negligence on his part, yet the defendant did not take or use due or reasonable precautions to

have or keep the place in which he was set at work reasonably safe or free from unnecessary danger or risk to him.

It can hardly be controverted that upon the facts and circumstances of this case, placing upon them the most favorable interpretation in behalf of the defendant, that a debatable question arose whether the accident did not happen because of the want of protectors and hangers which the exercise of reasonable care would have supplied and maintained. The rule of law in this State, which cannot now be disturbed, is that the master's duty to his servant requires of the former the exercise of reasonable care and skill in furnishing safe machinery for carrying on the business for which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections and tests at proper intervals and, besides, the master is responsible for the negligence of any agent whom he may select to perform this duty for him, if the agent fails to exercise reasonable care and skill in its performance. *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten*, 28 Vroom, 400, 402, 16 Am. Neg. Cas. 673, *ante*.

Applying this principle to the evidence, the court could not determine that the evidence was clear that the master's duty in this respect had been performed and that no other reasonable and legitimate conclusion could be reached. Whilst the burden, in the proof, of negligence in this respect is upon the plaintiff, yet if the question, as presented by the evidence, is one about which a difference of opinion might reasonably be entertained, the question must be submitted to the jury.

Whether the defendant was guilty of negligence in not exercising reasonable care in supplying reasonably safe machinery and appliances, and in keeping them in a safe condition, was a question for the jury, depending upon the facts of the case. *Van Steenburg v. Thornton*, 29 Vroom, 160, 16 Am. Neg. Cas. 681, *ante*; *Essex County Electric Co. v. Kelly*, 28 Vroom, 100, 16 Am. Neg. Cas. 700, *ante*.

This was the character of care required of the defendant company, and it could not absolve itself from responsibility by entrusting that care to an agent or a fellow-servant of the defendant, who failed in its exercise. *Ib.* In looking at the proof in this case on the part of the plaintiff, there appears, to my mind, affirmative proof of the negligence of the defendant in this respect. The circumstances are such, as produced on the part of the plaintiff, to fairly lead to this conclusion.

The further ground of nonsuit contended for is that the intestate took upon himself all the risks of dangers incident to the employment which were obvious, or could have been perceived by him in the exercise of his senses and the use of ordinary care and circumspection, and that these were the only risks to which he was subjected.

The degree of care required by law of the defendant, as applied to the facts of the case, in this respect leaves the intestate only responsible for the risks obvious to him, or which he could have discovered by the exercise of ordinary care. In view of the principle that the intestate had the right to assume that his employer had exercised reasonable care in furnishing proper appliances and in keeping them safe, the facts are such that whether the dangers were obvious to him or whether he could have perceived the dangers by ordinary observation, became questions for the jury and not for the court to solve. The facts, as presented in the evidence, were the subjects of two classes of conclusions or inferences, both perhaps, to an extent, reasonable, and it was within the province of the jury to determine which to adopt.

Again; it is contended that the accident occurred through the negligence of the engineer in the careless manipulation of the brake. The evidence does not show in this case what the action of the engineer was which can be characterized as negligent. There is some evidence directed to the proof that the accident might have been prevented if the engineer had properly applied the brake and caused a friction, which would have prevented the rope from running off the drum so rapidly and thus obviated the sagging. But what the conduct of the engineer on this occasion was does not appear in the evidence for the plaintiff. Whether the engineer failed to slack up on this rope, so that the carriage in which the stone was hoisted could have been drawn back without the sagging of the rope, does not appear. An argument is made that the accident must have happened in this way. But there are clear indications in the evidence that this rope, of the length of two hundred and fifty feet, would be liable to swing from side to side or sag unless it had protectors or hangers attached thereto. Now, conceding that the engineer was a fellow-servant of the deceased, the question arises upon the evidence whether the accident was due to his negligence or whether it was due to the defects in

the rope itself and the machinery which the engineer was operating. There is, as has been said, evidence tending to show that however careful the engineer might have been in operating his engine and the drum, yet it might not have prevented the sagging of the rope. These are questions which manifestly should have been submitted to the jury. The negligence of a co-servant which would excuse the liability of the master, should clearly appear in the evidence produced on the part of the plaintiff, in order to sustain a motion to nonsuit. The most which could be said in favor of the defendant in error in this matter would be that there existed a substantial dispute whether the accident was caused by the negligence of the engineer in charge of the machinery, and the state of the case required, upon this question, that it should have been submitted to the jury.

Upon this subject it is only necessary to state that, by all the authorities in this State, it is held that when the evidence on any given subject in this class of cases is open to fair debate, and leaves the mind in a state of some doubt upon the question, the trial judge is not justified in taking the question from the jury.

Wherever two inferences can be drawn from the evidence upon questions of negligence, a case is presented which calls for the opinion of a jury. *Bahr v. Lombard, Ayres & Co.*, 24 Vroom, 233, 16 Am. Neg. Cas. 689, *ante*; *Del., L. & W. R. R. Co. v. Shelton*, 26 Vroom, 342, 12 Am. Neg. Cas. 274*n*.

The judgment of nonsuit must be reversed and a *venire de novo* awarded.

FOR AFFIRMANCE: NONE. FOR REVERSAL: THE CHANCELLOR, CHIEF JUSTICE, DEPUE, DIXON, GARRISON, GUMMERE, LIPPINCOTT, LUDLOW, MAGIE, VAN SYCKLE, BARKALOW, BOGERT, DAYTON, HENDRICKSON, NIXON, JJ. (15).

Employees injured — New Mexico cases.

Freight conductor killed — Collision — Fellow-servant.

LUTZ v. ATLANTIC & PACIFIC R. R. Co., 6 New Mexico, 496 (August, 1892), was an action for the alleged negligent killing of a freight conductor, caused by train running against the rear of the deceased's train breaking the box car and striking the deceased. Negligence alleged was failure to furnish proper car for use of the deceased. There was a judgment for defendant in the Second Judicial District Court, Bernalillo county, which, on appeal,

was affirmed. It was held that the negligence of fellow-servants operating the train which ran into deceased's train was the proximate cause of the injury. Opinion by SEEDS, J. The court discussed the New Mexico statute relating to actions for damages for deaths of persons caused by negligence of railroad companies (sections 2308-2310) and held that the same did not change the common-law rule exempting a master from liability to servant for negligence of fellow-servant.

Sectionhand injured — Collision — Work train and hand car — Fellow-servant.

ATCHISON, TOPEKA & SANTA FE R. R. Co. v. MARTIN, and MARTIN v. ATCHISON, TOPEKA & SANTA FE R. R. Co., 7 New Mexico, 158 (August, 1893), sectionhand riding on hand car injured by work train running into hand car, throwing it from track; judgment for plaintiff for \$8,000 in the Second Judicial District, Bernalillo county, was reversed, the fellow-servant rule being applied. The plaintiff, the foreman of the sectionmen, the conductor and the engineer of the work train were fellow-servants.

Foreman of mine injured — Defective machinery — Knowledge of defect — Assumption of risk.

In ALEXANDER v. TENNESSEE & LOS CARRILLOS GOLD & SILVER MINING Co., 3 New Mexico, 255 (May Term, 1884), foreman in defendant's mine injured by hoisting machinery which he knew to be defective, judgment for defendant in the First Judicial Court, Santa Fe county, was affirmed, plaintiff having assumed the risk, having waived all claim for damages in such case where, knowing of the defect, he failed to require defendant to remedy the defect when he entered into employment. Opinion by BELL, J.

Property damaged — Powder explosion — Consignor and consignee — Respondeat superior not applicable.

ABRAHAM v. THE CALIFORNIA POWDER WORKS, 5 New Mexico, 479 (February, 1890), was an action of trespass on the case against the California Powder Works and also the Safety Nitro-Powder Company, to recover damages for injuries to a brick hotel building, from an explosion of powder alleged to be stored in a powder house by the defendants. Verdict of \$300 was obtained against the California Powder Works in the Third Judicial District Court, Grant county, but by direction of the trial court a verdict of not guilty was rendered for the Safety Nitro-Powder Company. Defendant appealed. Judgment reversed. Opinion by LEE, J. The nature of the case may be seen by the ruling as stated in the syllabus to the official report: "Where gunpowder is consigned to be sold on commission, the relation between consignor and consignee is not that of master and servant, but simply of consignor and factor or consignee for the purpose of selling the goods; and where such factor or consignee has the exclusive management and control of the storage of the goods as such, of which the consignor has no knowledge, and with which he has nothing to do, the doctrine of *respondeat superior* does not apply; and the consignor is not liable, in an action on the case, for damages resulting from an explosion of the gunpowder so consigned and stored."

KEEGAN v. WESTERN R. R. CO.

Court of Appeals, New York, March Term, 1853.

[Reported in 8 N. Y. 175.]

FIREMAN INJURED BY EXPLOSION OF LOCOMOTIVE BOILER — NOTICE OF DEFECT — LIABILITY OF MASTER — FELLOW-SERVANT RULE — REVIEW — PRACTICE. — A railroad company which continues in use a defective and dangerous locomotive engine, after notice of its dangerous condition, is liable to one of its servants engaged in running such engine for an injury sustained by him (without negligence on his part), in consequence of such defects.

Negligence on the part of the servant will not be presumed, where the fact of such negligence is not found by the jury or referee before whom the cause was tried.

The cases which hold that a principal is not liable to one agent or servant for an injury sustained by him in consequence of the negligence of another agent or servant of the same principal, while engaged in the same general business, are only applicable when the injury complained of happened without any actual fault or misconduct of the principal, either in the act which caused the injury, or in the selection and employment of the agent by whose fault it happened.

When a case comes before this court on appeal from a judgment rendered on the report of a referee, where there are no exceptions, and no distinct question of law appears to have been presented to and passed upon by the referee, the only question for review is, whether the facts found by him are sufficient to sustain the judgment.

[So held in an action for damages for injuries sustained by a fireman who was scalded by the bursting of a boiler of a locomotive engine.]

ACTION on the case commenced in the Supreme Court to recover damages for an injury sustained by the plaintiff by the bursting of a boiler of a locomotive engine upon which he was engaged as a fireman on the defendants' road (1).

It was alleged in the first count of the declaration that the defendants, before and at the time of the committing of the

1. See also the following cases arising out of locomotive explosions:

In *KIRKPATRICK v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 79 N. Y. 240 (1879), plaintiff's intestate, a fireman, killed by explosion of defendant's locomotive, judgment for plaintiff for \$1,000 was *affirmed*.

In *MURPHY v. BOSTON & ALBANY*

R. R. Co., 88 N. Y. 146 (1882), mechanic in defendant's repair shop, engaged in setting safety valve on one of defendant's locomotives, under direction of master mechanic, killed by explosion of the locomotive, caused by failure of a co-employee to detect the defect, judgment of nonsuit was *affirmed*, the fellow-servant rule being

grievances thereafter mentioned, were the owners of a certain railroad, and of a carriage commonly called a locomotive, moved and propelled by steam and by them used and employed in carrying and conveying passengers and goods upon and over their said road, from Greenbush, in the county of Rensselaer, to Boston, in the State of Massachusetts, and intermediate places; that the plaintiff, on December 1, 1845, at Greenbush aforesaid, at the time of the committing of the said grievances, was in the employment of the defendants, as fireman upon said locomotive so moved and propelled by steam as aforesaid; and it then and there became and was the duty of the defendants to provide a good, safe, and secure locomotive, with good, safe, and secure machinery and apparatus to move and propel the same by means of steam as aforesaid. Yet the defendants, not regarding their duty, conducted themselves so carelessly, negligently and unskillfully in this behalf that by and through the carelessness, negligence, unskillfulness and default of the defendants and their servants, in providing, using and suffering to be used an unsafe, defective and insecure locomotive and for want of due care and attention to their duty in that behalf, on the day and at the place aforesaid, and whilst the said locomotive was in the use and service of the defendants upon their said road, and whilst the plaintiff was on the same, in the capacity aforesaid, for the defendants, the boiler connected with the engine of the said locomotive, by reason of unsafeness, defectiveness, and insecurity thereof, exploded, whereby large quantities of steam and water escaped therefrom and fell upon the plaintiff, by which he was greatly injured, etc.

There were three other counts, not varying materially from the first, except in the statements of the damages. The defendants pleaded the general issue.

The case was tried in 1848 before Cornelius L. Tracy, referee, who reported the testimony at length, together with the following statement of the facts found by him:

applied. *Affirming* 24 Hun, 142, which *affirmed* 8 Abb. N. C. 41, 59 How. Pr. 197.

In *DAVIS v. N. Y., LAKE ERIE & WESTERN R. R. Co.*, 110 N. Y. 646 (1888), motion to amend complaint, which was granted at General Term, Supreme Court, was dismissed. Plain-

tiff was an engineer in defendant's employ and was injured by an explosion of gas in firebox of locomotive; defective engine alleged; motion to amend by inserting allegation that coal furnished was unfit for use in locomotive.

“ 1. That in the month of December, 1845, and for about five months previous pretty much all the time, the plaintiff was in the employment of the defendants as fireman on one of the locomotives used by them; and that during that month the boiler of said locomotive exploded, causing the injuries to the plaintiff complained of.

“ 2. That the boiler of this locomotive was defective and dangerous; and that its condition in this respect was known to the defendants and to the persons in defendants' service, whose duty it was to select the engines which were to be used on the defendants' road, for some weeks before the explosion; and that the defendants had been frequently notified thereof.

“ 3. That during the two months preceding the explosion, the engineer of this locomotive reported to the defendants, on five or six different occasions, the defective condition of the boiler thereof; and that these reports were entered on the books of the defendants kept for that purpose.

“ 4. That the injury to the plaintiff resulted from the improper conduct of the defendants, which was known to be thus defective.”

The damages were assessed by the referee at \$3,500. Upon this report the Supreme Court in the Third district rendered judgment in favor of the plaintiff for the damages assessed, and costs, and the defendants prosecuted this appeal.

Judgment affirmed. Affirming 6 Barb. 231.

M. T. REYNOLDS, for appellants (Railroad Company).

N. HILL, JR., for respondent.

Ruggles, Ch. J. — This case comes before the court on the report of a referee in the nature of a special verdict, and the question is whether, upon the facts found, the defendants are liable.

The plaintiff was injured by the explosion of the boiler of a locomotive engine on which he was employed by the defendants as a fireman. The boiler was defective and dangerous, and its condition in this respect was, and had for some time been known to the defendants by the reports of the engineer made on five or six different occasions, which were entered on the books of the defendants kept for that purpose, and the injury to the plaintiff resulted from the improper conduct of the defendants in using the engine in question thus known to be defective.

On this statement of facts no doubt can be entertained of the liability of the defendants.

The cases referred to, in which it has been held that a principal is not liable to one agent or servant for an injury sustained by him in consequence of the misfeasance or negligence of another agent or servant of the same principal, while engaged in the same general business, are applicable only where the injury complained of happened without any actual fault or misconduct of the principal, either in the act which caused the injury, or in the selection and employment of the agent by whose fault it did happen. Whenever the injury results from the actual negligence or misfeasance of the principal, he is liable as well in the case of one of his servants as in any other. But where the injury results from the actual fault of a competent and careful agent (as may sometimes happen), the fault will not be imputed to the principal when the injury falls upon another servant, as it will where the injury falls on a third person, as for instance on a passenger on a railroad. In the case of a passenger the actual fault of the agent is imputed to the principal on grounds of public policy; in the case of a servant it is not. The reasons for this distinction may be found in the cases cited by the appellants' counsel. But it is unnecessary to state them here, because the injury in the present case is found to have resulted directly from the negligence or misconduct of the defendants themselves, in continuing to use an engine having a defective and dangerous boiler, after notice of its dangerous condition.

It was made a point on the argument that the plaintiff knew the condition of the boiler, and therefore, took the risk upon himself. But this point is not sustained in point of fact. The referee does not find that the plaintiff knew it to be in a dangerous condition, and this fact, if material, cannot be presumed by the court.

Judgment affirmed.

WARNER, ADM'X V. ERIE RAILWAY COMPANY.

Court of Appeals, New York, 1868.

[Reported in 39 N. Y. 468.]

FALL OF RAILROAD BRIDGE — EMPLOYEE ON TRAIN KILLED — DECAY IN TIMBERS — LATENT DEFECT — RAILROAD COMPANY NOT LIABLE. — In an action to recover damages for the death of plaintiff's intestate, a baggageman in defendant's employ, who while performing his duties on a train was killed by the bridge over which the train was passing collapsing, the fall being occasioned from decay in its timbers, it appeared that the bridge was properly constructed and was originally of sufficient strength for the purposes for which it was intended. The trial court held that there was only one question to be submitted to the jury, namely, whether the board of directors themselves, as representing the defendant, and as distinguished from the employees, were negligent in not discovering the unsafe condition of the bridge, and refused an instruction requested by defendant that, in order to recover, plaintiff must show that the decay in the bridge, if that was the cause of the accident, was known, by notice or otherwise, to the president and directors of the railroad. *Held*, that on the facts presented, defendant was not guilty of negligence, and judgment for plaintiff was *reversed* (1).

1. Among other Railroad Bridge Accidents see the following cases:

VOSBURGH v. LAKE SHORE & MICHIGAN SOUTHERN R'Y Co., 94 N. Y. 374 (1884); brakeman in defendant's employ injured by fall of railroad bridge; defendant liable; judgment on verdict for plaintiff for \$5,000 *affirmed*. It was held that "Whether the bridge was in truth defective in particulars, not latent or undiscoverable, but open and obvious to the eye of a skilled and faithful inspector, and whether the inspector did make such an examination as reasonable care required and the company should have exacted in the exercise of such care under the existing circumstances, and in view of such obvious and apparent defects, were questions of fact in the case, and properly submitted to the jury." Opinion by FINCH, J. *Affirming* 14 Weekly Dig. 514.

WALLACE v. CENTRAL VERMONT R.

Co., 138 N. Y. 302 (1893); brakeman on top of freight train struck by low bridge, a telltale being out of order; judgment of nonsuit *reversed*, as the fact of the telltale being out of order was to be taken into consideration on the question of contributory negligence.

WILLIAMS v. DELAWARE, LACKAWANNA & WESTERN R. R. Co., 116 N. Y. 628 (1889); brakeman on top of freight car struck by bridge over track; failure of plaintiff to exercise ordinary care; knowledge of danger; assumption of risk; nonsuit should have been granted; judgment for plaintiff for \$4,900 *reversed*. *Reversing* 39 Hun, 430. Opinion by HAIGHT, J. In regard to plaintiff's knowledge of the danger the court said that it was quite evident "that he had on numerous occasions passed under this bridge whilst on top of the train, and if so, he must have known, had he

DUTY OF MASTER — CONSTRUCTION OF BRIDGE — SELECTION OF AGENTS — INSPECTION — NOTICE OF DEFECT. — In such action the principle applied was that where the master (the railroad company) has erected a structure to be used in its ordinary and accustomed business, without fault as to plan, mode of construction and character of materials, so that it was originally sufficient for all the purposes for which it is used, employs skilful and trustworthy agents to supervise, examine and test it, and that duty is performed with frequency, and with such tests as custom and experience have sanctioned and prescribed; he has exercised such care and skill as the law exacts of an employer in reference to his employee, and that no liability can attach to a party for a defect in such structure by which an employee has sustained an injury, unless there has been actual notice or knowledge that defects existed which, unless properly remedied, would be liable to produce serious or fatal consequences.

APPEAL from judgment of Supreme Court affirming a judgment on verdict for plaintiff for \$5,000. See 49 Barb. 558. The case is stated in the opinion. *Judgment reversed.*

Bacon, J. — In approaching the consideration of this case, which, in the precise aspect it assumes, may be deemed in the

exercised ordinary care and observation, that it was not of sufficient height to permit a person to pass under it whilst standing upon the top of a box car of the company. In this regard we are unable to distinguish the case from that of *Gibson v. Erie R'y Co.*, 63 N. Y. 449. In that case the plaintiff was struck by the projecting roof of the depot building. He was familiar with the locality and knew of the roof. He had, however, never measured its exact height from the platform or its distance from the top of the cars. His information upon the subject was derived from general observation. In this case the bridge crossing over the railroad was an open, visible, permanent structure, which the plaintiff daily observed whilst passing under it in the employ of the defendant. True, he had never measured its height from the rails, but having passed through under the bridge whilst on top of the cars he must have known that it was not of sufficient height to permit him to

stand while so passing. The rule is, that a servant who enters upon employment from its nature hazardous, assumes the usual risks and perils of the service, and of the open, visible structures known to him, or of which he must have known had he exercised ordinary care and observation." * * *

The facts in the case of *GIBSON, ADM'X, v. ERIE R'y Co.*, 63 N. Y. 449 (1875), referred to in the Williams case (preceding paragraph) were as follows: The plaintiff brought action for alleged negligent killing of her intestate. "The deceased, at the time of the accident, was a freight conductor in defendant's employ, and was in charge of a freight train going east from Buffalo. Arriving at Attica, the train stopped at the west end of the station, and Parker [the intestate] left the train and went into the depot. The train started up. Parker came out, caught hold of a passing car, and began to climb up to the top by the ladder at the side. He was struck by

courts of this State, a pioneer case, it is important to distinguish the principles which are to decide it from those which have been held in cognate cases, and especially to ascertain the precise ground on which the charge and rulings of the judge upon the trial proceeded, and by which we are to assume the jury were guided in rendering their verdict.

In the first place, then, it is to be remarked, that the defendant in this action is not responsible, and is not to be made liable for injuries suffered by one of its employees, solely through the carelessness or negligence of another employee of the defendant, engaged in the same general business. The liability to injury from such a source is one which each employee takes upon himself when engaging with others in the service of a common master. It is a hazard incident to the nature of the engagement into which he enters, and in respect to which he becomes, so to speak, his own insurer.

In the second place, the cases which establish this general rule, maintain also the further qualification or extension of it,

the projecting roof of the depot and killed. The track was ten feet ten inches from the side of the building. The roof projected beyond the building eight feet two inches, and was twelve feet four inches above the track. The car was nine feet six inches high. The roof had been in the condition it then was for twenty years. The deceased had been upon the road as brakeman and conductor for seven years, passing over the road once or twice a day, and had lived at Attica eighteen or twenty years. It was proved that the usual place for the conductor to ride between stations was in the caboose. There was no evidence that it was any part of his duty as conductor to get on top of the cars, or that his doing so at the time of the accident had any necessary connection with his duties. At the close of plaintiff's evidence, and at the close of all the evidence, defendant's counsel moved for a nonsuit upon the ground that no actionable negligence on the part of the defend-

ant had been shown, and that the evidence showed negligence on the part of the deceased. The motion was denied, and defendant's counsel duly excepted." The Court of Appeals *reversed* the judgment for \$1,400 for plaintiff on the ground of contributory negligence of the deceased. Opinion by ALLEN, J. *Reversing* 5 Hun, 3.

HUNTER v. NEW YORK, ONTARIO & WESTERN R. R. Co., 116 N. Y. 615 (1889); brakeman on top of car struck by arch of tunnel as train was entering same; no evidence as to plaintiff's height; facts held insufficient to establish case and error to deny defendant's motion to dismiss; judgment on verdict of \$6,000 for plaintiff was *reversed*. Opinion by BROWN, J. "Court may take judicial notice of the size and height of the human body." Rule applied in this case to show that it would be impossible for plaintiff, on the testimony, to strike his head against the arch.

that the liability is not enlarged by the fact that an injured employee is of an inferior grade of employment to that of the party by whose carelessness the injury is inflicted and the damage caused, provided the services of each in his particular sphere and department are directed to the accomplishment of the same general end. These principles have been often under discussion, and are settled by an array of authorities, which it is hardly necessary to cite in detail. The following, among many others, may be deemed sufficient for the purpose: *Priestley v. Fowler*, 3 M. & W. 1; *Coon v. Utica & Syr. R. Co.*, 5 N. Y. 492; *Albro v. Agawam Canal Co.*, 6 Cush. 75, 15 Am. Neg. Cas. 655ⁿ (2).

The only ground, then, which the law recognizes, of liability on the part of the defendant, is that which arises from personal negligence, or such want of care and prudence in the manage-

2. In *PRIESTLEY v. FOWLER*, 3 Mees. & W. 1 (Exch., 1837), a declaration in case stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding, and being carried and conveyed by the said van, with the said goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of the neglect of which duties, the van gave way and broke down, and the plaintiff was thrown to the ground, and his thigh fractured. *Held*, on mo-

tion in arrest of judgment after verdict for the plaintiff, first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van; but, secondly, that, even in that case, the action was not maintainable.

In *PRIESTLEY v. FOWLER*, *supra*, LORD ABINGER, C. B., in delivering the opinion, said: "It is admitted that there is no precedent for the present action by a servant against a master;" and then proceeded to discuss the extent to which the principle of liability of a master to his servant would go, where it applied to the present case. "The mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself."

In *COON v. SYRACUSE & UTICA R. Co.*, 5 N. Y. 492 (1851), where employee on hand car was injured by work train running into hand car, caused by negligence of fellow-servant, the railroad company was not liable; and nonsuit was *affirmed*. *Affirming* 6 Barb. 231.

ment of its affairs, or the selection of its agents or appliances, the omission of which occasioned the injury, and which, if they had been exercised, would have averted it. We are not now dealing, it must be remembered, with the liability which a railroad corporation assumes in respect to the safety and security of passengers transported on their road for a compensation, and in regard to whom they become absolute insurers against all defects which the highest degree of vigilance would detect or provide against. The liability here, if there is any, is measured by that lower standard which all the authorities recognize in the case of an employee, and which is answered if the care bestowed accords with that reasonable skill and prudence which men exercise in the transaction of their accustomed business and employments.

The ground of liability affirmed in this case, and on account of which a recovery was had, was the alleged weakness, decay, and defectiveness of a bridge of the defendant, by the falling of which the death of the intestate was occasioned. The allegations of the complaint are that the defendant did not use ordinary or reasonable care and diligence in providing a safe and suitable bridge over the Conhocton river, at the place in question; that before the breaking down of the bridge, the defendant had noticed that it was unsafe and insecure for the passage of trains thereon, and that defendant carelessly and negligently failed to cause a suitable examination to be made of said bridge for the purpose of ascertaining whether it was unsafe and insecure. It is further alleged that if any examination was made, it was made by servants and agents who were careless and incompetent, to the knowledge of the defendant, and in the selection and employment of whom the defendant had not used ordinary care and diligence. With these allegations in view as constituting in the mind of the pleader the *gravamen* of the action, let us see what the case really disclosed, and in what respect it was presented to the jury.

At the close of the plaintiff's testimony there was a motion to nonsuit, founded on the alleged absence of any proof to show negligence, or of any knowledge or notice to the defendant of the unsafe character of the bridge, and this motion was renewed at the close of the testimony. The judge, in reference to this demand, held, that there was not any evidence for the jury to consider relative to the original sufficiency of the bridge,

nor any testimony impeaching the competency of the defendant's employees. He further stated that there was only one question for the jury, and that was whether the board of directors themselves, as representing the defendant, and as distinguished from the employees, were guilty of negligence in not discovering the fact that the bridge was in an unsafe condition; that if the jury should be satisfied that the bridge was unsafe from decay, and that occasioned its fall, and the directors were guilty of negligence in not discovering the fact, the plaintiff would be entitled to recover, and that this question alone must go to the jury. To all which the defendant's counsel excepted.

At the close of the charge there was a request to instruct the jury in relation to the actual knowledge of the defendant's employees, and their omission to remedy such known defect assented to by the court, which, if the defendant's counsel had been content to stand upon, would have actually precluded a recovery in this case; but I agree with the opinion of the Supreme Court that this request and instruction was virtually waived by the counsel, and revoked by the court in the subsequent ruling, and that it may, therefore, on this appeal be laid out of the case.

The final instruction of the court, in answer to a request to charge that it was necessary to show that the decay in the bridge, if it fell from decay, was known by some notice, or otherwise, to the president and directors, was that if the board of directors, by the exercise of that care and skill that is to be expected of persons occupying the same position, could, by the exercise of reasonable diligence and skill, have ascertained or known the defects in the bridge, the failure on their part to ascertain would make the defendant liable, because it is negligence, and substantially the same as if notice had been given to the board. To this proposition the defendant's counsel excepted.

There is a little vagueness, and perhaps, inaccuracy, in the expression used as to the care and skill which was "to be expected in persons occupying the same position," which might possibly have tended to mislead or confuse the jury had not the judge in the earlier part of the charge explained that the care and diligence which the directors were required to bestow, was that reasonable care, skill and foresight over the affairs of the corporation, which reasonable and prudent men

occupying such positions ordinarily exercise under the same circumstances. With this qualification, then, I think the charge is not liable to any serious misconstruction, and presents with sufficient distinctness the proposition the judge was requested to charge, and the one he actually presented to the jury.

Let us see, now, what the case disclosed upon the concession of all parties, and upon clear and uncontroverted evidence. We start with the admission that there was no question as to the original sufficiency of the bridge, and no impeachment, whatever, of the competency of the defendant's employees. Two leading and important averments of the complaint are thus disposed of *in limine*. It is then proved by evidence not sought to be contradicted, that, by these competent agents, a frequent inspection and examination of the bridge was made, the usual and accustomed tests, long employed, and deemed ample and sufficient, were applied to the structure in its various parts, and no imperfection or decay was detected, and none was visible upon an outward and external inspection; and, on the day before it fell, a special observation was made of the bridge while a heavy train was passing over it, and no imperfection or weakness was discovered. If it be said that the test of boring the timbers was not applied, the answer may very well be that this is no more a certain test than the one which was applied; that it had but rarely been used upon the bridges on the defendant's road, or, so far as the testimony shows, upon any other; and, carried too far, becomes, itself, a source of weakness, and that while after a catastrophe has occurred it is sometimes easy and quite common to say that if something else unusual and unthought of had been done it might possibly have been averted; ordinary care and diligence, which is the acknowledged measure of the defendant's obligation, does not require the application of these unusual tests, nor the employment of the utmost possible safeguards.

There was one more element invoked to attach liability to the defendant consequent upon the fall of this bridge, and that was the length of time it had stood. It was constructed in the fall of 1855, and had remained until the time of the accident, a period of about nine and a half years. The evidence showed that bridges of similar construction and materials upon the defendant's road had stood over ten years, and were considered, and to all appearances were, sound and safe; some had stood

over fourteen years, and one over seventeen years, in the same condition. Although some of the witnesses for the plaintiff testified that they would not consider such a bridge as safe beyond the period of seven or eight years, yet, if upon adequate and repeated inspection, and the application of appropriate tests, no defect was exhibited, a mere opinion as to the length of time such a bridge might be expected to stand, would have no appreciable weight in the scale of evidence. There is really, then, no conflict of evidence as to the care and skill used in the construction and maintenance of this bridge, the inspection to which it was subjected, the adequate skill and competency of the employees engaged in that specified duty, the experience of defendant, both in the construction and duration of such structures, and the absolute want of any actual notice to defendant or any of its employees of any defect real or suspected in this bridge. And this being so, upon undisputed evidence, the conclusion, in my judgment, is inevitable, that the defendant was not guilty of the want of such care in respect to their employees as it was their duty (representing as it is conceded, the board of directors do, the corporation itself), to bestow upon its officers. If this conclusion is sound, then it seems very clear to me that it was the duty of the court to take the case from the jury, and hold that on the established facts the plaintiff could not recover, but that at all events the defendant was entitled to the instruction the counsel asked, to wit, that in order to charge the defendant, it was necessary for the plaintiff to show that the decay in the bridge, if it fell from decay, was known by some notice or otherwise to the president and directors of the road.

The true principle applicable here is, I think, that, where the defendant has erected a structure to be used in its ordinary and accustomed business, without fault as to plan, mode of construction and character of materials, so that it was originally sufficient for all the purposes for which it is used, employs skillful and trustworthy agents to supervise, examine and test it, and that duty is performed with frequency, and with such tests as custom and experience have sanctioned and prescribed, it has exercised such care and skill as the law exacts of an employer in reference to his employee, and that no liability can attach to a party for a defect in such structure by which an employee has sustained an injury, unless there has been actual

notice or knowledge that defects existed which, unless promptly remedied, would be liable to produce serious or fatal consequences.

A broader liability than this cannot be imposed without, in my opinion, breaking down and obliterating the distinction which exists between the responsibility incurred to a passenger and an employee, and the rule laid down by the court in this case would practically make the railroad company an insurer of the latter as well as of the former, and in the words of a learned judge, in a parallel case, "a latent defect in a steam boiler, a rotten plank in a ship, a flaw in an iron rail, an unknown weakness in a floor, would charge the master with all the damages to his employees in consequence thereof."

A different and more stringent rule than I have thus suggested would impose an intolerable burden upon a board of directors and, carried to its legitimate results, would require them to give their individual and personal attention not only to the construction, but to the actual existing condition of their road, with all its structures, appliances and machinery. They must supervise and constantly examine every locomotive, passenger and freight car, rail, tie, wheel, axle, and brake, and be responsible for the consequences that may arise to an employee from a latent defect, not cognizable by the senses of an experienced and skillful mechanic, nor capable of detection by the faithful application of well-known, long used, and approved tests.

The doctrine upheld by the court in this case, maintains in effect that a railroad corporation must have a board of directors, not only possessing adequate skill to determine whether its competent employees perform their duty, as between the corporation and its other employees, but if there be an omission of duty on the part of such skilful employees which the directors have themselves failed to discover, the corporation is guilty of negligence, and responsible to an injured employee for all the consequences resulting therefrom. Such a rule, I am persuaded, would not only carry their corporate liability beyond reason, but beyond the fair scope of any authority which has been invoked to maintain it.

I do not think it would be profitable to go over, in detail, the long array of authorities which have been cited by the counsel on both sides in this case, to sustain and justify their respective

positions. They have been mostly collected, and the purport of them very fully and fairly stated in the opinion prepared by Mr. Justice Miller, upon the former argument of this case. I have carefully examined them, but shall not venture to collate or comment upon them further than to remark, that, while, on the one hand, some of them contain statements and discussion of principles that may be invoked in favor of the claim to recover, put forth by the plaintiff's counsel, and sustained upon the trial of this cause, none of them go the full length required to uphold the ruling of the judge; while, on the other hand, several cases go far, as I understand them, in maintaining the doctrine I seek to apply to this case, and in one instance the decision is fully and directly in point.

Thus, in *Tarrant v. Webb*, 89 Eng. C. L. 795 (1), it is held that a master is not responsible for an injury to a servant from the negligence of a fellow-servant, provided the master uses reasonable care in the selection of the servant. Jervis, Ch. J., in this case, makes the significant remark that the master may be responsible where he is personally guilty of negligence, but certainly not where he does his best to get competent persons.

In the leading case of *Priestley v. Fowler*, 3 M. & W. 1 (2), it was held that the servant could not recover of the master for injuries resulting from the breaking down of a van, arising from defective construction, where there was no proof of knowledge on the part of the master of the defect, Lord Abinger remarking that "the mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself."

In our own State, the point has never been fairly presented. In *Keegan v. Western R. Co.*, 4 Seld. 175 (3), the defendant had express and repeated notice through the reports of its own

1. In *TARRANT v. WEBB*, 18 C. B. 797, it was held that a master is not generally responsible for an injury to a servant from the negligence of a fellow-servant, but the rule is subject to this qualification, that the master uses reasonable care in the selection of the servant. It was also held that the master is not bound to warrant the competency of his servants; and in an action against him for an in-

jury done by one of his servants to another, the question for the jury is, not whether the servant is incompetent, but whether the master did not exercise due care in employing him.

2. See note of *Priestley v. Fowler*, 3 M. & W. 1, on page 737, *ante*.

3. The *Keegan* case, 4 Seld. (8 N. Y.) 175, is reported on page 730, *ante*.

servants of the defectiveness of the engine, through the explosion of which the injury to the plaintiff was occasioned. In *Ryan v. Fowler*, 24 N. Y. 410 (1), the master had the same notice of the defectiveness of the structure, through the falling of which the plaintiff suffered injury, for which she recovered. In *Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 562 (2), a recovery by an employee against the company for an injury occasioned by the conduct of another employee was set aside on the ground that the action could not be maintained unless the injury resulted from unskilfulness for which the company was responsible. In discussing the principle applicable to cases of this character, Allen, J., says: "If the injury arises from a defect or insufficiency in the machinery or implements furnished by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the cause through his own personal negligence or want of care, in other words, it must be shown that he either knew or ought to have known the defects which caused the injury. Personal negligence is the gist of the action."

We have been cited to a number of cases in the courts of our sister States, none of which are very apposite to this precise case, excepting *Snow v. Housatonic R. Co.*, 8 Allen, 441, 15 Am. Neg. Cas. 417, which the plaintiff's counsel invokes as a clear authority in his favor, but which is susceptible of the criticism that the defect in the track, through which the injury was suffered was palpable to view, and was known to, and was grossly neglected by the track repairer, whose specific duty it was to remedy the defect; and the case of *Hard v. Vermont, etc., R. Co.*, 32 Vt. 473, which is precisely in point for the defendant, and holds this distinct proposition, that, although it is the duty of a railroad corporation to exercise all reasonable care in procuring sound machinery and faithful and competent

1. In *RYAN v. FOWLER*, 24 N. Y. 410 (1862), where girl, fourteen years old, in defendant's employ, was injured by fall of a privy in the factory, the defendant was held liable for defects which should have been known by him, his duty being to keep premises in safe condition for use by employees. Judgment for plaintiff affirmed.

2. In *WRIGHT v. N. Y. CENTRAL R. R. Co.*, 25 N. Y. 562 (1862), brakeman injured in collision, judgment for plaintiff was reversed. The *WRIGHT* case is reported as a note to the case next reported herein, and is very fully commented on in that case (the *Lanning* case).

employees, and although they are liable to their servants for the neglect of this duty, yet, after having performed it, they are not liable to a servant for injuries occasioned by the neglect of any of his co-servants engaged in the same general business, even though the negligent servant be superior in grade to the one injured.

It is said, and it may be conceded, that this case is in advance of any decision yet made, where the principle is involved, but, if so, it is, in my opinion, a sound and judicious advance. It does not exonerate the directors of a railroad corporation from liability for personal negligence, nor discharge them from the obligation to perform their duty, if notice or knowledge of defects or insufficiencies is brought home to them, and injury results to one of their servants from a failure to remedy the defect through which the injury occurs. It holds them to the highest measure of responsibility, for the proper construction of the road, its adjuncts and equipments, and the selection of competent and skilful subordinates to supervise, inspect and repair, and control and regulate its operation; but, having faithfully performed these duties, it relieves them from the extreme rigor of a rule which would practically make them insurers of the absolute safety of, and indemnities for, every injury which an employee in their service might suffer from the act or omission of his fellow-servant.

Since the argument of this case and the preparation of the foregoing opinion, my attention has been called to the case of *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, decided in the English House of Lords in May, 1865, and reported in the Law Reports, Appellate series, part 3, for July, 1868 (1). It was a Scotch appeal, in a case where a verdict had been recovered against the proprietors of a coal mine, for the death of a party occasioned, as was alleged, by the defective construction of a scaffold in the mine. Without recapitulating the facts, it may be sufficient to state that the case turned upon the liability of the master for an injury to his employee, where the master did not personally superintend the work, but devolved it upon a suitable mechanic, a foreman, superior in grade to the injured employee. Opinions were given by Lord Chancellor Cairns,

1. *WILSON v. MERRY*, L. R. 1 H. L. at bar. The facts of the case will be Sc. 326, is sufficiently stated as to found reported as a note to the Lan- its rulings, in the opinion in the case ing case, the case next reported herein.

and by the ex-chancellors, Lords Cranworth and Chelmsford, all substantially concurring in the conclusion that the duty of the master was to select proper and competent persons to do the work, and furnish them with adequate materials and resources for its accomplishment, and when he had done that he had performed his whole duty. In the course of his opinion, Lord Cairns says: "The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business, but to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work." He adds: "If the persons so selected are guilty of negligence, this is not the negligence of the master, and if an accident occurs to a workman to-day, in consequence of the negligence of another workman, skilful and competent, who was formerly but is no longer in the employment of the master, the master is not liable, although the two cannot, technically, be described as fellow-workmen. Negligence cannot exist, if the master does his best to supply competent persons. He cannot warrant the competency of his servants." The case is very instructive, as containing the latest utterance of the highest court in England, and the opinions of all the learned lords maintain, with great distinctness and force, the principle of liability which I have endeavored, as well as I was able, to illustrate and enforce in the foregoing opinion, and which should, I think, govern in the disposal of this case.

The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except HUNT, Ch. J., and MILLER, J.

Judgment reversed.

LANING v. NEW YORK CENTRAL RAILROAD COMPANY.

Court of Appeals, New York, May, 1872.

[Reported in 49 N. Y. 521.]

FALL OF SCAFFOLD—DEFECTIVE CONSTRUCTION—EMPLOYEE INJURED — INCOMPETENT EMPLOYEE — INTEMPERATE HABITS—NOTICE TO AGENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—MASTER LIABLE.—In an action to recover damages for injuries sustained by plaintiff, an employee of defendant, caused by the fall of a scaffold upon which plaintiff and other employees were standing, while performing their duties, the fall of the scaffold being occasioned by a defect in its construction, it appeared that defendant had employed a competent agent who employed a competent foreman for the work, but the latter had subsequently acquired intemperate habits and at or near the time of the accident was drunk, and while in this condition he directed two incompetent and unskilful men to erect the scaffold which by reason of such incompetency was defectively constructed. The habits of the foreman were known to plaintiff and the agent, and the latter had threatened to discharge the foreman unless he reformed. *Held*, that knowledge of the agent of the foreman's intemperate habits was knowledge of the defendant, and the latter was liable for the negligence of the former in retaining such intemperate and incompetent employee after having knowledge thereof. *Held, also*, that whether plaintiff was negligent in remaining in the employment, after knowledge of the incompetency of the foreman, was a question for the jury (1).

DUTY OF MASTER TO SERVANT—SAFE MACHINERY—COMPETENT SERVANTS—AGENT.—The duty of the master to the servant, or his implied contract with the servant, is to the effect that the servant shall be under no risks from the imperfect or inadequate machinery or other material means and appliances, or from unskilful or incompetent fellow-servants of any grade, and this duty or contract is to be affirmatively and positively fulfilled and performed. If some general agent, clothed with the power, and charged with the duty of the master, fails to properly perform that duty, the master is liable for such neglect of the agent. It is not enough to satisfy the duty of the master that he selects one, or more than one, general agent of approved skill and fitness. If the general agent carelessly places

1. **BRICKNER, ADM'X, v. NEW YORK CENTRAL R. R. Co.**, 49 N. Y. 672 (May, 1872), was an action similar to and was decided upon the authority of *Laning v. N. Y. Central R. Co.*, 49 N. Y. 521 (the case at bar), and judgment was *affirmed*. **FOLGER, J.**, read for affirmance; all concurred, except **ALLEN, J.**, dissenting, and **RAPALLO, J.**, not voting. **SAMUEL HAND** appeared for appellant (N. Y. Central R. Co.); **ISAAC LAWSON**, for respondent. See case reported below, 2 Lans. 506.

by the side of a servant another unskilled and incompetent, the master's duty to the servant has not been performed.

INCOMPETENCY OF SERVANT — NOTICE — LIABILITY OF MASTER. — A master is liable to his servant for an injury caused by the incompetency or want of skill of a fellow-servant, whether it existed when the fellow-servant was hired, or has come upon him since the hiring, the fellow-servant having been in the first instance hired, or afterward continued in service, with notice or knowledge, or the means of knowledge of this lack. The duty of the master to his servant is to use reasonable care to provide and employ none but competent and skilful servants, and to discharge from his service, on notice thereof, any who fail to continue as such.

DEFECTIVE MACHINERY — INCOMPETENT SERVANT — KNOWLEDGE OF SERVANT — CONTINUANCE IN SERVICE — PROMISE TO REMEDY DEFECT — CONTRIBUTORY NEGLIGENCE. — Where a servant knows as fully as the master of the defective condition of machinery or appliances, or is aware of the incompetency of a fellow-servant, and he continues in the service, without promise from the master to remedy the defect, this may constitute contributory negligence for the servant to continue in service, but if the master induces the servant to remain in his service, after notice of defect or incompetency, by a promise to remedy the defect, the question of contributory negligence is for the jury.

APPEAL by defendant from order of the General Term of the Supreme Court in the Third Judicial department, affirming an order of Special Term denying a motion for new trial and refusing to set aside verdict for \$10,000 in favor of plaintiff. The facts appear in the opinion. *Judgment affirmed.*

MATTHEW HALE and SAMUEL HAND, for appellant.

A. J. PARKER, for respondent.

Folger, J. — Viewing the case as the jury would have been warranted in doing, it comes in the main to this.

The plaintiff with others, he and they being fellow-servants of the defendant, were engaged in the course of their ordinary service, in the performance of a work for the defendant, to do which it was necessary that there should be put up a scaffold for them to stand upon.

One Westman, the foreman of these men, directed one Churchill and another to put up the scaffold. There is some dispute in the testimony as to who the other was, but the jury might properly have found that one Foreman was the person, who, by the direction of Westman, helped Churchill. Churchill had been in the employ of the defendant for some months, engaged in different kinds of subordinate service. It is not

shown for what particular service, if for any particular service, he was hired by Coleby, who was the agent of the defendant to hire these men. Nor was it shown that he was not skilful and competent to do that for which he was hired, and in fact to do all that was put upon him to do before the task of building this scaffold. Foreman is not shown to have been hired by the defendant. Coleby testified that he did not know him, and that his name was not upon the pay-rolls of the defendant. The plaintiff testified that the day of the accident was the first day on which he had seen him there. Churchill could not say that Foreman had worked there after the accident; but there was testimony that he was at work on that day, with Churchill, in putting up this scaffold. The jury could rightly find, or infer from what was testified, that Foreman was in fact at work on that day in the defendant's business, and that, by the direction of Westman, Foreman and Churchill put up this scaffold. See *Althorf v. Wolfe*, 22 N. Y. 355 (1). The scaffold fell with some of the men upon it, and the plaintiff was seriously injured by the fall, he being among those upon it by direction of Westman.

The scaffold fell from a defect in its construction; this defect was mainly from building it with timbers too small in size, and too poor in quality, being cross-grained and hence weak.

There was no lack of good and proper material, which could have been as readily got at. Indeed, there was an abundant supply of proper material; but the insufficient timbers which were used were taken from the mass by Churchill and Foreman, either from a lack of skill to select better, or from a lack of faculty to perceive the necessity of using stronger, or from a lack of strength to handle and lift larger and heavier timbers, or from these three causes combined. It was, at all events, from the unskilfulness and incompetency of Churchill and Foreman

1. *ALTHORF v. WOLFE*, 22 N. Y. 355 (1860), was an action for damages for death of plaintiff's intestate who, while passing along the sidewalk in front of defendant's house, was killed by being struck by snow and ice which was being shoveled off the roof of defendant's house. Defendant had ordered servant to clear the

roof and the latter had asked friend to help him. It did not appear whether the falling snow and ice which killed plaintiff's intestate was shoveled by defendant's servant or the friend assisting the latter. *Held*, defendant was liable for act of servant. Judgment for plaintiff for \$3,500 affirmed. *Affirming* 2 Hilt. 344.

for this particular work, that the scaffold was so unsafely built that it fell.

The plaintiff knew that the scaffold was built by some of those there engaged at work. He did not know who were the individuals that built it, nor the manner in which it was built, not having seen it while they were building it, nor until, by the direction of the foreman, he stepped upon it.

Westman, the foreman, was a competent man in skill and natural judgment. It does not appear that, at the time he was hired for the defendant, he had acquired any habit which detracted from his competency. At the time of this work, however, he was not temperate in strong drink. The testimony tended to show that he was drunk on the day, and near the time of the accident. The testimony does not show directly, though it is an inference which a jury might make fairly that his condition in that respect was a cause of the injury to the plaintiff; for they might well infer that, if his faculties had been without confusion from strong drink, he would not have put these lads, deficient in judgment and strength, to a work requiring discretion and power, or would have inspected the result of their work before using it.

The plaintiff well knew the habits of Westman in this particular and knew that he was drunk on this day, not only at the time of the accident, but before, and that he had been drunk on days before that. The testimony tended to show that Coleby had knowledge of Westman's habits. The jury might so have found.

Such being the fact, if the plaintiff has ground of action against the defendant for this injury and the resultant damage, it must be found in the want of skill, and in the incompetency of Churchill and Foreman and in the use of them by Westman for the work of erecting the scaffold. Indeed, it may be stated yet more narrowly, and it must be found alone, in the use of these two young men for this work by Westman. For it is not shown that Churchill was hired for this kind of work, or for work of this importance to others. The employment of him was not like that of one to act as an engineer for the peculiar duty of managing an engine, or as a switchman to attend to a switch, but it was general. The proof shows that the labor he performed was miscellaneous, not altogether that of a mechanic; and the particular work to which he went was not

because he was hired for that specifically, but because he was set at that by his immediate superior. From the time of his hiring until this occurrence, it does not appear that he was incompetent to do that for which he was employed and at which he was put. It does not appear that Foreman was hired at all by the defendant, or by Coleby, their agent; to hire men. Coleby, who hired the men, and had hired Churchill, neither hired him for this purpose, nor did he set him at this work; on the contrary, Coleby testified that this scaffold was built without his knowledge, and that he had instructed Westman, the plaintiff, and the others who were to risk themselves upon the scaffold, to build the first two, and showed them where they should get the lumber for the purpose, and in this he is not contradicted. It is not possible then to contend that the defendant was negligent in the fact of taking generally into its employment Churchill, or suffering Foreman to labor without especial hiring, though for some kinds of services they were without skill and were incompetent, so long as they should not be put at that which they were not competent and skilful to do. The negligence was in putting them to the service of erecting this scaffold. It begins there and dates no farther back. And it is upon the basis of that negligence that the defendant must be found liable, if liable at all. And, conceding that there was negligence in directing these lads to the work of putting up this scaffold, that negligence cannot be traced farther back than to Westman. For he, thus put in charge of this gang of men, to supervise and direct them in this work, was supplied by Coleby, his immediate superior, with other competent men in numbers enough and with fit material. It would not have been Coleby's negligence if Westman had not used the fit material. It was not Coleby's negligence that Westman did not use the competent men. With the reservation, however, from these last two statements, of any negligence of Coleby, in continuing in the employ of the defendant a man of Westman's habits after notice or knowledge thereof. Nor, with the same reservation, was it the negligence of the defendant, or any of its agents, other than Westman.

We have thus presented to us this case. One servant of a common master is injured by the negligent act of a fellow-servant of a rank one step higher. The act of negligence in the fellow-servant is the result of an incompetency which did

not exist when he entered the employment of the master. It is not permanent, but occasional, and produced by evil habits, the existence of which was known before and at the time of the injury, both to the servant injured and to the hiring agent of the master.

Most of the principles of law which are to be applied to these facts, and to determine the relative rights of the servant injured and the master, are settled in this State, and must be conceded.

A master is not liable to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business. Nor is the liability of the master enlarged when the servant who has sustained an injury is of a grade of the service inferior to that of the servant or agent whose negligence, carelessness, or misconduct has caused the injury, if the services of each, in his particular labor, are directed to the same general end. And, though the inferior in grade is subject to the control and directions of the superior whose act or omission has caused the injury, the rule is the same. Nor is it necessary to exempt the master from liability, that the sufferer and the one who causes the injury should be at the time engaged in the same particular work. If they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purposes, the master is not liable.

These rules seem to have been laid down with care, after due consideration, to be sustained by reason, to have been assented to by more than a bare majority of this court, in at least two instances at some interval of time, and should be adhered to in any case the facts of which bring it within the purview of them. See *Wright v. N. Y. Central R. R. Co.*, 25 N. Y. 562; *Warner v. Erie R'y Co.*, 39 N. Y. 468, and the cases cited in them (1).

1. In *WRIGHT v. N. Y. CENTRAL R. R. Co.*, 25 N. Y. 562 (1862), it appeared that plaintiff, a brakeman in defendant's employ, was injured at night in a collision between two trains on a single track. The engineer who ran the train took the place of a sick employee by direction of manager. He was not familiar with the road and ran the train at full speed without waiting for other train. At the trial there was verdict and judg-

ment for plaintiff for \$2,500 which was *affirmed* by General Term of Supreme Court. On appeal judgment was *reversed*. The collision was held to be caused by engineer running train at full speed, not to his ignorance of the road. It was also held that defendant was not liable for the engineer's lack of prudence resulting in injury to the brakeman, and that the risk was assumed by the latter. *Held*, also, that the direction of the super-

The cases cited hold, further, that the master is liable to a servant for his (the master's) own personal negligence, or want of care and prudence, and for his own personal act or misconduct occasioning injury and damage to the servant. And such negligence, want of care and prudence, act or misconduct, may be shown in the mismanagement of the master's affairs in the selection and employment of incompetent and unfit agents and servants or the furnishing of improper and unsafe machinery, implements, facilities or materials for the use or labor of the servant. (*Id.*)

And to charge a servant with liability to one servant for an injury on the ground that he has selected and employed another unskilful and incompetent servant, it must appear that the injury complained of was the result of the want of skill and competency of the other. (*Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 562.)

So far, we doubt not that the learned counsel for the appellant and respondent respectively would agree. But just here arise points of difference.

The appellant claims, as we understand its position to be, that it acts through a board of directors, and acts immediately in no other way; and that when the board of directors, itself composed of discreet, prudent and honorable men, has selected and employed skilful and competent general servants, agents and superintendents, it has done its whole duty to the servants of lower rank, who shall in turn be selected and employed by those of general power and duties. The negligence, it is claimed, of these general servants, agents and superintendents, is not the negligence of the corporate body, nor of the board of directors through which in the first instance the corporate body acts; but that it is, so far as a servant of the corporate

intendent or manager to the engineer to take the place of a sick engineer was not an act within the rule requiring employment of competent servants. *Reversing* 28 Ba h. 80.

WARNER v. ERIE R'y Co., 39 N. Y. 468 (1868), was an action for damages for negligent killing of plaintiff's intestate, a baggage man on defendant's train, caused by bridge falling while train was passing over

same. On the trial plaintiff had verdict and judgment for \$5,000 which was *affirmed* at General Term of Supreme Court. On appeal judgment was *reversed*. Question of inspection, decayed condition of bridge; necessary to show master's knowledge of such condition. *Reversing* 49 Barb. 558. The Warner case is reported in this volume of AM. NEG. CAS., page 734, *ante*.

body in any rank is concerned, the negligence of a fellow-servant for which the master is not liable. And it is claimed that the rule we have above extracted (to wit: that the negligence, want of care and prudence, act or misconduct of the master, may be shown in the selection and employment of incompetent and unfit agents and servants) is only applicable when such selection or employment is by the master in person, and not through a general or superior agent; and that such rule is to be governed by the other rule extracted above (and which the defendant claims to be), that the master is liable to a servant only for *his own personal* negligence or want of care and prudence, and for his own personal act or misconduct occasioning injury and damage to the servant. And, indeed, taking another rule above given, in the full scope of the general language in which it is laid down, unrestricted by the consideration and the circumstances of cases which must always affect and limit most general rules in some degree, it is to be confessed that it seems that they have literal show of authority for their position. It is said that if two servants are in the employ of the same master, engaged in the same common enterprise, and performing duties and services for the same general purposes, the master is not liable. (Wright v. N. Y. Cent. R. Co., 25 N. Y. 562, p. 565.) Now, it is apparent that the agent who selects a machine to be used in the business of the master, speaking generally, is in the employment of the same master. He is engaged in the same common enterprise, and performing a duty and a service for the same general purposes of the master. And so of the agent who selects and hires men to act in that business. It is necessary for that business, to aid the common enterprise, and to advance those general purposes, that machines should be had and the men hired, and the agent who attends thereto performs a service to that end. The position has also in its favor a judicial assertion more specific than this. In Wright v. N. Y. Cent. R. R. Co., *supra*, the learned judge who delivered the opinion, after intimating (p. 571) that it is at least debatable whether the defendant in that case was responsible to the other of its servants for the proper performance of the delegated power in the selection and hiring of engineers by Upton, the agent of the defendant, who was charged with that duty, goes on to say: "That in the exercise of power there in question (which was to select one from a body of engineers to

run an engine on a particular trip), Upton was acting as the servant of the company, in concert with every other person having any duty to perform, in respect to that particular purpose; and after saying (p. 572) that the cases cited show that for the negligence of a foreman or a superintendent the master is no more liable than for the negligence of any other servant, he remarks that it can make no difference in principle that the negligence is in the selection of the materials, the implements or the agents for the performance of a given work, instead of directing the time, mode or manner of doing the work. And this proposition has more significance, from the fact that the decision of this court in the case reversed the judgment of the Supreme Court therein, in giving which the court held "That the power to employ servants may be delegated by the principal, and this must generally be so when the principal is a corporation. When the principal so acts by the agent, he will, upon general principles, be liable for the negligence of the agent. This agent will not be regarded simply as a fellow-servant of those whom he employs in the general business." (*Wright v. N. Y. Cent. R. Co.*, 28 Barb. 80, 86.)

If we adopt the statement in *Wright v. N. Y. Cent. R. R. Co.*, 25 N. Y. 562, and apply it to the facts of the case at bar, we must say that the defendant is no more liable for the negligence of Coleby in continuing the employment of Westman, though he was incompetent from drink, than for the negligence of any other servant; nor any more liable for the negligence of Westman, in directing to the putting up of this scaffold of two incompetent men, though that negligence was the result of his own temporary incompetency, his liability to recurrence whereof was known to Coleby, the agent of the defendant to employ and dismiss servants. And upon this the learned counsel for the appellant relies to sustain the position taken by it. They cite to us no other case which so holds. *Warner v. Erie R'y Co.*, 39 N. Y. 468, was the case of a structure originally sufficient, but rendered unsafe by gradual decay, which decay under the careful inspection of competent agents, in modes deemed sufficient by skilful and practical men, had not been discovered. *Wilson v. Merry*, L. R., 1 H. L., Scotch App. 326, was the case of a negligent act of a competent servant. *Gallagher v. Piper*, 16 C. B., N. S., 692, was also a case

of negligence, not of incompetence (1). *Hard v. Vt. & Can. R. R. Co.*, 32 Vt. 473, was the same.

While the reports of this State seem to be meager in authority in this particular point, the question has been somewhat discussed and decided in other States. See *Gilman v. Eastern R. R.*, 13 Allen, 433, 15 Am. Neg. Cas. 426; *Noyes v. Smith*, 28 Vt. 59; *Hard v. Vt. & Can. R. R. Co.*, 32 Vt. 473; *Frazier v. Penn. R. Co.*, 38 Pa. St. 104; *Walker v. Bolling*, 22 Ala. 294, 13 Am. Neg. Cas. 108*n*.

It is well maintained, in these cases, that if the position of the appellant is upheld in its full extent, it will, in most cases, relieve a corporate body, and any employer who acts through a corporate body, and any employer who acts through general superintendents, from liability to servants for injuries occasioned by imperfect and defective machinery, by unsafe mechanical means and appliances of any kind, and by all incompetent and unskilful sub-agents furnished without due care. And this statement of the learned judge in *Wright v. New York Central Railroad* was not necessary to the disposition of the case. Sufficient reasons for the judgment of the court had already been found in the fact that the injury complained of

1. In *WILSON v. MERRY*, L. R. 1 H. L. Sc. 326 (H. L. 1868), it appeared that respondents were owners of the Haughhead coal pit; Neish was their manager for this pit, and there was also a general manager over all the works named Jack. Neish had charge of sinking the pit and making arrangements under ground for opening a new seam, for which purpose a scaffold was erected. Two days after its erection, appellant's son was engaged by respondents to assist in driving the level. While so employed, he was killed by an explosion of fire damp, the accumulation of which was caused by the obstruction to the ventilation occasioned by the erection of the scaffold. It was admitted that both Neish and Jack were competent persons, selected for their duties with proper care. An action having been brought at the trial, the Lord Ordinary directed the jury that if they

were satisfied that the arrangements or system of the ventilation of the pit at the time of the accident had been designed and completed by Neish before the employment of appellant's son, and if the owners had delegated to Neish the whole of their authority in regard to the matter, then that Neish and the deceased did not stand in the relation of fellow-workmen engaged in a common employment, and that the defendants were not on that ground relieved from liability. A verdict was on this given for the plaintiff with damages. A new trial on the ground of misdirection having been granted by the Court of Sessions against the interlocutor of that court, the appeal was brought to the House of Lords, whereupon it was held, confirming the interlocutor, that in the points referred to there had been a misdirection.

did not result from the incompetency or unskilfulness of the fellow-servant whose act, it was claimed, had occasioned it, and, perhaps, in the fact that the plaintiff knew the perils of the service and continued in it, voluntarily assuming the risks; and in the further fact that the servant complained of was competent, and that there was no negligence in selecting him for the work. We may decline, then, to be bound by it, so far as this question is concerned. We should not hold as there enunciated, unless it is the clear result of former decisions. The duty of the master to the servant, as it is sometimes put (*Wright v. N. Y. C. R. Co.*, 25 N. Y. 556), or his implied contract with his servant, as it is differently intimated (*Farwell v. Boston & W. R. R.*, 4 Metc. 49, 15 Am. Neg. Cas. 407), leads to another conclusion. That duty or contract is to the effect that the servant shall be under no risks from the imperfect or inadequate machinery or other material means and appliances, or from unskilful or incompetent fellow-servants of any grade. It is a duty or contract to be affirmatively and positively fulfilled and performed. And there is not a performance of it until there has been placed for the servant's use perfect and adequate physical means, and for his helpmeets fit and competent fellow-servants; or due care used to that end.

In *WILSON v. MERRY*, L. R. 1 H. L. Sc. 326, it was held that the liability or nonliability of a master to his workmen cannot depend upon the question whether the author of the accident is or is not in any technical sense the fellow-workman or collaborateur of the sufferer. The case of the fellow-workman is an example of the rule, not the rule itself; the rule stands on broader grounds. The master is not, and cannot be liable to his servant unless there is negligence on the part of the master in that in which he, the master, has contracted or undertaken with the servant to do. A master does not contract or undertake with his servant to execute in person the works connected with his business. What the master is bound to his servant to do in the event of his not personally superintending the work, is to select proper

and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has done all that he is bound to do; and if the persons so selected are guilty of negligence, it is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the service of the master, the master is not liable, though the two workmen cannot technically be described as fellow-workmen. A master cannot warrant the competency of his servants.

In *GALLAGHER v. PIPER*, 16 C. B. N. S. 669, where plaintiff, a scaffolder in defendant's employ, was injured by the negligence of the defendant's general manager, it was held that defendants were not liable.

That some general agent, clothed with the power, and charged with the duty to make performance for the master, has not done his duty at all, or has not done it well, neither shows a performance by the master, nor excuses the master's non-performance. It is for the master to do, by himself or by some other. When it is done, then and not until then his duty is met or his contract kept. The servant then takes the risk of his negligence, recklessness or misconduct of his fellow in the use of the material and implements furnished, and of their failure from latent defects not revealed by practical tests, and from deterioration by the usual wear and tear. It is not enough to satisfy the affirmative duty or contract of the master that he selects one, or more than one, general agent of approved skill and fitness. If the general agent goes forward and carelessly places by the side of a servant another unskilled and incompetent, the duty of the master has not yet been met, his contract is yet unperformed. Corporate bodies must, of the necessity of their being, act through agents, and in the large enterprises and business pursuits of the times, the necessity is almost as stringent upon very many other employers. But they may not avoid the duty which they owe to their servants of furnishing them with sound mechanical contrivances nor put upon superior servants the duty of selecting and purchasing or hiring.

The duty being that of the principals, and theirs the contract, it is theirs to fulfil and perform, and if it is not done, or insufficiently done, the failure to do is theirs. As is well said, "if a master's personal knowledge of defects be necessary to his liability, the more he neglects his business and abandons it to others, the less will he be liable." Byles, J., in *Holmes v. Clarke*, 6 H. & N. 349 (1). We hold, therefore, that a master is liable to his servant for an injury caused by the incompetency or want of skill of a fellow-servant, whether it existed when the

1. *CLARKE v. HOLMES*, 7 H. & N. 937, affirming *Holmes v. Clarke*, 6 H. & N. 349, 10 Weekly Rep. 405, it appeared that plaintiff was employed by defendant to oil dangerous machinery. At the time plaintiff entered upon the service the machinery was fenced, but the fencing became broken by accident. The plaintiff complained

of the dangerous state of the machinery, and defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced. The defendant was held liable for the injury.

fellow-servant was hired, or has come upon him since the hiring, the fellow-servant having been in the first instance hired, or afterward continued in service, with notice or knowledge or the means of knowledge of this lack. The duty of the master to his servant is to use reasonable care to provide and employ none but competent and skilful servants, and to discharge from his service, on notice thereof, any who fail to continue such.

And applying this rule to the case in hand, we are of the opinion that the defendant was negligent towards the plaintiff, in retaining Westman in its service, after his habit of drinking to drunkenness was known to Coleby, its general agent for hiring and discharging men of the class of Westman.

Here, however, comes in another rule which affects the relations of master and servant. A servant has no cause of action against a master for an injury resulting from the negligence of the master, where the servant's negligence contributed to the taking place of the injury. And where the servant knows as fully as the master of the existence of that which is at last the producing cause of the injury, and continues, without promise of amendment of the defect, of his own accord in the master's employ, exposed to the effects when they shall come, it may constitute contributory negligence on his part to remain thereafter in the service. *Assop v. Yates*, 2 H. & N. 768 (1); *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669; *Skipp v. E. C. R'y Co.*, 24 Eng. L. & Eq. 396 (2); *Mad Riv. & L. E. R. R. Co. v. Barber*, 5 Ohio St. 541.

The learned counsel for the respondent cites *Snow v. Housatonic R. R.*, 8 Allen, 441, 15 Am. Neg. Cas. 417, as a contradiction of the principle maintained in these cases. But an examination of it shows that the plaintiff therein was not a servant

1. In *ASSOP v. YATES*, 2 H. & N. 768, where a cart ran against a hoarding which had been erected by defendant, and knocked down a machine inside the hoarding, which struck plaintiff, an employee of defendant, and it appeared that plaintiff had made complaint of the machine's position to defendant, but continued to work, although machine was not moved, defendant was not liable.

2. In *SKIPP v. EASTERN COUNTIES R'y Co.*, 9 Exch. 223, 24 Eng. L. & Eq. 396, where an employee of defendant engaged in coupling cars was thrown under cars and injured, and it appeared there were not sufficient men for the work, but plaintiff had worked for some time prior to the accident, without making any complaint as to insufficiency of men for the work, it was held that the railway company was not liable.

of the defendant therein. He was in the employ of the Western Railroad Company, which company, by contract with the defendant there, used its road and track for making up trains, etc., at the place where the plaintiff was injured. And the learned chief justice, in delivering the opinion of the court, says: "It does not appear that he (plaintiff) was employed in any duty or service for or on behalf of the defendants; on the contrary, it is stated that he was in the employment of another corporation. * * * On these facts it is difficult to see how the doctrine applicable to a claim for damages occasioned by the carelessness of a fellow-servant against a common employer can have any bearing on the rights of the parties to this action."

The court, in that case, recognizes the existence of the rule now under notice, but concludes that it does not apply to the facts of that case. (See page 450 of the report.) In *Gilman v. Eastern R. R. Co.*, 13 Allen, 433, 15 Am. Neg. Cas. 426, cited by the learned counsel, the question now under consideration was not passed upon, and was expressly ignored as not raised on the trial. (See page 445 of the report.) We have read the other cases cited by the learned counsel on this point, and apprehend that no ruling will be found in them different from that above expressed by us. While all of them hold that it is the duty of the master to provide safe and sufficient machinery and appliances, and skilled and competent agents and servants, none of them asserts that if the servant, who knows as well as the master of a lack in these respects, is injured thereby, he is not open to the imputation of contributory negligence; and the reason why is simple but sufficient. It is at his option ordinarily, to accept or to remain in the service or to leave it; and if he remains without promise of a change or other like inducement, it is for the jury to say whether or not he voluntarily assumes the risks of defective machinery and of incompetent servants whereof he has full and equal knowledge.

The case does not show that Westman, when first he came into the employ of the defendant, was competent in all respects. His incompetence and unfitness subsequently occurring were temporary and occasional, the result of evil habit. They had come to the knowledge of Coleby, who had power to act, so that it was negligent for the defendant to retain Westman in its employ. But it is apparent that the plaintiff knew as well, and, indeed, far better than any one else, the habits of West-

man, and his particular condition on that day. The strength of the affirmative testimony on both of these points is from the plaintiff's mouth. The plaintiff knew that the building of this scaffold was going on. He knew that neither of the persons who had built the other two scaffolds was engaged in the erection of the third, which fell; for those men were occupied where he was, a short distance away from it. He knew that men, under the direction of Westman, were putting it up, and as they were not of the three persons who had together built the two scaffolds, he knew that Westman had taken orders for the third. He knew that Westman was drunk on that day and at that time. If it was negligence in Coleby and the defendant to suffer Westman, in that state, to remain in the control and direction of men and work, was it not negligence in the plaintiff to remain in the defendant's employ, subject to Westman's direction and liable to evil results from work done under his supervision, likely to be an insufficient and negligent supervision from his perceptions being clouded and dulled by drink? But, in this case, whether the plaintiff was so negligent as to be contributory to the injury which he received, was a question for the jury. For Laning had testified that Coleby had said to him, that if Westman did not do better he would have to discharge him. It has been held that there is a formal distinction between the case of a servant who knowingly enters into a contract to work on defective machinery and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under promise that the defect shall be remedied. See *Holmes v. Clarke*, 10 Weekly Rep. 405 (1). And the fact that after

1. The opinions of the judges in *Clarke v. Holmes*, 7 H. & N. 937, affirming *Holmes v. Clarke*, 6 H. & N. 349, 10 Weekly Rep. 405, express more correctly the true idea: "There is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery and that of one who on a temporary defect arising is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his

service under a promise that the defect shall be remedied. In the latter case the servant by no means waives his right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfil his obligation. No doubt a defect thus arising in machinery may be such that no man of ordinary prudence would run the hazard of working on it. If a jury should find that a party complaining had materially contributed to the injury by his

Laning had entered the service of the defendant, he acquired knowledge of the intemperate habit of Westman, was a fact in the case to be submitted to the jury, to be considered by them, together with this promise of Coleby and all the other facts and circumstances, in determining the question whether the plaintiff himself helped to bring about the accident for which he seeks to charge the defendant. (*Holmes v. Clarke*, 10 Weekly Rep. 405.) Knowledge in such a case is not of itself, in point of law, an answer to the action. (*Id.*) It has, indeed, been carried farther than the circumstances of this case require. *Hoey v. Dublin & Belfast R'y Co.*, 18 Weekly Rep. 930 (Irish Com. Pl.) And see *Huddleston v. Lowell Machine Shop*, 106 Mass. 282, 15 Am. Neg. Cas. 690; *Britton v. Great Western Cotton Co., L. R.*, 7 Exch. 130 (1).

It is now to be seen what was the action of the court below on this question, and what exception the defendant has taken to bring that action under review.

The defendant, when the plaintiff rested, and also when the

own rashness, the action could not be maintained, inasmuch as it is well established that a plaintiff, who has materially contributed to his own injury by his own negligence, cannot recover, although he may show negligence in the opposite party. But the question whether the injury of which the plaintiff complains is to be ascribed wholly to the negligence of the defendant, or whether the plaintiff has had any share in bringing it about, is one wholly for the jury." CROMPTON, J. (p. 946), says: "We need not consider the personal knowledge, in such a case, the plaintiff had of the danger, because there was a neglect of duty on the part of the defendant in not keeping the machinery fenced. The party cannot recover if he has contributed to the accident, * * * knowledge is only a part of negligence."

1. In *HOEY v. DUBLIN & BELFAST R'y Co.*, 18 Weekly Rep. 930 (Irish Com. Pl.), an action by an employee

against the railway company for injury from incompetent fellow-servant, the negligence charged being selection of incompetent servant, it was held that it was not a sufficient answer that plaintiff, for a reasonable time before the injury, had knowledge of the incompetency of the fellow-servant.

In *BRITTON v. GREAT WESTERN COTTON Co., L. R.*, 7 Exch. 130, action for damages for death of plaintiff's intestate, an employee in defendant's factory, engaged in greasing the bearings between the fly wheel and the spur wheel of a steam engine, who was found dead on the bearings, after working a few days, the machinery not being fenced as required by statute, the failure to fence being the negligence charged, it was held that assuming there was no contributory negligence on the part of deceased, either in accepting or conducting the employment, the action was maintainable.

proofs were closed, moved that the plaintiff be nonsuited on the ground that the negligence of him and his fellow-employees contributed to the accident. But there was enough in the testimony to justify the court in denying, as it did, that motion.

Two of the requests to charge, made by the defendant at the trial, were addressed to the question of the plaintiff's knowledge of Westman's habit, and the contributing negligence of the plaintiff by reason thereof; but each of them is based upon the idea that the knowledge of the plaintiff of the incompetency of Westman was a bar to a recovery, and not merely a fact to go to the jury with the other evidence; from all of which they were to determine whether the plaintiff was to be charged with negligence contributory to the injury. These requests were, therefore, properly refused.

The court upon this subject charged the jury that the plaintiff's knowledge of the fact of Westman's intemperance would not exonerate the defendant from responsibility; yet it called upon the plaintiff to exercise more caution, care and judgment than he otherwise would have done, and that he was bound to exercise ordinary care and caution in view of that fact. The defendant excepted to so much thereof as instructed the jury that knowledge of the fact in the plaintiff did not exonerate the defendant. In our view the learned judge at circuit was correct in that; the charge was to the effect that in this case knowledge was not of itself, in point of law, an answer to the action. (See cases above cited.)

The requests to charge, which were refused, assumed as proven what was yet to be determined *pro* or *con* by the jury, or rested upon propositions of law which we think were not sound, or upon propositions of law which, though sound in themselves, did not comprehend all the facts of this case, or assumed as established as fact in the case which was not in the testimony.

The declarations of Coleby, the admission of which in evidence was objected to by the defendant, were properly received. He was the agent of the defendant, with the power and duty of hiring and discharging servants. He had the power to discharge Westman for any fault amounting to incompetency. His neglect to do so, after knowledge on his part of a reason why he should, was the neglect of the defendant, and it was competent to prove by his own declarations that he

had such knowledge, made, as they were, to the plaintiff in the case. They were part of the *res gestæ*, and had a bearing upon the question of the contributory negligence of the plaintiff.

There is one other point made by the defendant which requires notice.

The verdict for the plaintiff was for the sum of \$10,000. A motion was made at Special Term to set aside this verdict as one against evidence, and that the damages are excessive. The motion was denied.

From the order of Special Term denying it, the appeal was taken to the General Term, where a new trial was denied, and judgment ordered for the plaintiff on the verdict. The defendant claims here that the General Term was of the opinion that the damages were excessive, but also of the opinion that it had no power to reduce them, and no power to do aught but grant a new trial for that reason, which for that reason alone it declined to do. The defendant claims that the General Term, having the power to reverse the judgment and order a new trial, unless the plaintiff should stipulate to reduce his recovery to a sum which the court should name, and to order that, if he did so stipulate, the judgment should be affirmed for that sum, it erred in not exercising that power.

It is true that it was a matter of discretion with the court at General Term, whether it would make such order, and if it had exercised that discretion and refused to make it, no error would exist. But if, having the power so to do, it failed to use it on the ground that the power was not in it, there is error which may be reviewed and corrected.

The claim of error here under notice is to be sustained, if at all, not upon anything shown in the order of the court at General Term, nor upon the judgment entered thereon, nor upon anything which appears in the record. The opinion delivered at General Term, if it can be used, shows plainly that if the court there had deemed that it had the power to reduce the damages, still leaving a recovery, it would have exercised it, but that it was of the opinion that it could effect that end only by granting a new trial for that reason, and that the excess of damages was not of itself quite sufficient to warrant an order for a new trial.

But we are not authorized to review a judgment, and to

reverse it for an alleged error which does not appear upon the record, and is not shown or to be arrived at, save by expressions appearing in the opinions of the court.

The judgment must be affirmed, with costs to the respondent.

All concur except ALLEN, J., dissenting, and RAPALLO, J., not voting.

Judgment affirmed.

FLIKE, ADM'R V. BOSTON AND ALBANY RAILROAD COMPANY.

Court of Appeals, New York, November 1873.

[Reported in 53 N. Y. 549.]

FIREMAN KILLED — COLLISION — FREIGHT TRAINS — RUNAWAY CARS — INSUFFICIENT BRAKEMEN — NEGLIGENCE OF AGENT — RAILROAD COMPANY LIABLE — FELLOW-SERVANT — RESPONDEAT SUPERIOR. — In an action to recover damages for the death of the plaintiff's intestate, a fireman on a freight train on defendant's road, caused by a number of cars of another freight train which was in advance, becoming detached and colliding with the train on which the deceased was employed, it appeared that the forward train was deficient in brakemen; that there were but two aboard when there should have been three, and that if a third brakemen had been stationed on the runaway cars the accident could have been prevented. The train was sent out insufficiently equipped with brakemen by defendant's agent, a head conductor, whose duty it was to make up trains, hire and station brakemen, and generally to dispatch the trains (1). *Held*, that the defendant was liable. (ALLEN, GROVER and FOLGER, JJ., *dissenting*.)

1. SPRONG, ADM'X, v. BOSTON & ALBANY R. R. Co., 58 N. Y. 56 (June, 1874), was an appeal in an action for damages for death of plaintiff's intestate, Charles H. Sprong, who was head brakeman on defendant's freight train, the accident being the same as that in the FLIKE case [collision between freight cars]. Judgment for plaintiff in the General Term of the Supreme Court, Third Judicial Department, affirming judgment on verdict rendered for plaintiff, was *affirmed*. ANDREWS, J., in delivering the opinion, referred to the Flike case as follows: "In Flike, Adm'r, v.

Boston & Albany R. R. Co., 53 N. Y. 549, which was also an action against the defendant in this action to recover damages for the defendant's negligence in causing the death of the plaintiff's intestate, a fireman on the same train on which Sprong, the plaintiff's intestate in this action was, and who was killed by the same collision, two questions, also involved in this case, were decided: First, that the evidence justified the jury in finding that the corporation, defendant, was guilty of negligence in sending out the first train with an insufficient number of brakemen; and, second, that

the refusal to nonsuit, and the refusal to direct a verdict for the defendant below. No error is discoverable in these refusals.

" 1. There was evidence to go to the jury in respect to the liability of the company for Margaret Bennett's injury.

" 2. As to the negligence of plaintiff, which is alleged to have contributed to the injury, the claim is that it was established by inferences drawn from the construction of the machine, and from the mode in which her hand was pulled in between the cylinders from below (1). The contention is that she could not have been so injured unless she had put her hand in a place of obvious danger. But it was for the jury to draw inferences from the facts, and a peremptory instruction could not be given by the trial judge unless in a case where but a single inference could be drawn. It was so improbable that she received her injury in the precise manner she described, and so difficult to conceive how she was drawn in without her own negligence, that a new trial might well have been allowed on the ground that the jury's inference of no negligence on her part was against the weight of evidence. But as it was possible that her injury happened in a manner consistent with her description, and without negligence on her part, an instruction for a verdict against her ought not to have been given, for a second or subsequent verdict on the same evidence in her favor would doubtless not have been disturbed. *Crue v. Caldwell*, 23 Vroom, 215. The result is that the judgment must be *affirmed*." For affirmance: 10; for reversal; none. RICHARD V. LINDABURY, appeared for plaintiff in error; SAMUEL KALISCH, *contra*.

1. *Minor employee, a female, injured by machine—Erroneous instructions on damages.*—See, also, *THE CLARK MILE-END SPOOL COTTON CO. v. SHAFFERY*, 58 N. J. Law, 229 (Supreme Court, November Term, 1895), where female employee, a minor, was injured while operating defendant's machine. Judgment for plaintiff in the Essex Circuit was *reversed* for error on damages. The court said: "The plaintiff was an unemancipated minor, and the trial judge, in charging the jury on the subject of damages, gave them, among other directions, this instruction: 'And you are also to consider the loss of wages in the past, if there has been any proof of such loss.' There can be no doubt that this legal exposition was erroneous, inasmuch as the right

to such damages in part did not reside in her mother. That this was a mere slip is obvious, for the exception to the instruction was general and unspecific, so that the attention of the judge was not called to the subject. As was said in the case of *Crater v. Binninger*, 4 Vroom, 513, 520, 'such a bill ought not to be allowed, for, as has been repeatedly said by this court, exceptions, to be legal, must be specific. But as the bill in this case comes before us in this general form, this court has no power to limit the range of objections.' See, also, *Packard v. Bergen Neck R. R.*, 25 Vroom, 229. These wages are an unknown quantity, and must have been included in the verdict." This error being incurable judgment was *reversed*.

MAHER v. McGRATH.

Supreme Court, New Jersey, February Term, 1896.

(Reported in 58 N. J. Law, 469.)

FALL OF SCAFFOLD ERECTED BY MASONS AND LABORER DELIVERING BRICK INJURED — FELLOW-SERVANT — MASTER NOT LIABLE. — Plaintiff was a laborer in defendant's employ, engaged in attending upon masons, also employed by defendant, who were constructing the walls of a brick building, the defendant being the contractor for its erection. While plaintiff was delivering a hodful of brick to the masons upon a scaffold which the latter had erected, the scaffold fell owing to its defective construction, and plaintiff fell with it, sustaining severe injuries. *Held*, that the injury was due to the negligence of fellow-servants, for which the master was not liable.

ON RULE to show cause. *Rule absolute.*

ARGUED at November Term, 1895, before BEASLEY, Ch. J., and MAGIE and LUDLOW, JJ.

JOHN R. HARDIN, for the rule.

JOHN T. DUNN, *contra*.

Magie, J. — This cause was tried in the Union Circuit, in the May Term, 1892. Plaintiff obtained a verdict, and a rule to show cause was allowed defendant within the required time. This rule has only been brought to hearing at this term.

The action of plaintiff was brought to recover damages from the defendant, his employer, for injuries received by the fall of a scaffold on which plaintiff was working. The reasons assigned for a new trial are founded solely upon the alleged error of the trial judge in refusing to nonsuit plaintiff, or to direct a verdict for defendant.

The state of the case contains only the evidence given at the trial on behalf of plaintiff and the charge of the trial judge. It discloses that the evidence given on behalf of defendant was omitted therefrom by consent of counsel. In reviewing the alleged error of the trial judge, we are therefore confined to a consideration of the evidence appearing in the agreed-upon state of the case.

Plaintiff was a laborer in the defendant's employ, engaged in attending upon masons, also employed by defendant, and who were constructing the walls of a brick building. The evidence shows that when plaintiff delivered to the masons upon

a scaffold a hodful of brick, the scaffold fell, and he fell with it, and thereby sustained severe injuries.

The cause of the fall was plainly fixed by the evidence to have been the breaking of a "bearer," one end of which was fastened to a scaffold pole, and the other end was supported by the wall on which the masons were working. The bearer supported the scaffold planks on which the masons stood.

Plaintiff claimed to have established defendant's liability to him for his injuries on the ground that the evidence showed a dereliction of the duty which, as employer, he owed his servants in two respects, viz.: 1, as to the materials with which the scaffold was constructed, and, 2, as to the manner of its construction. His case was thus submitted to the jury, with instructions as to a master's duty, which are not complained of, and which seem unobjectionable, if applicable. The only question, therefore, is whether the evidence justified their application.

With respect to the materials used in the construction of the part of the scaffold that fell, the evidence does not show that they were furnished by defendant. On the contrary, it appears that the masons took lumber belonging to the carpenter engaged upon the building, and used it, without his knowledge, in the construction of that part of the scaffold. The bearer that broke was thus procured.

But it is unnecessary to consider whether defendant is charged with any liability for defects in materials thus procured; for the evidence makes it clear that the fall of the scaffold was due, not to defects in the material, but to defective construction. The bearer used was three by six and about ten feet long. It was so adjusted that the scaffold planks were supported by it on what the witnesses call "the flat," and the proof shows that if placed "on edge" it would have been sufficient for its purpose. The weight it supported was therefore imposed on its weakest side. This, it appears, is contrary to the usual mode of construction.

The only question, then, is whether defendant is liable for this error in construction.

It affirmatively appears that defendant personally took no part in its construction, but that it was constructed by the masons in accordance with the custom of the trade.

As the error of construction which occasioned plaintiff's injury was committed by workmen with whom he was working

in a common employment, subject to a common danger which all equally knew must result from a negligent construction of the scaffold, the rule which denies the liability of the master for injury received from the negligence of a fellow-servant was plainly applicable. As there was no evidence that defendant was negligent in the selection and employment of the masons engaged in the work, there was no evidence of defendant's liability sufficient to be submitted to the jury.

In a case where the evidence was sufficient to establish, *prima facie*, that a ladder was furnished by an employer to be used by his workmen, it was held that the master was bound to take reasonable care to have it safe for such use. *Mills v. Maine Ice Co.*, 22 Vroom, 342, 16 Am. Neg. Cas. 674, *ante*. But in this case the scaffold was not a permanent platform furnished by the employer on which he invited his workmen to stand in doing their work. *Mulchey v. Meth. R. Soc.*, 125 Mass. 487, 15 Am. Neg. Cas. 661. It was a temporary and movable platform, to be increased in height as the work progressed, by the workmen themselves, as their needs required. For an injury received by one workman from the negligence of others in increasing the scaffold's height, the employer would be no more liable than he would be for the fall of a ladder furnished by him to his workmen, when the fall was the result of one of them negligently placing it insecurely.

For these reasons, I think the rule should be made absolute.

COMBEN v. THE BELLEVILLE STONE COMPANY OF NEW JERSEY.

Court of Errors and Appeals, New Jersey, June Term, 1896.

(Reported in 59 N. J. Law, 296.)

**LABORER IN QUARRY THROWN FROM ROCK AND KILLED —
BLASTING OPERATIONS — DEFECTIVE MACHINERY — SAFE
APPLIANCES AND PLACE TO WORK — CONTRIBUTORY NEG-
LIGENCE — QUESTION FOR JURY. — 1.** The duty of a master
towards a servant in his employment is to exercise reasonable care and
skill to provide safe machinery and appliances for carrying on the busi-
ness for which he employs the servant, and in keeping such machinery
and appliances in a safe condition for such use, including the duty of

making inspection and tests at proper intervals whilst the work progresses, to ascertain if it remains in such safe condition. The master is also bound to exercise reasonable care to provide a safe place for his servant to perform his work, and to the exercise of reasonable care to keep and maintain the place safe, and such duty as to machinery, appliances and place continues when his servant is changed from place to place upon the work in which he is engaged for his master when the danger of such change is not obvious, and the servant is without knowledge of it, and cannot observe and acquire the knowledge in the exercise of ordinary care in the employment (1).

1. *Falling from platform — Railing giving way — Defendant liable.* — In *ALEXANDER DYE WORKS v. ROUFOSSE*, 57 N. J. Law, 700 (Errors and Appeals, March Term, 1895), it was held that "the fact that the evidence was susceptible of a finding that the plaintiff was guilty of contributory negligence, was not ground for reversing a finding of the jury to the opposite effect." Opinion by GARRISON, J. Affirmance unanimous. It appeared that "William Roufosse was employed by the Alexander Dye Works to hang silk in the drying-room. The silk was festooned over rails near the ceiling, about sixteen feet from the floor. For this work the company furnished a ladder ten feet high, the platform of which was guarded, upon three of its sides, by a low wooden railing. From this platform Roufosse fell and injured himself. His testimony and his contention are that the railing gave way under ordinary pressure, owing to conditions which inspection and repair would have remedied. The defendants insisted that, both in law and in fact, the risk and the negligence were the plaintiff's." Judgment for plaintiff affirmed.

Falling of heavy stone — Employee killed — Machinery — Inspection — New trial. — In *ATZ v. THE NEWARK LIME & CEMENT MANUFACTURING CO.*, 59 N. J. Law, 41 (Supreme Court, June Term, 1896), rule to show cause for new trial, verdict being returned

for plaintiff, was made absolute. Opinion by MAGIE, J. It appeared that "plaintiff's intestate was in the employ of the defendant, a company engaged in the manufacture of cement. On May 5, 1892, defendant was using a machine for grinding broken rock called the Page mill. The mill had an upper stone which was fixed in a frame of hard wood, and a lower stone which revolved. The upper stone had a hole of about five inches in diameter in the centre, through which the rock to be ground was fed from a hopper. In that hole was the 'damsel,' inserted in the lower wheel and which, when the latter revolved, oscillated the trough leading from the hopper so as to produce a constant feed of rock. The frame in which the upper stone was fixed was hinged on one side upon a frame surrounding the lower stone. On the opposite side an iron lag-bolt was inserted having a ring attached. At intervals the grinding surfaces of the two stones required to be sharpened. To expose them for that purpose there was a traveling-block and pulleys over the mill, carrying a chain with a hook. When the hook was inserted in the ring the frame with the upper stone in it was raised by the use of the pulleys to a perpendicular and then lowered on the other side, leaving both grinding faces exposed. When sharpened the operation was reversed and the frame with the upper stone was let down upon the

2. Where there is a fair dispute in the evidence, or two classes of conclusion can reasonably be reached from it, whether the injury to the servant was the result of the negligence of the master to exercise the care required to provide proper machinery and appliances for the use of the servant, or a proper place in which to perform his work, or whether the injury was the result of obvious danger or risk to the servant, or the want of ordinary care on his part to observe dangers within his knowledge, or of which he ought to have known in the exercise of such care, then a case is made which should be submitted to the jury for their determination.

lower stone. On the day named deceased and another workman were engaged in lowering the upper stone after sharpening, the latter managing the pulleys. When the frame was nearly in place deceased directed the other workman to stop lowering, which he did. Thereupon the lag-bolt broke and the upper stone fell. Deceased had one arm and part of his head between the stones and was instantly killed. The administrator of deceased brought this action to recover for the pecuniary loss to the next of kin and obtained a verdict. This rule to show cause was allowed."

The rulings by the learned judge are stated in the syllabus to the official report as follows:

"1. When the duty which a master owes to a servant respecting machines furnished for the servant to work with requires inspection of the machines, the duty will be performed by such an inspection as ordinary prudence would dictate.

"2. A master is not liable for an injury occasioned by a defect which would not have been disclosed by such an inspection as it was his duty to make.

"3. Such inspection would require the use of practicable tests known to the master or so commonly used for that purpose that he might be presumed to have knowledge of them."

Miscellaneous cases.

Property damaged—Explosion of steam boiler—Liability of manufac-

turer.—In *VAN WINKLE v. THE AMERICAN STEAM BOILER COMPANY*, 52 N. J. Law, 240 (February Term, 1890), demurrer to declaration was overruled, the case being stated in the syllabus to the official report (opinion by BEASLEY, Ch. J.) as follows:

"1. The defendant having insured a steam boiler, which was in a building adjacent to the mill of the plaintiff, and which mill had been injured by the bursting of such boiler; and it appearing that the defendant had co-operated actively with the owner of the boiler in its management: *Held*, that the defendant was responsible for such damage, if the same was occasioned by its want of care and skill in such transaction.

"2. In such instances, the owner of the dangerous machine is liable for the immediate and obvious damage caused by its mismanagement, and all persons, whether servants or volunteers, who participate in such mismanagement, are also liable.

"3. There is a public duty to exercise great care and skill incumbent on those having charge of instruments which, if mismanaged, are highly dangerous to the lives and persons of men who happen to be in their neighborhood; and for the non-performance of such duty a person specially injured thereby is entitled to sue."

Dangerous premises—Fall of wall—Employee of another injured—Liability of person constructing building.—In *LECHMAN v. HOOPER*, 52 N.

3. When, at the close of the case of the plaintiff, there exists upon the evidence a substantial dispute whether the injury arose from the negligence of a fellow-servant or not, a motion to nonsuit on this ground cannot prevail.

(*Syllabus by the court.*)

ON ERROR to the Essex County Circuit Court. The facts appear in the opinion. *Nonsuit reversed.*

J. Law, 253 (February Term, 1890), rule to show cause for new trial, after verdict for plaintiff, was discharged, the syllabus to the official report (opinion by BEASLEY, Ch. J.) stating the case as follows:

"1. The plaintiff was in the employ of a person in the business of putting up an iron lintel, etc., and, in the course of his employment, went to a building that was being erected by the defendant, who was a mason; one of the walls having been just built was in a dangerous condition, and the defendant directed one of his men to make the wall safe; the wall, being neglected, fell upon the plaintiff, who therefor brought suit. There was some evidence which, it was contended, tended to show that the co-employee of the plaintiff, who was in charge of that particular job, was notified of the danger in question. *Held*, that notice of the nuisance was due to the plaintiff personally, and that notice to his co-employee would not affect him.

"2. The principle of decision is, that the tortfeasor owed to the plaintiff the duty to apprise him of the lurking danger, and that the plaintiff had not appointed his master, or any of the servants of such master, his agent to receive for him such notice."

Property damaged—Defective building—Liability of architect—Negligence of architect and contractor—Joint liability.—In *NEWMAN v. FOWLER*, 37 N. J. Law, 89 (Supreme Court, June Term, 1874), on writ of error to

the Essex Circuit, judgment was entered on the verdict for plaintiff, on the facts as stated in the opinion by BEASLEY, Ch. J., as follows: "The damages for which indemnification is sought in this suit, are the results of the negligence of another party as well as that of the defendant. The plaintiff employed the defendant to oversee, in the capacity of architect, the putting up of a building, and the verdict has established that this structure is defective in workmanship and materials, in consequence of the want of care or want of skill of the contractor engaged to do the work, and of the defendant as architect. The loss comprised in the present cause of action has arisen, therefore, by reason of the default of these two persons, the contractor and the defendant. The suit is against the latter, solely."

The rulings of the learned judge are stated in the syllabus to the official report as follows:

"1. When two or more persons, though not acting in concert, occasion an injury, they are severally liable for the consequences.

"2. When a house was badly built in consequence of the joint neglect of the architect and the contractor, a suit, founded on such neglect, will lie against the architect alone.

"3. Nor will the fact that the owner of the house refuses to pay the contractor a part of the money due to the contractor, on the ground that the house is badly built, bar such suit."

THOMAS J. LINTOTT, for plaintiff in error.

HAYES & LAMBERT, for defendant in error.

Lippincott, J. — On March 7, 1894, one Robert Comben, the intestate of the plaintiff in error, was employed by the defendant in error in working in its stone or rock quarry at Avondale, in the State of New Jersey, and whilst so working he was, by the operation of the machinery and appliances of the defendant in use in its quarry, thrown from a ledge of rock where he was working and killed. The plaintiff in error is his widow, and sues the defendant company for damages resulting to her as his widow, and to his two brothers, as his next of kin. At the trial below, at the close of the case of the plaintiff, the trial judge ordered a judgment of nonsuit, to a review of which this writ of error is directed.

At the trial it appeared that the intestate was a quarryman in the employment of the defendant, engaged in drilling holes in the rock for the purposes of blasting. At the time of the accident he was so engaged on a pinnacle or ledge of rock to which he had been removed from another part of the work. In about twenty minutes after he had been set at work at this place, the drag rope connected with the machinery for hoisting the rock and debris out of the quarry sagged and swept across the ledge of rock and carried the deceased into the quarry below, and by reason of the fall he was killed. It was the sagging of this rope which caused the accident and his death. Had the rope remained taut it would have been some eight or ten feet above his head, and he would probably have escaped injury. The machinery was operated by an engine and derrick, and the rock was hoisted up in carriages to which the rope was attached and by means of a stationary cable carried to the dumping ground. The drag rope which on this occasion sagged ran from a drum in the engine house up to an anchorage of the cable, and then passed through a pulley. This drag rope was regulated or controlled by the drum, which drum was operated by engine power, and its movements controlled by a friction brake, by which the rope could be released wholly or in part, and the friction increased or decreased by the engineer in charge of the machinery. There is some evidence that the proper manipulation of the friction brake would prevent to some extent the sagging of the rope. It is in evidence also, and, as it appears, undisputed,

that the sagging and swinging of the rope could have been prevented by the attachment of protectors or hangers from some portion of the machinery to the rope, and that thus it would have been rendered safe. There is also evidence tending to show that the rope was too long to be safe if operated without these protectors or hangers. The rope was from two hundred to two hundred and fifty feet in length, and without any protection from sagging save from the friction brake. The evidence shows that there was nothing connected with the rope to hold it from swinging or sagging at any point between the engine and the point of anchorage, where it passed through the pulley. There is evidence to show that when the rope was taut it would not only be from eight to ten feet above the head of the intestate, but also it would not approach nearer to him than from five to eight feet, but when it was slackened it was liable to sweep across the ledge or face of the rock where the intestate was at work. It is in evidence that in a quarry worked close by this one by similar machinery, this drag rope was held by hangers. It is also in evidence that the derrick by which the hoisting was done had stood on this ledge of rock for a long time previously, and that it had been removed about a week before the accident in order to allow the workmen to excavate the ledge. There is evidence tending to show that the foreman of the defendant had been warned, just before or about the time he set the intestate to work there, that the spot was a dangerous one to work in because of the liability to danger by reason of the sagging of this rope, and that in the face of this warning the intestate was placed there to work without this alleged defect being remedied. There is a question under the evidence whether the intestate knew of this danger or whether it could have been obvious to him. Previous to this time he had been at work upon another portion of the quarry where there existed no such danger as this, and it is questionable under the evidence whether before he was set at work at the place of the accident, at the time or afterwards and before the accident, he could have observed or could have known at all of the danger to be encountered there. There is evidence that another workman had warned the foreman of the danger and refused to do the work, which was to drill holes in the rock of the ledge for blasting, and that the foreman said there was no danger, and that the rope

would not come near them. The foreman then called the intestate and set him to work at this place, the doing of which in holding the drill or striking the same rendered it exceedingly doubtful whether the deceased could observe anything whatever but the drill he was using or striking.

The facts in connection with the conduct of the foreman are only referred to to show that the place at which the intestate had just been set at work was a very dangerous one. This was not so by reason of any of the tools with which he was working and which were within his control or in the use of which he had any choice, but because of the defective and unsafe machinery and appliances in there, of the danger of which he had no notice, knowledge or warning. Whilst he had been working in this quarry for some time, it was in another part thereof and at some distance away from this point, and there is no evidence, as I understand it, which shows that he had any knowledge, when he was set at work at this point, of the defect in the machinery or rope, or ever had the opportunity to discover such defects. Whether the danger was obvious to him does not appear from the evidence on the part of the plaintiff in this case. The danger did not arise from any direction of the foreman in the use of any tools or appliances with which the intestate was doing his work, but from the condition of the rope used in the general operation of the quarry.

It is not possible to cite the evidence in detail; there is some confusion in it and some contrariety about it, but the facts are generally as stated. Some exceptions were taken by the plaintiff in error upon the rulings of the trial judge in rejecting evidence, but they have not been considered, for the facts above stated appear from the evidence to which no objection was made or exception taken.

The declaration claims liability upon the averment that the defendant did not exercise reasonable care to furnish suitable and safe machinery and appliances in respect to said work, and that from the want of such reasonable care this rope was left and remained unguarded and unprotected and loosely swinging and vibrating in a manner dangerous to the safety of the intestate and rendering the place unsafe for the deceased, and thus the accident and his death occurred; and that whilst the intestate was without any negligence on his part, yet the defendant did not take or use due or reasonable precautions to

have or keep the place in which he was set at work reasonably safe or free from unnecessary danger or risk to him.

It can hardly be controverted that upon the facts and circumstances of this case, placing upon them the most favorable interpretation in behalf of the defendant, that a debatable question arose whether the accident did not happen because of the want of protectors and hangers which the exercise of reasonable care would have supplied and maintained. The rule of law in this State, which cannot now be disturbed, is that the master's duty to his servant requires of the former the exercise of reasonable care and skill in furnishing safe machinery for carrying on the business for which he employs the servant, and in keeping such machinery and appliances in repair, including the duty of making inspections and tests at proper intervals and, besides, the master is responsible for the negligence of any agent whom he may select to perform this duty for him, if the agent fails to exercise reasonable care and skill in its performance. *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten*, 28 Vroom, 400, 402, 16 Am. Neg. Cas. 673, *ante*.

Applying this principle to the evidence, the court could not determine that the evidence was clear that the master's duty in this respect had been performed and that no other reasonable and legitimate conclusion could be reached. Whilst the burden, in the proof, of negligence in this respect is upon the plaintiff, yet if the question, as presented by the evidence, is one about which a difference of opinion might reasonably be entertained, the question must be submitted to the jury.

Whether the defendant was guilty of negligence in not exercising reasonable care in supplying reasonably safe machinery and appliances, and in keeping them in a safe condition, was a question for the jury, depending upon the facts of the case. *Van Steenburg v. Thornton*, 29 Vroom, 160, 16 Am. Neg. Cas. 681, *ante*; *Essex County Electric Co. v. Kelly*, 28 Vroom, 100, 16 Am. Neg. Cas. 700, *ante*.

This was the character of care required of the defendant company, and it could not absolve itself from responsibility by entrusting that care to an agent or a fellow-servant of the defendant, who failed in its exercise. *Ib.* In looking at the proof in this case on the part of the plaintiff, there appears, to my mind, affirmative proof of the negligence of the defendant in this respect. The circumstances are such, as produced on the part of the plaintiff, to fairly lead to this conclusion.

The further ground of nonsuit contended for is that the intestate took upon himself all the risks of dangers incident to the employment which were obvious, or could have been perceived by him in the exercise of his senses and the use of ordinary care and circumspection, and that these were the only risks to which he was subjected.

The degree of care required by law of the defendant, as applied to the facts of the case, in this respect leaves the intestate only responsible for the risks obvious to him, or which he could have discovered by the exercise of ordinary care. In view of the principle that the intestate had the right to assume that his employer had exercised reasonable care in furnishing proper appliances and in keeping them safe, the facts are such that whether the dangers were obvious to him or whether he could have perceived the dangers by ordinary observation, became questions for the jury and not for the court to solve. The facts, as presented in the evidence, were the subjects of two classes of conclusions or inferences, both perhaps, to an extent, reasonable, and it was within the province of the jury to determine which to adopt.

Again; it is contended that the accident occurred through the negligence of the engineer in the careless manipulation of the brake. The evidence does not show in this case what the action of the engineer was which can be characterized as negligent. There is some evidence directed to the proof that the accident might have been prevented if the engineer had properly applied the brake and caused a friction, which would have prevented the rope from running off the drum so rapidly and thus obviated the sagging. But what the conduct of the engineer on this occasion was does not appear in the evidence for the plaintiff. Whether the engineer failed to slack up on this rope, so that the carriage in which the stone was hoisted could have been drawn back without the sagging of the rope, does not appear. An argument is made that the accident must have happened in this way. But there are clear indications in the evidence that this rope, of the length of two hundred and fifty feet, would be liable to swing from side to side or sag unless it had protectors or hangers attached thereto. Now, conceding that the engineer was a fellow-servant of the deceased, the question arises upon the evidence whether the accident was due to his negligence or whether it was due to the defects in

the rope itself and the machinery which the engineer was operating. There is, as has been said, evidence tending to show that however careful the engineer might have been in operating his engine and the drum, yet it might not have prevented the sagging of the rope. These are questions which manifestly should have been submitted to the jury. The negligence of a co-servant which would excuse the liability of the master, should clearly appear in the evidence produced on the part of the plaintiff, in order to sustain a motion to nonsuit. The most which could be said in favor of the defendant in error in this matter would be that there existed a substantial dispute whether the accident was caused by the negligence of the engineer in charge of the machinery, and the state of the case required, upon this question, that it should have been submitted to the jury.

Upon this subject it is only necessary to state that, by all the authorities in this State, it is held that when the evidence on any given subject in this class of cases is open to fair debate, and leaves the mind in a state of some doubt upon the question, the trial judge is not justified in taking the question from the jury.

Wherever two inferences can be drawn from the evidence upon questions of negligence, a case is presented which calls for the opinion of a jury. *Bahr v. Lombard, Ayres & Co.*, 24 Vroom, 233, 16 Am. Neg. Cas. 689, *ante*; *Del., L. & W. R. R. Co. v. Shelton*, 26 Vroom, 342, 12 Am. Neg. Cas. 274*n*.

The judgment of nonsuit must be reversed and a *venire de novo* awarded.

FOR AFFIRMANCE: NONE. FOR REVERSAL: THE CHANCELLOR, CHIEF JUSTICE, DEPUE, DIXON, GARRISON, GUMMERE, LIPPINCOTT, LUDLOW, MAGIE, VAN SYCKLE, BARKALOW, BOGERT, DAYTON, HENDRICKSON, NIXON, JJ. (15).

Employees injured — New Mexico cases.

Freight conductor killed — Collision — Fellow-servant.

LUTZ v. ATLANTIC & PACIFIC R. R. Co., 6 New Mexico, 496 (August, 1892), was an action for the alleged negligent killing of a freight conductor, caused by train running against the rear of the deceased's train breaking the box car and striking the deceased. Negligence alleged was failure to furnish proper car for use of the deceased. There was a judgment for defendant in the Second Judicial District Court, Bernalillo county, which, on appeal,

was *affirmed*. It was held that the negligence of fellow-servants operating the train which ran into deceased's train was the proximate cause of the injury. Opinion by SEEDS, J. The court discussed the New Mexico statute relating to actions for damages for deaths of persons caused by negligence of railroad companies (sections 2308-2310) and held that the same did not change the common-law rule exempting a master from liability to servant for negligence of fellow-servant.

Sectionhand injured — Collision — Work train and hand car — Fellow-servant.

ATCHISON, TOPEKA & SANTA FE R. R. Co. v. MARTIN, and MARTIN v. ATCHISON, TOPEKA & SANTA FE R. R. Co., 7 New Mexico, 158 (August, 1893), sectionhand riding on hand car injured by work train running into hand car, throwing it from track; judgment for plaintiff for \$8,000 in the Second Judicial District, Bernalillo county, was *reversed*, the fellow-servant rule being applied. The plaintiff, the foreman of the sectionmen, the conductor and the engineer of the work train were fellow-servants.

Foreman of mine injured — Defective machinery — Knowledge of defect — Assumption of risk.

IN ALEXANDER v. TENNESSEE & LOS CARRILLOS GOLD & SILVER MINING Co., 3 New Mexico, 255 (May Term, 1884), foreman in defendant's mine injured by hoisting machinery which he knew to be defective, judgment for defendant in the First Judicial Court, Santa Fe county, was *affirmed*, plaintiff having assumed the risk, having waived all claim for damages in such case where, knowing of the defect, he failed to require defendant to remedy the defect when he entered into employment. Opinion by BELL, J.

Property damaged — Powder explosion — Consignor and consignee — Respondeat superior not applicable.

ABRAHAMS v. THE CALIFORNIA POWDER WORKS, 5 New Mexico, 479 (February, 1890), was an action of trespass on the case against the California Powder Works and also the Safety Nitro-Powder Company, to recover damages for injuries to a brick hotel building, from an explosion of powder alleged to be stored in a powder house by the defendants. Verdict of \$300 was obtained against the California Powder Works in the Third Judicial District Court, Grant county, but by direction of the trial court a verdict of not guilty was rendered for the Safety Nitro-Powder Company. Defendant appealed. *Judgment reversed*. Opinion by LEE, J. The nature of the case may be seen by the ruling as stated in the syllabus to the official report: "Where gunpowder is consigned to be sold on commission, the relation between consignor and consignee is not that of master and servant, but simply of consignor and factor or consignee for the purpose of selling the goods; and where such factor or consignee has the exclusive management and control of the storage of the goods as such, of which the consignor has no knowledge, and with which he has nothing to do, the doctrine of *respondeat superior* does not apply; and the consignor is not liable, in an action on the case, for damages resulting from an explosion of the gunpowder so consigned and stored."

KEEGAN v. WESTERN R. R. CO.*Court of Appeals, New York, March Term, 1853.*

[Reported in 8 N. Y. 175.]

FIREMAN INJURED BY EXPLOSION OF LOCOMOTIVE BOILER — NOTICE OF DEFECT — LIABILITY OF MASTER — FELLOW-SERVANT RULE — REVIEW — PRACTICE. — A railroad company which continues in use a defective and dangerous locomotive engine, after notice of its dangerous condition, is liable to one of its servants engaged in running such engine for an injury sustained by him (without negligence on his part), in consequence of such defects.

Negligence on the part of the servant will not be presumed, where the fact of such negligence is not found by the jury or referee before whom the cause was tried.

The cases which hold that a principal is not liable to one agent or servant for an injury sustained by him in consequence of the negligence of another agent or servant of the same principal, while engaged in the same general business, are only applicable when the injury complained of happened without any actual fault or misconduct of the principal, either in the act which caused the injury, or in the selection and employment of the agent by whose fault it happened.

When a case comes before this court on appeal from a judgment rendered on the report of a referee, where there are no exceptions, and no distinct question of law appears to have been presented to and passed upon by the referee, the only question for review is, whether the facts found by him are sufficient to sustain the judgment.

[So held in an action for damages for injuries sustained by a fireman who was scalded by the bursting of a boiler of a locomotive engine.]

ACTION on the case commenced in the Supreme Court to recover damages for an injury sustained by the plaintiff by the bursting of a boiler of a locomotive engine upon which he was engaged as a fireman on the defendants' road (1).

It was alleged in the first count of the declaration that the defendants, before and at the time of the committing of the

1. See also the following cases arising out of locomotive explosions:

In **KIRKPATRICK v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.**, 79 N. Y. 240 (1879), plaintiff's intestate, a fireman, killed by explosion of defendant's locomotive, judgment for plaintiff for \$1,000 was *affirmed*.

In **MURPHY v. BOSTON & ALBANY**

R. R. Co., 88 N. Y. 146 (1882), mechanic in defendant's repair shop, engaged in setting safety valve on one of defendant's locomotives, under direction of master mechanic, killed by explosion of the locomotive, caused by failure of a co-employee to detect the defect, judgment of nonsuit was *affirmed*, the fellow-servant rule being

grievances thereafter mentioned, were the owners of a certain railroad, and of a carriage commonly called a locomotive, moved and propelled by steam and by them used and employed in carrying and conveying passengers and goods upon and over their said road, from Greenbush, in the county of Rensselaer, to Boston, in the State of Massachusetts, and intermediate places; that the plaintiff, on December 1, 1845, at Greenbush aforesaid, at the time of the committing of the said grievances, was in the employment of the defendants, as fireman upon said locomotive so moved and propelled by steam as aforesaid; and it then and there became and was the duty of the defendants to provide a good, safe, and secure locomotive, with good, safe, and secure machinery and apparatus to move and propel the same by means of steam as aforesaid. Yet the defendants, not regarding their duty, conducted themselves so carelessly, negligently and unskillfully in this behalf that by and through the carelessness, negligence, unskillfulness and default of the defendants and their servants, in providing, using and suffering to be used an unsafe, defective and insecure locomotive and for want of due care and attention to their duty in that behalf, on the day and at the place aforesaid, and whilst the said locomotive was in the use and service of the defendants upon their said road, and whilst the plaintiff was on the same, in the capacity aforesaid, for the defendants, the boiler connected with the engine of the said locomotive, by reason of unsafeness, defectiveness, and insecurity thereof, exploded, whereby large quantities of steam and water escaped therefrom and fell upon the plaintiff, by which he was greatly injured, etc.

There were three other counts, not varying materially from the first, except in the statements of the damages. The defendants pleaded the general issue.

The case was tried in 1848 before Cornelius L. Tracy, referee, who reported the testimony at length, together with the following statement of the facts found by him:

applied. *Affirming* 24 Hun, 142, which *affirmed* 8 Abb. N. C. 41, 59 How. Pr. 197.

In *DAVIS v. N. Y., LAKE ERIE & WESTERN R. R. Co.*, 110 N. Y. 646 (1888), motion to amend complaint, which was granted at General Term, Supreme Court, was dismissed. Plain-

tiff was an engineer in defendant's employ and was injured by an explosion of gas in firebox of locomotive; defective engine alleged; motion to amend by inserting allegation that coal furnished was unfit for use in locomotive.

" 1. That in the month of December, 1845, and for about five months previous pretty much all the time, the plaintiff was in the employment of the defendants as fireman on one of the locomotives used by them; and that during that month the boiler of said locomotive exploded, causing the injuries to the plaintiff complained of.

" 2. That the boiler of this locomotive was defective and dangerous; and that its condition in this respect was known to the defendants and to the persons in defendants' service, whose duty it was to select the engines which were to be used on the defendants' road, for some weeks before the explosion; and that the defendants had been frequently notified thereof.

" 3. That during the two months preceding the explosion, the engineer of this locomotive reported to the defendants, on five or six different occasions, the defective condition of the boiler thereof; and that these reports were entered on the books of the defendants kept for that purpose.

" 4. That the injury to the plaintiff resulted from the improper conduct of the defendants, which was known to be thus defective."

The damages were assessed by the referee at \$3,500. Upon this report the Supreme Court in the Third district rendered judgment in favor of the plaintiff for the damages assessed, and costs, and the defendants prosecuted this appeal.

Judgment affirmed. Affirming 6 Barb. 231.

M. T. REYNOLDS, for appellants (Railroad Company).

N. HILL, JR., for respondent.

Ruggles, Ch. J. — This case comes before the court on the report of a referee in the nature of a special verdict, and the question is whether, upon the facts found, the defendants are liable.

The plaintiff was injured by the explosion of the boiler of a locomotive engine on which he was employed by the defendants as a fireman. The boiler was defective and dangerous, and its condition in this respect was, and had for some time been known to the defendants by the reports of the engineer made on five or six different occasions, which were entered on the books of the defendants kept for that purpose, and the injury to the plaintiff resulted from the improper conduct of the defendants in using the engine in question thus known to be defective.

On this statement of facts no doubt can be entertained of the liability of the defendants.

The cases referred to, in which it has been held that a principal is not liable to one agent or servant for an injury sustained by him in consequence of the misfeasance or negligence of another agent or servant of the same principal, while engaged in the same general business, are applicable only where the injury complained of happened without any actual fault or misconduct of the principal, either in the act which caused the injury, or in the selection and employment of the agent by whose fault it did happen. Whenever the injury results from the actual negligence or misfeasance of the principal, he is liable as well in the case of one of his servants as in any other. But where the injury results from the actual fault of a competent and careful agent (as may sometimes happen), the fault will not be imputed to the principal when the injury falls upon another servant, as it will where the injury falls on a third person, as for instance on a passenger on a railroad. In the case of a passenger the actual fault of the agent is imputed to the principal on grounds of public policy; in the case of a servant it is not. The reasons for this distinction may be found in the cases cited by the appellants' counsel. But it is unnecessary to state them here, because the injury in the present case is found to have resulted directly from the negligence or misconduct of the defendants themselves, in continuing to use an engine having a defective and dangerous boiler, after notice of its dangerous condition.

It was made a point on the argument that the plaintiff knew the condition of the boiler, and therefore, took the risk upon himself. But this point is not sustained in point of fact. The referee does not find that the plaintiff knew it to be in a dangerous condition, and this fact, if material, cannot be presumed by the court.

Judgment affirmed.

WARNER, ADM'X V. ERIE RAILWAY COMPANY.

Court of Appeals, New York, 1868.

[Reported in 39 N. Y. 468.]

FALL OF RAILROAD BRIDGE — EMPLOYEE ON TRAIN KILLED — DECAY IN TIMBERS — LATENT DEFECT — RAILROAD COMPANY NOT LIABLE. — In an action to recover damages for the death of plaintiff's intestate, a baggageman in defendant's employ, who while performing his duties on a train was killed by the bridge over which the train was passing collapsing, the fall being occasioned from decay in its timbers, it appeared that the bridge was properly constructed and was originally of sufficient strength for the purposes for which it was intended. The trial court held that there was only one question to be submitted to the jury, namely, whether the board of directors themselves, as representing the defendant, and as distinguished from the employees, were negligent in not discovering the unsafe condition of the bridge, and refused an instruction requested by defendant that, in order to recover, plaintiff must show that the decay in the bridge, if that was the cause of the accident, was known, by notice or otherwise, to the president and directors of the railroad. *Held*, that on the facts presented, defendant was not guilty of negligence, and judgment for plaintiff was *reversed* (1).

1. Among other Railroad Bridge Accidents see the following cases:

VOSBURGH v. LAKE SHORE & MICHIGAN SOUTHERN R'Y Co., 94 N. Y. 374 (1884); brakeman in defendant's employ injured by fall of railroad bridge; defendant liable; judgment on verdict for plaintiff for \$5,000 *affirmed*. It was held that "Whether the bridge was in truth defective in particulars, not latent or undiscoverable, but open and obvious to the eye of a skilled and faithful inspector, and whether the inspector did make such an examination as reasonable care required and the company should have exacted in the exercise of such care under the existing circumstances, and in view of such obvious and apparent defects, were questions of fact in the case, and properly submitted to the jury." Opinion by FINCH, J. *Affirming* 14 Weekly Dig. 514.

WALLACE v. CENTRAL VERMONT R.

Co., 138 N. Y. 302 (1893); brakeman on top of freight train struck by low bridge, a telltale being out of order; judgment of nonsuit *reversed*, as the fact of the telltale being out of order was to be taken into consideration on the question of contributory negligence.

WILLIAMS v. DELAWARE, LACKAWANNA & WESTERN R. R. Co., 116 N. Y. 628 (1889); brakeman on top of freight car struck by bridge over track; failure of plaintiff to exercise ordinary care; knowledge of danger; assumption of risk; nonsuit should have been granted; judgment for plaintiff for \$4,900 *reversed*. *Reversing* 39 Hun, 430. Opinion by HAIGHT, J. In regard to plaintiff's knowledge of the danger the court said that it was quite evident "that he had on numerous occasions passed under this bridge whilst on top of the train, and if so, he must have known, had he

DUTY OF MASTER — CONSTRUCTION OF BRIDGE — SELECTION OF AGENTS — INSPECTION — NOTICE OF DEFECT. — In such action the principle applied was that where the master (the railroad company) has erected a structure to be used in its ordinary and accustomed business, without fault as to plan, mode of construction and character of materials, so that it was originally sufficient for all the purposes for which it is used, employs skilful and trustworthy agents to supervise, examine and test it, and that duty is performed with frequency, and with such tests as custom and experience have sanctioned and prescribed; he has exercised such care and skill as the law exacts of an employer in reference to his employee, and that no liability can attach to a party for a defect in such structure by which an employee has sustained an injury, unless there has been actual notice or knowledge that defects existed which, unless properly remedied, would be liable to produce serious or fatal consequences.

APPEAL from judgment of Supreme Court affirming a judgment on verdict for plaintiff for \$5,000. See 49 Barb. 558. The case is stated in the opinion. *Judgment reversed.*

Bacon, J. — In approaching the consideration of this case, which, in the precise aspect it assumes, may be deemed in the

exercised ordinary care and observation, that it was not of sufficient height to permit a person to pass under it whilst standing upon the top of a box car of the company. In this regard we are unable to distinguish the case from that of *Gibson v. Erie R'y Co.*, 63 N. Y. 449. In that case the plaintiff was struck by the projecting roof of the depot building. He was familiar with the locality and knew of the roof. He had, however, never measured its exact height from the platform or its distance from the top of the cars. His information upon the subject was derived from general observation. In this case the bridge crossing over the railroad was an open, visible, permanent structure, which the plaintiff daily observed whilst passing under it in the employ of the defendant. True, he had never measured its height from the rails, but having passed through under the bridge whilst on top of the cars he must have known that it was not of sufficient height to permit him to

stand while so passing. The rule is, that a servant who enters upon employment from its nature hazardous, assumes the usual risks and perils of the service, and of the open, visible structures known to him, or of which he must have known had he exercised ordinary care and observation." * * *

The facts in the case of *GIBSON, ADM'X, v. ERIE R'Y Co.*, 63 N. Y. 449 (1875), referred to in the Williams case (preceding paragraph) were as follows: The plaintiff brought action for alleged negligent killing of her intestate. "The deceased, at the time of the accident, was a freight conductor in defendant's employ, and was in charge of a freight train going east from Buffalo. Arriving at Attica, the train stopped at the west end of the station, and Parker [the intestate] left the train and went into the depot. The train started up. Parker came out, caught hold of a passing car, and began to climb up to the top by the ladder at the side. He was struck by

courts of this State, a pioneer case, it is important to distinguish the principles which are to decide it from those which have been held in cognate cases, and especially to ascertain the precise ground on which the charge and rulings of the judge upon the trial proceeded, and by which we are to assume the jury were guided in rendering their verdict.

In the first place, then, it is to be remarked, that the defendant in this action is not responsible, and is not to be made liable for injuries suffered by one of its employees, solely through the carelessness or negligence of another employee of the defendant, engaged in the same general business. The liability to injury from such a source is one which each employee takes upon himself when engaging with others in the service of a common master. It is a hazard incident to the nature of the engagement into which he enters, and in respect to which he becomes, so to speak, his own insurer.

In the second place, the cases which establish this general rule, maintain also the further qualification or extension of it,

the projecting roof of the depot and killed. The track was ten feet ten inches from the side of the building. The roof projected beyond the building eight feet two inches, and was twelve feet four inches above the track. The car was nine feet six inches high. The roof had been in the condition it then was for twenty years. The deceased had been upon the road as brakeman and conductor for seven years, passing over the road once or twice a day, and had lived at Attica eighteen or twenty years. It was proved that the usual place for the conductor to ride between stations was in the caboose. There was no evidence that it was any part of his duty as conductor to get on top of the cars, or that his doing so at the time of the accident had any necessary connection with his duties. At the close of plaintiff's evidence, and at the close of all the evidence, defendant's counsel moved for a nonsuit upon the ground that no actionable negligence on the part of the defend-

ant had been shown, and that the evidence showed negligence on the part of the deceased. The motion was denied, and defendant's counsel duly excepted." The Court of Appeals *reversed* the judgment for \$1,400 for plaintiff on the ground of contributory negligence of the deceased. Opinion by ALLEN, J. *Reversing* 5 Hun, 3.

HUNTER *v.* NEW YORK, ONTARIO & WESTERN R. R. Co., 116 N. Y. 615 (1889); brakeman on top of car struck by arch of tunnel as train was entering same; no evidence as to plaintiff's height; facts held insufficient to establish case and error to deny defendant's motion to dismiss; judgment on verdict of \$6,000 for plaintiff was *reversed*. Opinion by BROWN, J. "Court may take judicial notice of the size and height of the human body." Rule applied in this case to show that it would be impossible for plaintiff, on the testimony, to strike his head against the arch.

that the liability is not enlarged by the fact that an injured employee is of an inferior grade of employment to that of the party by whose carelessness the injury is inflicted and the damage caused, provided the services of each in his particular sphere and department are directed to the accomplishment of the same general end. These principles have been often under discussion, and are settled by an array of authorities, which it is hardly necessary to cite in detail. The following, among many others, may be deemed sufficient for the purpose: *Priestley v. Fowler*, 3 M. & W. 1; *Coon v. Utica & Syr. R. Co.*, 5 N. Y. 492; *Albro v. Agawam Canal Co.*, 6 Cush. 75, 15 Am. Neg. Cas. 655ⁿ (2).

The only ground, then, which the law recognizes, of liability on the part of the defendant, is that which arises from personal negligence, or such want of care and prudence in the manage-

2. In *PRIESTLEY v. FOWLER*, 3 Mees. & W. 1 (Exch., 1837), a declaration in case stated that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant in a certain van of the defendant then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding, and being carried and conveyed by the said van, with the said goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair, and should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless that the defendant did not use proper care that the van should not be overloaded, or that the plaintiff should be safely and securely carried; in consequence of the neglect of which duties, the van gave way and broke down, and the plaintiff was thrown to the ground, and his thigh fractured. *Held*, on mo-

tion in arrest of judgment after verdict for the plaintiff, first, that it was sufficiently to be collected from the declaration that the defendant directed the plaintiff to go in the van; but, secondly, that, even in that case, the action was not maintainable.

In *PRIESTLEY v. FOWLER*, *supra*, LORD ABINGER, C. B., in delivering the opinion, said: "It is admitted that there is no precedent for the present action by a servant against a master;" and then proceeded to discuss the extent to which the principle of liability of a master to his servant would go, where it applied to the present case. "The mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself."

In *COON v. SYRACUSE & UTICA R. R. Co.*, 5 N. Y. 492 (1851), where employee on hand car was injured by work train running into hand car, caused by negligence of fellow-servant, the railroad company was not liable; and nonsuit was *affirmed*. *Affirming* 6 Barb. 231.

ment of its affairs, or the selection of its agents or appliances, the omission of which occasioned the injury, and which, if they had been exercised, would have averted it. We are not now dealing, it must be remembered, with the liability which a railroad corporation assumes in respect to the safety and security of passengers transported on their road for a compensation, and in regard to whom they become absolute insurers against all defects which the highest degree of vigilance would detect or provide against. The liability here, if there is any, is measured by that lower standard which all the authorities recognize in the case of an employee, and which is answered if the care bestowed accords with that reasonable skill and prudence which men exercise in the transaction of their accustomed business and employments.

The ground of liability affirmed in this case, and on account of which a recovery was had, was the alleged weakness, decay, and defectiveness of a bridge of the defendant, by the falling of which the death of the intestate was occasioned. The allegations of the complaint are that the defendant did not use ordinary or reasonable care and diligence in providing a safe and suitable bridge over the Conhocton river, at the place in question; that before the breaking down of the bridge, the defendant had noticed that it was unsafe and insecure for the passage of trains thereon, and that defendant carelessly and negligently failed to cause a suitable examination to be made of said bridge for the purpose of ascertaining whether it was unsafe and insecure. It is further alleged that if any examination was made, it was made by servants and agents who were careless and incompetent, to the knowledge of the defendant, and in the selection and employment of whom the defendant had not used ordinary care and diligence. With these allegations in view as constituting in the mind of the pleader the *gravamen* of the action, let us see what the case really disclosed, and in what respect it was presented to the jury.

At the close of the plaintiff's testimony there was a motion to nonsuit, founded on the alleged absence of any proof to show negligence, or of any knowledge or notice to the defendant of the unsafe character of the bridge, and this motion was renewed at the close of the testimony. The judge, in reference to this demand, held, that there was not any evidence for the jury to consider relative to the original sufficiency of the bridge,

nor any testimony impeaching the competency of the defendant's employees. He further stated that there was only one question for the jury, and that was whether the board of directors themselves, as representing the defendant, and as distinguished from the employees, were guilty of negligence in not discovering the fact that the bridge was in an unsafe condition; that if the jury should be satisfied that the bridge was unsafe from decay, and that occasioned its fall, and the directors were guilty of negligence in not discovering the fact, the plaintiff would be entitled to recover, and that this question alone must go to the jury. To all which the defendant's counsel excepted.

At the close of the charge there was a request to instruct the jury in relation to the actual knowledge of the defendant's employees, and their omission to remedy such known defect assented to by the court, which, if the defendant's counsel had been content to stand upon, would have actually precluded a recovery in this case; but I agree with the opinion of the Supreme Court that this request and instruction was virtually waived by the counsel, and revoked by the court in the subsequent ruling, and that it may, therefore, on this appeal be laid out of the case.

The final instruction of the court, in answer to a request to charge that it was necessary to show that the decay in the bridge, if it fell from decay, was known by some notice, or otherwise, to the president and directors, was that if the board of directors, by the exercise of that care and skill that is to be expected of persons occupying the same position, could, by the exercise of reasonable diligence and skill, have ascertained or known the defects in the bridge, the failure on their part to ascertain would make the defendant liable, because it is negligence, and substantially the same as if notice had been given to the board. To this proposition the defendant's counsel excepted.

There is a little vagueness, and perhaps, inaccuracy, in the expression used as to the care and skill which was "to be expected in persons occupying the same position," which might possibly have tended to mislead or confuse the jury had not the judge in the earlier part of the charge explained that the care and diligence which the directors were required to bestow, was that reasonable care, skill and foresight over the affairs of the corporation, which reasonable and prudent men

occupying such positions ordinarily exercise under the same circumstances. With this qualification, then, I think the charge is not liable to any serious misconstruction, and presents with sufficient distinctness the proposition the judge was requested to charge, and the one he actually presented to the jury.

Let us see, now, what the case disclosed upon the concession of all parties, and upon clear and uncontroverted evidence. We start with the admission that there was no question as to the original sufficiency of the bridge, and no impeachment, whatever, of the competency of the defendant's employees. Two leading and important averments of the complaint are thus disposed of *in limine*. It is then proved by evidence not sought to be contradicted, that, by these competent agents, a frequent inspection and examination of the bridge was made, the usual and accustomed tests, long employed, and deemed ample and sufficient, were applied to the structure in its various parts, and no imperfection or decay was detected, and none was visible upon an outward and external inspection; and, on the day before it fell, a special observation was made of the bridge while a heavy train was passing over it, and no imperfection or weakness was discovered. If it be said that the test of boring the timbers was not applied, the answer may very well be that this is no more a certain test than the one which was applied; that it had but rarely been used upon the bridges on the defendant's road, or, so far as the testimony shows, upon any other; and, carried too far, becomes, itself, a source of weakness, and that while after a catastrophe has occurred it is sometimes easy and quite common to say that if something else unusual and unthought of had been done it might possibly have been averted; ordinary care and diligence, which is the acknowledged measure of the defendant's obligation, does not require the application of these unusual tests, nor the employment of the utmost possible safeguards.

There was one more element invoked to attach liability to the defendant consequent upon the fall of this bridge, and that was the length of time it had stood. It was constructed in the fall of 1855, and had remained until the time of the accident, a period of about nine and a half years. The evidence showed that bridges of similar construction and materials upon the defendant's road had stood over ten years, and were considered, and to all appearances were, sound and safe; some had stood

over fourteen years, and one over seventeen years, in the same condition. Although some of the witnesses for the plaintiff testified that they would not consider such a bridge as safe beyond the period of seven or eight years, yet, if upon adequate and repeated inspection, and the application of appropriate tests, no defect was exhibited, a mere opinion as to the length of time such a bridge might be expected to stand, would have no appreciable weight in the scale of evidence. There is really, then, no conflict of evidence as to the care and skill used in the construction and maintenance of this bridge, the inspection to which it was subjected, the adequate skill and competency of the employees engaged in that specified duty, the experience of defendant, both in the construction and duration of such structures, and the absolute want of any actual notice to defendant or any of its employees of any defect real or suspected in this bridge. And this being so, upon undisputed evidence, the conclusion, in my judgment, is inevitable, that the defendant was not guilty of the want of such care in respect to their employees as it was their duty (representing as it is conceded, the board of directors do, the corporation itself), to bestow upon its officers. If this conclusion is sound, then it seems very clear to me that it was the duty of the court to take the case from the jury, and hold that on the established facts the plaintiff could not recover, but that at all events the defendant was entitled to the instruction the counsel asked, to wit, that in order to charge the defendant, it was necessary for the plaintiff to show that the decay in the bridge, if it fell from decay, was known by some notice or otherwise to the president and directors of the road.

The true principle applicable here is, I think, that, where the defendant has erected a structure to be used in its ordinary and accustomed business, without fault as to plan, mode of construction and character of materials, so that it was originally sufficient for all the purposes for which it is used, employs skillful and trustworthy agents to supervise, examine and test it, and that duty is performed with frequency, and with such tests as custom and experience have sanctioned and prescribed, it has exercised such care and skill as the law exacts of an employer in reference to his employee, and that no liability can attach to a party for a defect in such structure by which an employee has sustained an injury, unless there has been actual

notice or knowledge that defects existed which, unless promptly remedied, would be liable to produce serious or fatal consequences.

A broader liability than this cannot be imposed without, in my opinion, breaking down and obliterating the distinction which exists between the responsibility incurred to a passenger and an employee, and the rule laid down by the court in this case would practically make the railroad company an insurer of the latter as well as of the former, and in the words of a learned judge, in a parallel case, "a latent defect in a steam boiler, a rotten plank in a ship, a flaw in an iron rail, an unknown weakness in a floor, would charge the master with all the damages to his employees in consequence thereof."

A different and more stringent rule than I have thus suggested would impose an intolerable burden upon a board of directors and, carried to its legitimate results, would require them to give their individual and personal attention not only to the construction, but to the actual existing condition of their road, with all its structures, appliances and machinery. They must supervise and constantly examine every locomotive, passenger and freight car, rail, tie, wheel, axle, and brake, and be responsible for the consequences that may arise to an employee from a latent defect, not cognizable by the senses of an experienced and skillful mechanic, nor capable of detection by the faithful application of well-known, long used, and approved tests.

The doctrine upheld by the court in this case, maintains in effect that a railroad corporation must have a board of directors, not only possessing adequate skill to determine whether its competent employees perform their duty, as between the corporation and its other employees, but if there be an omission of duty on the part of such skilful employees which the directors have themselves failed to discover, the corporation is guilty of negligence, and responsible to an injured employee for all the consequences resulting therefrom. Such a rule, I am persuaded, would not only carry their corporate liability beyond reason, but beyond the fair scope of any authority which has been invoked to maintain it.

I do not think it would be profitable to go over, in detail, the long array of authorities which have been cited by the counsel on both sides in this case, to sustain and justify their respective

positions. They have been mostly collected, and the purport of them very fully and fairly stated in the opinion prepared by Mr. Justice Miller, upon the former argument of this case. I have carefully examined them, but shall not venture to collate or comment upon them further than to remark, that, while, on the one hand, some of them contain statements and discussion of principles that may be invoked in favor of the claim to recover, put forth by the plaintiff's counsel, and sustained upon the trial of this cause, none of them go the full length required to uphold the ruling of the judge; while, on the other hand, several cases go far, as I understand them, in maintaining the doctrine I seek to apply to this case, and in one instance the decision is fully and directly in point.

Thus, in *Tarrant v. Webb*, 89 Eng. C. L. 795 (1), it is held that a master is not responsible for an injury to a servant from the negligence of a fellow-servant, provided the master uses reasonable care in the selection of the servant. Jervis, Ch. J., in this case, makes the significant remark that the master may be responsible where he is personally guilty of negligence, but certainly not where he does his best to get competent persons.

In the leading case of *Priestley v. Fowler*, 3 M. & W. 1 (2), it was held that the servant could not recover of the master for injuries resulting from the breaking down of a van, arising from defective construction, where there was no proof of knowledge on the part of the master of the defect, Lord Abinger remarking that "the mere relation of master and servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself."

In our own State, the point has never been fairly presented. In *Keegan v. Western R. Co.*, 4 Seld. 175 (3), the defendant had express and repeated notice through the reports of its own

1. In *TARRANT v. WEBB*, 18 C. B. 797, it was held that a master is not generally responsible for an injury to a servant from the negligence of a fellow-servant, but the rule is subject to this qualification, that the master uses reasonable care in the selection of the servant. It was also held that the master is not bound to warrant the competency of his servants; and in an action against him for an in-

jury done by one of his servants to another, the question for the jury is, not whether the servant is incompetent, but whether the master did not exercise due care in employing him.

2. See note of *Priestley v. Fowler*, 3 M. & W. 1, on page 737, *ante*.

3. The *Keegan* case, 4 Seld. (8 N. Y.) 175, is reported on page 730, *ante*.

servants of the defectiveness of the engine, through the explosion of which the injury to the plaintiff was occasioned. In *Ryan v. Fowler*, 24 N. Y. 410 (1), the master had the same notice of the defectiveness of the structure, through the falling of which the plaintiff suffered injury, for which she recovered. In *Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 562 (2), a recovery by an employee against the company for an injury occasioned by the conduct of another employee was set aside on the ground that the action could not be maintained unless the injury resulted from unskilfulness for which the company was responsible. In discussing the principle applicable to cases of this character, Allen, J., says: "If the injury arises from a defect or insufficiency in the machinery or implements furnished by the master, knowledge of the defect or insufficiency must be brought home to the master, or proof given that he was ignorant of the cause through his own personal negligence or want of care, in other words, it must be shown that he either knew or ought to have known the defects which caused the injury. Personal negligence is the gist of the action."

We have been cited to a number of cases in the courts of our sister States, none of which are very apposite to this precise case, excepting *Snow v. Housatonic R. Co.*, 8 Allen, 441, 15 Am. Neg. Cas. 417, which the plaintiff's counsel invokes as a clear authority in his favor, but which is susceptible of the criticism that the defect in the track, through which the injury was suffered was palpable to view, and was known to, and was grossly neglected by the track repairer, whose specific duty it was to remedy the defect; and the case of *Hard v. Vermont, etc., R. Co.*, 32 Vt. 473, which is precisely in point for the defendant, and holds this distinct proposition, that, although it is the duty of a railroad corporation to exercise all reasonable care in procuring sound machinery and faithful and competent

1. In *RYAN v. FOWLER*, 24 N. Y. 410 (1862), where girl, fourteen years old, in defendant's employ, was injured by fall of a privy in the factory, the defendant was held liable for defects which should have been known by him, his duty being to keep premises in safe condition for use by employees. Judgment for plaintiff affirmed.

2. In *WRIGHT v. N. Y. CENTRAL R. R. Co.*, 25 N. Y. 562 (1862), brakeman injured in collision, judgment for plaintiff was reversed. The *WRIGHT* case is reported as a note to the case next reported herein, and is very fully commented on in that case (the *Lanning* case).

employees, and although they are liable to their servants for the neglect of this duty, yet, after having performed it, they are not liable to a servant for injuries occasioned by the neglect of any of his co-servants engaged in the same general business, even though the negligent servant be superior in grade to the one injured.

It is said, and it may be conceded, that this case is in advance of any decision yet made, where the principle is involved, but, if so, it is, in my opinion, a sound and judicious advance. It does not exonerate the directors of a railroad corporation from liability for personal negligence, nor discharge them from the obligation to perform their duty, if notice or knowledge of defects or insufficiencies is brought home to them, and injury results to one of their servants from a failure to remedy the defect through which the injury occurs. It holds them to the highest measure of responsibility, for the proper construction of the road, its adjuncts and equipments, and the selection of competent and skilful subordinates to supervise, inspect and repair, and control and regulate its operation; but, having faithfully performed these duties, it relieves them from the extreme rigor of a rule which would practically make them insurers of the absolute safety of, and indemnities for, every injury which an employee in their service might suffer from the act or omission of his fellow-servant.

Since the argument of this case and the preparation of the foregoing opinion, my attention has been called to the case of *Wilson v. Merry*, L. R. 1 H. L. Sc. 326, decided in the English House of Lords in May, 1865, and reported in the Law Reports, Appellate series, part 3, for July, 1868 (1). It was a Scotch appeal, in a case where a verdict had been recovered against the proprietors of a coal mine, for the death of a party occasioned, as was alleged, by the defective construction of a scaffold in the mine. Without recapitulating the facts, it may be sufficient to state that the case turned upon the liability of the master for an injury to his employee, where the master did not personally superintend the work, but devolved it upon a suitable mechanic, a foreman, superior in grade to the injured employee. Opinions were given by Lord Chancellor Cairns,

1. *WILSON v. MERRY*, L. R. 1 H. L. at bar. The facts of the case will be Sc. 326, is sufficiently stated as to found reported as a note to the Lan- its rulings, in the opinion in the case ing case, the case next reported herein.

and by the ex-chancellors, Lords Cranworth and Chelmsford, all substantially concurring in the conclusion that the duty of the master was to select proper and competent persons to do the work, and furnish them with adequate materials and resources for its accomplishment, and when he had done that he had performed his whole duty. In the course of his opinion, Lord Cairns says: "The master is not, and cannot be, liable to his servant, unless there be negligence on the part of the master in that which he, the master, has contracted or undertaken with his servant to do. The master has not contracted or undertaken to execute in person the work connected with his business, but to select proper and competent persons to do so, and furnish them with adequate materials and resources for the work." He adds: "If the persons so selected are guilty of negligence, this is not the negligence of the master, and if an accident occurs to a workman to-day, in consequence of the negligence of another workman, skilful and competent, who was formerly but is no longer in the employment of the master, the master is not liable, although the two cannot, technically, be described as fellow-workmen. Negligence cannot exist, if the master does his best to supply competent persons. He cannot warrant the competency of his servants." The case is very instructive, as containing the latest utterance of the highest court in England, and the opinions of all the learned lords maintain, with great distinctness and force, the principle of liability which I have endeavored, as well as I was able, to illustrate and enforce in the foregoing opinion, and which should, I think, govern in the disposal of this case.

The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except HUNT, Ch. J., and MILLER, J.

Judgment reversed.

LANING v. NEW YORK CENTRAL RAILROAD COMPANY.

Court of Appeals, New York, May, 1872.

[Reported in 49 N. Y. 521.]

FALL OF SCAFFOLD—DEFECTIVE CONSTRUCTION—EMPLOYEE INJURED — INCOMPETENT EMPLOYEE — INTEMPERATE HABITS—NOTICE TO AGENT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—MASTER LIABLE.—In an action to recover damages for injuries sustained by plaintiff, an employee of defendant, caused by the fall of a scaffold upon which plaintiff and other employees were standing, while performing their duties, the fall of the scaffold being occasioned by a defect in its construction, it appeared that defendant had employed a competent agent who employed a competent foreman for the work, but the latter had subsequently acquired intemperate habits and at or near the time of the accident was drunk, and while in this condition he directed two incompetent and unskilful men to erect the scaffold which by reason of such incompetency was defectively constructed. The habits of the foreman were known to plaintiff and the agent, and the latter had threatened to discharge the foreman unless he reformed. *Held*, that knowledge of the agent of the foreman's intemperate habits was knowledge of the defendant, and the latter was liable for the negligence of the former in retaining such intemperate and incompetent employee after having knowledge thereof. *Held, also*, that whether plaintiff was negligent in remaining in the employment, after knowledge of the incompetency of the foreman, was a question for the jury (1).

DUTY OF MASTER TO SERVANT — SAFE MACHINERY — COMPETENT SERVANTS — AGENT.—The duty of the master to the servant, or his implied contract with the servant, is to the effect that the servant shall be under no risks from the imperfect or inadequate machinery or other material means and appliances, or from unskilful or incompetent fellow-servants of any grade, and this duty or contract is to be affirmatively and positively fulfilled and performed. If some general agent, clothed with the power, and charged with the duty of the master, fails to properly perform that duty, the master is liable for such neglect of the agent. It is not enough to satisfy the duty of the master that he selects one, or more than one, general agent of approved skill and fitness. If the general agent carelessly places

1. BRICKNER, ADM'X, v. NEW YORK CENTRAL R. R. Co., 49 N. Y. 672 (May, 1872), was an action similar to and was decided upon the authority of *Laning v. N. Y. Central R. Co.*, 49 N. Y. 521 (the case at bar), and judgment was *affirmed*. FOLGER, J., read for affirmance; all concurred, except ALLEN, J., dissenting, and RAPALLO, J., not voting. SAMUEL HAND appeared for appellant (N. Y. Central R. Co.); ISAAC LAWSON, for respondent. See case reported below, 2 Lans. 506.

by the side of a servant another unskilled and incompetent, the master's duty to the servant has not been performed.

INCOMPETENCY OF SERVANT — NOTICE — LIABILITY OF MASTER. — A master is liable to his servant for an injury caused by the incompetency or want of skill of a fellow-servant, whether it existed when the fellow-servant was hired, or has come upon him since the hiring, the fellow-servant having been in the first instance hired, or afterward continued in service, with notice or knowledge, or the means of knowledge of this lack. The duty of the master to his servant is to use reasonable care to provide and employ none but competent and skilful servants, and to discharge from his service, on notice thereof, any who fail to continue as such.

DEFECTIVE MACHINERY — INCOMPETENT SERVANT — KNOWLEDGE OF SERVANT — CONTINUANCE IN SERVICE — PROMISE TO REMEDY DEFECT — CONTRIBUTORY NEGLIGENCE. — Where a servant knows as fully as the master of the defective condition of machinery or appliances, or is aware of the incompetency of a fellow-servant, and he continues in the service, without promise from the master to remedy the defect, this may constitute contributory negligence for the servant to continue in service, but if the master induces the servant to remain in his service, after notice of defect or incompetency, by a promise to remedy the defect, the question of contributory negligence is for the jury.

APPEAL by defendant from order of the General Term of the Supreme Court in the Third Judicial department, affirming an order of Special Term denying a motion for new trial and refusing to set aside verdict for \$10,000 in favor of plaintiff. The facts appear in the opinion. *Judgment affirmed.*

MATTHEW HALE and SAMUEL HAND, for appellant.

A. J. PARKER, for respondent.

Folger, J. — Viewing the case as the jury would have been warranted in doing, it comes in the main to this.

The plaintiff with others, he and they being fellow-servants of the defendant, were engaged in the course of their ordinary service, in the performance of a work for the defendant, to do which it was necessary that there should be put up a scaffold for them to stand upon.

One Westman, the foreman of these men, directed one Churchill and another to put up the scaffold. There is some dispute in the testimony as to who the other was, but the jury might properly have found that one Foreman was the person, who, by the direction of Westman, helped Churchill. Churchill had been in the employ of the defendant for some months, engaged in different kinds of subordinate service. It is not

shown for what particular service, if for any particular service, he was hired by Coleby, who was the agent of the defendant to hire these men. Nor was it shown that he was not skilful and competent to do that for which he was hired, and in fact to do all that was put upon him to do before the task of building this scaffold. Foreman is not shown to have been hired by the defendant. Coleby testified that he did not know him, and that his name was not upon the pay-rolls of the defendant. The plaintiff testified that the day of the accident was the first day on which he had seen him there. Churchill could not say that Foreman had worked there after the accident; but there was testimony that he was at work on that day, with Churchill, in putting up this scaffold. The jury could rightly find, or infer from what was testified, that Foreman was in fact at work on that day in the defendant's business, and that, by the direction of Westman, Foreman and Churchill put up this scaffold. See *Althorf v. Wolfe*, 22 N. Y. 355 (1). The scaffold fell with some of the men upon it, and the plaintiff was seriously injured by the fall, he being among those upon it by direction of Westman.

The scaffold fell from a defect in its construction; this defect was mainly from building it with timbers too small in size, and too poor in quality, being cross-grained and hence weak.

There was no lack of good and proper material, which could have been as readily got at. Indeed, there was an abundant supply of proper material; but the insufficient timbers which were used were taken from the mass by Churchill and Foreman, either from a lack of skill to select better, or from a lack of faculty to perceive the necessity of using stronger, or from a lack of strength to handle and lift larger and heavier timbers, or from these three causes combined. It was, at all events, from the unskilfulness and incompetency of Churchill and Foreman

1. *ALTHORF v. WOLFE*, 22 N. Y. 355 (1860), was an action for damages for death of plaintiff's intestate who, while passing along the sidewalk in front of defendant's house, was killed by being struck by snow and ice which was being shoveled off the roof of defendant's house. Defendant had ordered servant to clear the

roof and the latter had asked friend to help him. It did not appear whether the falling snow and ice which killed plaintiff's intestate was shoveled by defendant's servant or the friend assisting the latter. *Held*, defendant was liable for act of servant. Judgment for plaintiff for \$3,500 affirmed. *Affirming* 2 Hilt. 344.

for this particular work, that the scaffold was so unsafely built that it fell.

The plaintiff knew that the scaffold was built by some of those there engaged at work. He did not know who were the individuals that built it, nor the manner in which it was built, not having seen it while they were building it, nor until, by the direction of the foreman, he stepped upon it.

Westman, the foreman, was a competent man in skill and natural judgment. It does not appear that, at the time he was hired for the defendant, he had acquired any habit which detracted from his competency. At the time of this work, however, he was not temperate in strong drink. The testimony tended to show that he was drunk on the day, and near the time of the accident. The testimony does not show directly, though it is an inference which a jury might make fairly that his condition in that respect was a cause of the injury to the plaintiff; for they might well infer that, if his faculties had been without confusion from strong drink, he would not have put these lads, deficient in judgment and strength, to a work requiring discretion and power, or would have inspected the result of their work before using it.

The plaintiff well knew the habits of Westman in this particular and knew that he was drunk on this day, not only at the time of the accident, but before, and that he had been drunk on days before that. The testimony tended to show that Coleby had knowledge of Westman's habits. The jury might so have found.

Such being the fact, if the plaintiff has ground of action against the defendant for this injury and the resultant damage, it must be found in the want of skill, and in the incompetency of Churchill and Foreman and in the use of them by Westman for the work of erecting the scaffold. Indeed, it may be stated yet more narrowly, and it must be found alone, in the use of these two young men for this work by Westman. For it is not shown that Churchill was hired for this kind of work, or for work of this importance to others. The employment of him was not like that of one to act as an engineer for the peculiar duty of managing an engine, or as a switchman to attend to a switch, but it was general. The proof shows that the labor he performed was miscellaneous, not altogether that of a mechanic; and the particular work to which he went was not

because he was hired for that specifically, but because he was set at that by his immediate superior. From the time of his hiring until this occurrence, it does not appear that he was incompetent to do that for which he was employed and at which he was put. It does not appear that Foreman was hired at all by the defendant, or by Coleby, their agent; to hire men. Coleby, who hired the men, and had hired Churchill, neither hired him for this purpose, nor did he set him at this work; on the contrary, Coleby testified that this scaffold was built without his knowledge, and that he had instructed Westman, the plaintiff, and the others who were to risk themselves upon the scaffold, to build the first two, and showed them where they should get the lumber for the purpose, and in this he is not contradicted. It is not possible then to contend that the defendant was negligent in the fact of taking generally into its employment Churchill, or suffering Foreman to labor without especial hiring, though for some kinds of services they were without skill and were incompetent, so long as they should not be put at that which they were not competent and skilful to do. The negligence was in putting them to the service of erecting this scaffold. It begins there and dates no farther back. And it is upon the basis of that negligence that the defendant must be found liable, if liable at all. And, conceding that there was negligence in directing these lads to the work of putting up this scaffold, that negligence cannot be traced farther back than to Westman. For he, thus put in charge of this gang of men, to supervise and direct them in this work, was supplied by Coleby, his immediate superior, with other competent men in numbers enough and with fit material. It would not have been Coleby's negligence if Westman had not used the fit material. It was not Coleby's negligence that Westman did not use the competent men. With the reservation, however, from these last two statements, of any negligence of Coleby, in continuing in the employ of the defendant a man of Westman's habits after notice or knowledge thereof. Nor, with the same reservation, was it the negligence of the defendant, or any of its agents, other than Westman.

We have thus presented to us this case. One servant of a common master is injured by the negligent act of a fellow-servant of a rank one step higher. The act of negligence in the fellow-servant is the result of an incompetency which did

not exist when he entered the employment of the master. It is not permanent, but occasional, and produced by evil habits, the existence of which was known before and at the time of the injury, both to the servant injured and to the hiring agent of the master.

Most of the principles of law which are to be applied to these facts, and to determine the relative rights of the servant injured and the master, are settled in this State, and must be conceded.

A master is not liable to those in his employ for injuries resulting from the negligence, carelessness or misconduct of a fellow-servant engaged in the same general business. Nor is the liability of the master enlarged when the servant who has sustained an injury is of a grade of the service inferior to that of the servant or agent whose negligence, carelessness, or misconduct has caused the injury, if the services of each, in his particular labor, are directed to the same general end. And, though the inferior in grade is subject to the control and directions of the superior whose act or omission has caused the injury, the rule is the same. Nor is it necessary to exempt the master from liability, that the sufferer and the one who causes the injury should be at the time engaged in the same particular work. If they are in the employment of the same master, engaged in the same common work and performing duties and services for the same general purposes, the master is not liable.

These rules seem to have been laid down with care, after due consideration, to be sustained by reason, to have been assented to by more than a bare majority of this court, in at least two instances at some interval of time, and should be adhered to in any case the facts of which bring it within the purview of them. See *Wright v. N. Y. Central R. R. Co.*, 25 N. Y. 562; *Warner v. Erie R'y Co.*, 39 N. Y. 468, and the cases cited in them (1).

1. In *WRIGHT v. N. Y. CENTRAL R. R. Co.*, 25 N. Y. 562 (1862), it appeared that plaintiff, a brakeman in defendant's employ, was injured at night in a collision between two trains on a single track. The engineer who ran the train took the place of a sick employee by direction of manager. He was not familiar with the road and ran the train at full speed without waiting for other train. At the trial there was verdict and judg-

ment for plaintiff for \$2,500 which was *affirmed* by General Term of Supreme Court. On appeal judgment was *reversed*. The collision was held to be caused by engineer running train at full speed, not to his ignorance of the road. It was also held that defendant was not liable for the engineer's lack of prudence resulting in injury to the brakeman, and that the risk was assumed by the latter. *Held*, also, that the direction of the super-

The cases cited hold, further, that the master is liable to a servant for his (the master's) own personal negligence, or want of care and prudence, and for his own personal act or misconduct occasioning injury and damage to the servant. And such negligence, want of care and prudence, act or misconduct, may be shown in the mismanagement of the master's affairs in the selection and employment of incompetent and unfit agents and servants or the furnishing of improper and unsafe machinery, implements, facilities or materials for the use or labor of the servant. (*Id.*)

And to charge a servant with liability to one servant for an injury on the ground that he has selected and employed another unskilful and incompetent servant, it must appear that the injury complained of was the result of the want of skill and competency of the other. (*Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 562.)

So far, we doubt not that the learned counsel for the appellant and respondent respectively would agree. But just here arise points of difference.

The appellant claims, as we understand its position to be, that it acts through a board of directors, and acts immediately in no other way; and that when the board of directors, itself composed of discreet, prudent and honorable men, has selected and employed skilful and competent general servants, agents and superintendents, it has done its whole duty to the servants of lower rank, who shall in turn be selected and employed by those of general power and duties. The negligence, it is claimed, of these general servants, agents and superintendents, is not the negligence of the corporate body, nor of the board of directors through which in the first instance the corporate body acts; but that it is, so far as a servant of the corporate

intendant or manager to the engineer to take the place of a sick engineer was not an act within the rule requiring employment of competent servants. *Reversing* 28 Barb. 80.

WARNER v. ERIE R'Y Co., 39 N. Y. 468 (1868), was an action for damages for negligent killing of plaintiff's intestate, a baggage man on defendant's train, caused by bridge falling while train was passing over

same. On the trial plaintiff had verdict and judgment for \$5,000 which was *affirmed* at General Term of Supreme Court. On appeal judgment was *reversed*. Question of inspection, decayed condition of bridge; necessary to show master's knowledge of such condition. *Reversing* 49 Barb. 558. The Warner case is reported in this volume of AM. NEG. CAS., page 734, *ante*.

body in any rank is concerned, the negligence of a fellow-servant for which the master is not liable. And it is claimed that the rule we have above extracted (to wit: that the negligence, want of care and prudence, act or misconduct of the master, may be shown in the selection and employment of incompetent and unfit agents and servants) is only applicable when such selection or employment is by the master in person, and not through a general or superior agent; and that such rule is to be governed by the other rule extracted above (and which the defendant claims to be), that the master is liable to a servant only for *his own personal* negligence or want of care and prudence, and for his own personal act or misconduct occasioning injury and damage to the servant. And, indeed, taking another rule above given, in the full scope of the general language in which it is laid down, unrestricted by the consideration and the circumstances of cases which must always affect and limit most general rules in some degree, it is to be confessed that it seems that they have literal show of authority for their position. It is said that if two servants are in the employ of the same master, engaged in the same common enterprise, and performing duties and services for the same general purposes, the master is not liable. (Wright v. N. Y. Cent. R. Co., 25 N. Y. 562, p. 565.) Now, it is apparent that the agent who selects a machine to be used in the business of the master, speaking generally, is in the employment of the same master. He is engaged in the same common enterprise, and performing a duty and a service for the same general purposes of the master. And so of the agent who selects and hires men to act in that business. It is necessary for that business, to aid the common enterprise, and to advance those general purposes, that machines should be had and the men hired, and the agent who attends thereto performs a service to that end. The position has also in its favor a judicial assertion more specific than this. In Wright v. N. Y. Cent. R. R. Co., *supra*, the learned judge who delivered the opinion, after intimating (p. 571) that it is at least debatable whether the defendant in that case was responsible to the other of its servants for the proper performance of the delegated power in the selection and hiring of engineers by Upton, the agent of the defendant, who was charged with that duty, goes on to say: "That in the exercise of power there in question (which was to select one from a body of engineers to

run an engine on a particular trip), Upton was acting as the servant of the company, in concert with every other person having any duty to perform, in respect to that particular purpose; and after saying (p. 572) that the cases cited show that for the negligence of a foreman or a superintendent the master is no more liable than for the negligence of any other servant, he remarks that it can make no difference in principle that the negligence is in the selection of the materials, the implements or the agents for the performance of a given work, instead of directing the time, mode or manner of doing the work. And this proposition has more significance, from the fact that the decision of this court in the case reversed the judgment of the Supreme Court therein, in giving which the court held "That the power to employ servants may be delegated by the principal, and this must generally be so when the principal is a corporation. When the principal so acts by the agent, he will, upon general principles, be liable for the negligence of the agent. This agent will not be regarded simply as a fellow-servant of those whom he employs in the general business." (*Wright v. N. Y. Cent. R. Co.*, 28 Barb. 80, 86.)

If we adopt the statement in *Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 562, and apply it to the facts of the case at bar, we must say that the defendant is no more liable for the negligence of Coleby in continuing the employment of Westman, though he was incompetent from drink, than for the negligence of any other servant; nor any more liable for the negligence of Westman, in directing to the putting up of this scaffold of two incompetent men, though that negligence was the result of his own temporary incompetency, his liability to recurrence whereof was known to Coleby, the agent of the defendant to employ and dismiss servants. And upon this the learned counsel for the appellant relies to sustain the position taken by it. They cite to us no other case which so holds. *Warner v. Erie R'y Co.*, 39 N. Y. 468, was the case of a structure originally sufficient, but rendered unsafe by gradual decay, which decay under the careful inspection of competent agents, in modes deemed sufficient by skilful and practical men, had not been discovered. *Wilson v. Merry*, L. R., 1 H. L., Scotch App. 326, was the case of a negligent act of a competent servant. *Gallagher v. Piper*, 16 C. B., N. S., 692, was also a case

of negligence, not of incompetence (1). *Hard v. Vt. & Can. R. R. Co.*, 32 Vt. 473, was the same.

While the reports of this State seem to be meager in authority in this particular point, the question has been somewhat discussed and decided in other States. See *Gilman v. Eastern R. R.*, 13 Allen, 433, 15 Am. Neg. Cas. 426; *Noyes v. Smith*, 28 Vt. 59; *Hard v. Vt. & Can. R. R. Co.*, 32 Vt. 473; *Frazier v. Penn. R. Co.*, 38 Pa. St. 104; *Walker v. Bolling*, 22 Ala. 294, 13 Am. Neg. Cas. 108*n*.

It is well maintained, in these cases, that if the position of the appellant is upheld in its full extent, it will, in most cases, relieve a corporate body, and any employer who acts through a corporate body, and any employer who acts through general superintendents, from liability to servants for injuries occasioned by imperfect and defective machinery, by unsafe mechanical means and appliances of any kind, and by all incompetent and unskilful sub-agents furnished without due care. And this statement of the learned judge in *Wright v. New York Central Railroad* was not necessary to the disposition of the case. Sufficient reasons for the judgment of the court had already been found in the fact that the injury complained of

1. In *WILSON v. MERRY*, L. R. 1 H. L. Sc. 326 (H. L. 1868), it appeared that respondents were owners of the Haughhead coal pit; Neish was their manager for this pit, and there was also a general manager over all the works named Jack. Neish had charge of sinking the pit and making arrangements under ground for opening a new seam, for which purpose a scaffold was erected. Two days after its erection, appellant's son was engaged by respondents to assist in driving the level. While so employed, he was killed by an explosion of fire damp, the accumulation of which was caused by the obstruction to the ventilation occasioned by the erection of the scaffold. It was admitted that both Neish and Jack were competent persons, selected for their duties with proper care. An action having been brought at the trial, the Lord Ordinary directed the jury that if they

were satisfied that the arrangements or system of the ventilation of the pit at the time of the accident had been designed and completed by Neish before the employment of appellant's son, and if the owners had delegated to Neish the whole of their authority in regard to the matter, then that Neish and the deceased did not stand in the relation of fellow-workmen engaged in a common employment, and that the defendants were not on that ground relieved from liability. A verdict was on this given for the plaintiff with damages. A new trial on the ground of misdirection having been granted by the Court of Sessions against the interlocutor of that court, the appeal was brought to the House of Lords, whereupon it was held, confirming the interlocutor, that in the points referred to there had been a misdirection.

did not result from the incompetency or unskilfulness of the fellow-servant whose act, it was claimed, had occasioned it, and, perhaps, in the fact that the plaintiff knew the perils of the service and continued in it, voluntarily assuming the risks; and in the further fact that the servant complained of was competent, and that there was no negligence in selecting him for the work. We may decline, then, to be bound by it, so far as this question is concerned. We should not hold as there enunciated, unless it is the clear result of former decisions. The duty of the master to the servant, as it is sometimes put (*Wright v. N. Y. C. R. Co.*, 25 N. Y. 556), or his implied contract with his servant, as it is differently intimated (*Farwell v. Boston & W. R. R.*, 4 Metc. 49, 15 Am. Neg. Cas. 407), leads to another conclusion. That duty or contract is to the effect that the servant shall be under no risks from the imperfect or inadequate machinery or other material means and appliances, or from unskilful or incompetent fellow-servants of any grade. It is a duty or contract to be affirmatively and positively fulfilled and performed. And there is not a performance of it until there has been placed for the servant's use perfect and adequate physical means, and for his helpmeets fit and competent fellow-servants; or due care used to that end.

In *WILSON v. MERRY*, L. R. 1 H. L. Sc. 326, it was held that the liability or nonliability of a master to his workmen cannot depend upon the question whether the author of the accident is or is not in any technical sense the fellow-workman or collaborateur of the sufferer. The case of the fellow-workman is an example of the rule, not the rule itself; the rule stands on broader grounds. The master is not, and cannot be liable to his servant unless there is negligence on the part of the master in that in which he, the master, has contracted or undertaken with the servant to do. A master does not contract or undertake with his servant to execute in person the works connected with his business. What the master is bound to his servant to do in the event of his not personally superintending the work, is to select proper

and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this, he has done all that he is bound to do; and if the persons so selected are guilty of negligence, it is not the negligence of the master; and if an accident occurs to a workman to-day in consequence of the negligence of another workman, skilful and competent, who was formerly, but is no longer, in the service of the master, the master is not liable, though the two workmen cannot technically be described as fellow-workmen. A master cannot warrant the competency of his servants.

In *GALLAGHER v. PIPER*, 16 C. B. N. S. 669, where plaintiff, a scaffolder in defendant's employ, was injured by the negligence of the defendant's general manager, it was held that defendants were not liable.

That some general agent, clothed with the power, and charged with the duty to make performance for the master, has not done his duty at all, or has not done it well, neither shows a performance by the master, nor excuses the master's non-performance. It is for the master to do, by himself or by some other. When it is done, then and not until then his duty is met or his contract kept. The servant then takes the risk of his negligence, recklessness or misconduct of his fellow in the use of the material and implements furnished, and of their failure from latent defects not revealed by practical tests, and from deterioration by the usual wear and tear. It is not enough to satisfy the affirmative duty or contract of the master that he selects one, or more than one, general agent of approved skill and fitness. If the general agent goes forward and carelessly places by the side of a servant another unskilled and incompetent, the duty of the master has not yet been met, his contract is yet unperformed. Corporate bodies must, of the necessity of their being, act through agents, and in the large enterprises and business pursuits of the times, the necessity is almost as stringent upon very many other employers. But they may not avoid the duty which they owe to their servants of furnishing them with sound mechanical contrivances nor put upon superior servants the duty of selecting and purchasing or hiring.

The duty being that of the principals, and theirs the contract, it is theirs to fulfil and perform, and if it is not done, or insufficiently done, the failure to do is theirs. As is well said, "if a master's personal knowledge of defects be necessary to his liability, the more he neglects his business and abandons it to others, the less will he be liable." Byles, J., in *Holmes v. Clarke*, 6 H. & N. 349 (1). We hold, therefore, that a master is liable to his servant for an injury caused by the incompetency or want of skill of a fellow-servant, whether it existed when the

1. *CLARKE v. HOLMES*, 7 H. & N. 937, *affirming* *Holmes v. Clarke*, 6 H. & N. 349, 10 Weekly Rep. 405, it appeared that plaintiff was employed by defendant to oil dangerous machinery. At the time plaintiff entered upon the service the machinery was fenced, but the fencing became broken by accident. The plaintiff complained

of the dangerous state of the machinery, and defendant promised him that the fencing should be restored. The plaintiff, without any negligence on his part, was severely injured in consequence of the machinery remaining unfenced. The defendant was held liable for the injury.

fellow-servant was hired, or has come upon him since the hiring, the fellow-servant having been in the first instance hired, or afterward continued in service, with notice or knowledge or the means of knowledge of this lack. The duty of the master to his servant is to use reasonable care to provide and employ none but competent and skilful servants, and to discharge from his service, on notice thereof, any who fail to continue such.

And applying this rule to the case in hand, we are of the opinion that the defendant was negligent towards the plaintiff, in retaining Westman in its service, after his habit of drinking to drunkenness was known to Coleby, its general agent for hiring and discharging men of the class of Westman.

Here, however, comes in another rule which affects the relations of master and servant. A servant has no cause of action against a master for an injury resulting from the negligence of the master, where the servant's negligence contributed to the taking place of the injury. And where the servant knows as fully as the master of the existence of that which is at last the producing cause of the injury, and continues, without promise of amendment of the defect, of his own accord in the master's employ, exposed to the effects when they shall come, it may constitute contributory negligence on his part to remain thereafter in the service. *Assop v. Yates*, 2 H. & N. 768 (1); *Hayden v. Smithville Mfg. Co.*, 29 Conn. 548, 13 Am. Neg. Cas. 669; *Skipp v. E. C. R'y Co.*, 24 Eng. L. & Eq. 396 (2); *Mad Riv. & L. E. R. R. Co. v. Barber*, 5 Ohio St. 541.

The learned counsel for the respondent cites *Snow v. Housatonic R. R.*, 8 Allen, 441, 15 Am. Neg. Cas. 417, as a contradiction of the principle maintained in these cases. But an examination of it shows that the plaintiff therein was not a servant

1. In *ASSOP v. YATES*, 2 H. & N. 768, where a cart ran against a hoarding which had been erected by defendant, and knocked down a machine inside the hoarding, which struck plaintiff, an employee of defendant, and it appeared that plaintiff had made complaint of the machine's position to defendant, but continued to work, although machine was not moved, defendant was not liable.

2. In *SKIPP v. EASTERN COUNTIES R'y Co.*, 9 Exch. 223, 24 Eng. L. & Eq. 396, where an employee of defendant engaged in coupling cars was thrown under cars and injured, and it appeared there were not sufficient men for the work, but plaintiff had worked for some time prior to the accident, without making any complaint as to insufficiency of men for the work, it was held that the railway company was not liable.

of the defendant therein. He was in the employ of the Western Railroad Company, which company, by contract with the defendant there, used its road and track for making up trains, etc., at the place where the plaintiff was injured. And the learned chief justice, in delivering the opinion of the court, says: "It does not appear that he (plaintiff) was employed in any duty or service for or on behalf of the defendants; on the contrary, it is stated that he was in the employment of another corporation. * * * On these facts it is difficult to see how the doctrine applicable to a claim for damages occasioned by the carelessness of a fellow-servant against a common employer can have any bearing on the rights of the parties to this action."

The court, in that case, recognizes the existence of the rule now under notice, but concludes that it does not apply to the facts of that case. (See page 450 of the report.) In *Gilman v. Eastern R. R. Co.*, 13 Allen, 433, 15 Am. Neg. Cas. 426, cited by the learned counsel, the question now under consideration was not passed upon, and was expressly ignored as not raised on the trial. (See page 445 of the report.) We have read the other cases cited by the learned counsel on this point, and apprehend that no ruling will be found in them different from that above expressed by us. While all of them hold that it is the duty of the master to provide safe and sufficient machinery and appliances, and skilled and competent agents and servants, none of them asserts that if the servant, who knows as well as the master of a lack in these respects, is injured thereby, he is not open to the imputation of contributory negligence; and the reason why is simple but sufficient. It is at his option ordinarily, to accept or to remain in the service or to leave it; and if he remains without promise of a change or other like inducement, it is for the jury to say whether or not he voluntarily assumes the risks of defective machinery and of incompetent servants whereof he has full and equal knowledge.

The case does not show that Westman, when first he came into the employ of the defendant, was competent in all respects. His incompetence and unfitness subsequently occurring were temporary and occasional, the result of evil habit. They had come to the knowledge of Coleby, who had power to act, so that it was negligent for the defendant to retain Westman in its employ. But it is apparent that the plaintiff knew as well, and, indeed, far better than any one else, the habits of West-

man, and his particular condition on that day. The strength of the affirmative testimony on both of these points is from the plaintiff's mouth. The plaintiff knew that the building of this scaffold was going on. He knew that neither of the persons who had built the other two scaffolds was engaged in the erection of the third, which fell; for those men were occupied where he was, a short distance away from it. He knew that men, under the direction of Westman, were putting it up, and as they were not of the three persons who had together built the two scaffolds, he knew that Westman had taken orders for the third. He knew that Westman was drunk on that day and at that time. If it was negligence in Coleby and the defendant to suffer Westman, in that state, to remain in the control and direction of men and work, was it not negligence in the plaintiff to remain in the defendant's employ, subject to Westman's direction and liable to evil results from work done under his supervision, likely to be an insufficient and negligent supervision from his perceptions being clouded and dulled by drink? But, in this case, whether the plaintiff was so negligent as to be contributory to the injury which he received, was a question for the jury. For Laning had testified that Coleby had said to him, that if Westman did not do better he would have to discharge him. It has been held that there is a formal distinction between the case of a servant who knowingly enters into a contract to work on defective machinery and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under promise that the defect shall be remedied. See *Holmes v. Clarke*, 10 Weekly Rep. 405 (1). And the fact that after

1. The opinions of the judges in *Clarke v. Holmes*, 7 H. & N. 937, affirming *Holmes v. Clarke*, 6 H. & N. 349, 10 Weekly Rep. 405, express more correctly the true idea: "There is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery and that of one who on a temporary defect arising is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his

service under a promise that the defect shall be remedied. In the latter case the servant by no means waives his right to hold the master responsible for any injury which may arise to him from the omission of the master to fulfil his obligation. No doubt a defect thus arising in machinery may be such that no man of ordinary prudence would run the hazard of working on it. If a jury should find that a party complaining had materially contributed to the injury by his

Laning had entered the service of the defendant, he acquired knowledge of the intemperate habit of Westman, was a fact in the case to be submitted to the jury, to be considered by them, together with this promise of Coleby and all the other facts and circumstances, in determining the question whether the plaintiff himself helped to bring about the accident for which he seeks to charge the defendant. (*Holmes v. Clarke*, 10 Weekly Rep. 405.) Knowledge in such a case is not of itself, in point of law, an answer to the action. (*Id.*) It has, indeed, been carried farther than the circumstances of this case require. *Hoey v. Dublin & Belfast R'y Co.*, 18 Weekly Rep. 930 (Irish Com. Pl.) And see *Huddleston v. Lowell Machine Shop*, 106 Mass. 282, 15 Am. Neg. Cas. 690; *Britton v. Great Western Cotton Co., L. R.*, 7 Exch. 130 (1).

It is now to be seen what was the action of the court below on this question, and what exception the defendant has taken to bring that action under review.

The defendant, when the plaintiff rested, and also when the

own rashness, the action could not be maintained, inasmuch as it is well established that a plaintiff, who has materially contributed to his own injury by his own negligence, cannot recover, although he may show negligence in the opposite party. But the question whether the injury of which the plaintiff complains is to be ascribed wholly to the negligence of the defendant, or whether the plaintiff has had any share in bringing it about, is one wholly for the jury." CROMPTON, J. (p. 946), says: "We need not consider the personal knowledge, in such a case, the plaintiff had of the danger, because there was a neglect of duty on the part of the defendant in not keeping the machinery fenced. The party cannot recover if he has contributed to the accident, * * * knowledge is only a part of negligence."

1. In *HOEY v. DUBLIN & BELFAST R'y Co.*, 18 Weekly Rep. 930 (Irish Com. Pl.), an action by an employee

against the railway company for injury from incompetent fellow-servant, the negligence charged being selection of incompetent servant, it was held that it was not a sufficient answer that plaintiff, for a reasonable time before the injury, had knowledge of the incompetency of the fellow-servant.

In *BRITTON v. GREAT WESTERN COTTON Co., L. R.*, 7 Exch. 130, action for damages for death of plaintiff's intestate, an employee in defendant's factory, engaged in greasing the bearings between the fly wheel and the spur wheel of a steam engine, who was found dead on the bearings, after working a few days, the machinery not being fenced as required by statute, the failure to fence being the negligence charged, it was held that assuming there was no contributory negligence on the part of deceased, either in accepting or conducting the employment, the action was maintainable.

proofs were closed, moved that the plaintiff be nonsuited on the ground that the negligence of him and his fellow-employees contributed to the accident. But there was enough in the testimony to justify the court in denying, as it did, that motion.

Two of the requests to charge, made by the defendant at the trial, were addressed to the question of the plaintiff's knowledge of Westman's habit, and the contributing negligence of the plaintiff by reason thereof; but each of them is based upon the idea that the knowledge of the plaintiff of the incompetency of Westman was a bar to a recovery, and not merely a fact to go to the jury with the other evidence; from all of which they were to determine whether the plaintiff was to be charged with negligence contributory to the injury. These requests were, therefore, properly refused.

The court upon this subject charged the jury that the plaintiff's knowledge of the fact of Westman's intemperance would not exonerate the defendant from responsibility; yet it called upon the plaintiff to exercise more caution, care and judgment than he otherwise would have done, and that he was bound to exercise ordinary care and caution in view of that fact. The defendant excepted to so much thereof as instructed the jury that knowledge of the fact in the plaintiff did not exonerate the defendant. In our view the learned judge at circuit was correct in that; the charge was to the effect that in this case knowledge was not of itself, in point of law, an answer to the action. (See cases above cited.)

The requests to charge, which were refused, assumed as proven what was yet to be determined *pro* or *con* by the jury, or rested upon propositions of law which we think were not sound, or upon propositions of law which, though sound in themselves, did not comprehend all the facts of this case, or assumed as established as fact in the case which was not in the testimony.

The declarations of Coleby, the admission of which in evidence was objected to by the defendant, were properly received. He was the agent of the defendant, with the power and duty of hiring and discharging servants. He had the power to discharge Westman for any fault amounting to incompetency. His neglect to do so, after knowledge on his part of a reason why he should, was the neglect of the defendant, and it was competent to prove by his own declarations that he

had such knowledge, made, as they were, to the plaintiff in the case. They were part of the *res gestæ*, and had a bearing upon the question of the contributory negligence of the plaintiff.

There is one other point made by the defendant which requires notice.

The verdict for the plaintiff was for the sum of \$10,000. A motion was made at Special Term to set aside this verdict as one against evidence, and that the damages are excessive. The motion was denied.

From the order of Special Term denying it, the appeal was taken to the General Term, where a new trial was denied, and judgment ordered for the plaintiff on the verdict. The defendant claims here that the General Term was of the opinion that the damages were excessive, but also of the opinion that it had no power to reduce them, and no power to do aught but grant a new trial for that reason, which for that reason alone it declined to do. The defendant claims that the General Term, having the power to reverse the judgment and order a new trial, unless the plaintiff should stipulate to reduce his recovery to a sum which the court should name, and to order that, if he did so stipulate, the judgment should be affirmed for that sum, it erred in not exercising that power.

It is true that it was a matter of discretion with the court at General Term, whether it would make such order, and if it had exercised that discretion and refused to make it, no error would exist. But if, having the power so to do, it failed to use it on the ground that the power was not in it, there is error which may be reviewed and corrected.

The claim of error here under notice is to be sustained, if at all, not upon anything shown in the order of the court at General Term, nor upon the judgment entered thereon, nor upon anything which appears in the record. The opinion delivered at General Term, if it can be used, shows plainly that if the court there had deemed that it had the power to reduce the damages, still leaving a recovery, it would have exercised it, but that it was of the opinion that it could effect that end only by granting a new trial for that reason, and that the excess of damages was not of itself quite sufficient to warrant an order for a new trial.

But we are not authorized to review a judgment, and to

reverse it for an alleged error which does not appear upon the record, and is not shown or to be arrived at, save by expressions appearing in the opinions of the court.

The judgment must be affirmed, with costs to the respondent.

All concur except ALLEN, J., dissenting, and RAPALLO, J., not voting.

Judgment affirmed.

FLIKE, ADM'R V. BOSTON AND ALBANY RAILROAD COMPANY.

Court of Appeals, New York, November 1873.

[Reported in 53 N. Y. 549.]

FIREMAN KILLED — COLLISION — FREIGHT TRAINS — RUNAWAY CARS — INSUFFICIENT BRAKEMEN — NEGLIGENCE OF AGENT — RAILROAD COMPANY LIABLE — FELLOW-SERVANT — RESPONDEAT SUPERIOR. — In an action to recover damages for the death of the plaintiff's intestate, a fireman on a freight train on defendant's road, caused by a number of cars of another freight train which was in advance, becoming detached and colliding with the train on which the deceased was employed, it appeared that the forward train was deficient in brakemen; that there were but two aboard when there should have been three, and that if a third brakemen had been stationed on the runaway cars the accident could have been prevented. The train was sent out insufficiently equipped with brakemen by defendant's agent, a head conductor, whose duty it was to make up trains, hire and station brakemen, and generally to dispatch the trains (1). *Held*, that the defendant was liable. (ALLEN, GROVER and FOLGER, JJ., *dissenting*.)

1. SPRONG, ADM'X, *v.* BOSTON & ALBANY R. R. Co., 58 N. Y. 56 (June, 1874), was an appeal in an action for damages for death of plaintiff's intestate, Charles H. Sprong, who was head brakeman on defendant's freight train, the accident being the same as that in the FLIKE case [collision between freight cars]. Judgment for plaintiff in the General Term of the Supreme Court, Third Judicial Department, affirming judgment on verdict rendered for plaintiff, was *affirmed*. ANDREWS, J., in delivering the opinion, referred to the Flike case as follows: "In Flike, Adm'r, *v.*

Boston & Albany R. R. Co., 53 N. Y. 549, which was also an action against the defendant in this action to recover damages for the defendant's negligence in causing the death of the plaintiff's intestate, a fireman on the same train on which Sprong, the plaintiff's intestate in this action was, and who was killed by the same collision, two questions, also involved in this case, were decided: First, that the evidence justified the jury in finding that the corporation, defendant, was guilty of negligence in sending out the first train with an insufficient number of brakemen; and, second, that

Held, also, that the fact that the agent had employed a third brakeman to go upon this train who, by reason of oversleeping, failed to get aboard in time, did not relieve the company from liability, as such hiring was only one of the steps proper to be taken to discharge the principal's duty to supply sufficient help, etc., and this duty remained to be performed. Nor is the defendant relieved, although negligence may be imputed to the defaulting brakeman, as the only effect of such negligence would be to make it contributory with the brakeman which would not affect the liability of the defendant. (ALLEN, GROVER and FOLGER, JJ., *dissenting*.)

LIABILITY OF CORPORATION FOR ACT OF AGENT.—A corporation is liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent entrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present and consequently liable for the manner in which they are performed.

DUTY OF RAILROAD COMPANY TO SUPPLY SAFE MACHINERY, SUFFICIENT HELP, ETC.—It was the duty of the defendant in making up and dispatching the advance train to supply it with suitable machinery and sufficient help for the business and journey which it was about to undertake, and if there was any want of care in these respects, which caused the injury, it is liable.

APPEAL from order of the General Term of the Supreme Court in the Third Judicial Department, denying a motion for a new trial and ordering judgment for plaintiff on a verdict for \$5,000. *Judgment affirmed*.

This action was brought to recover damages for the death

although the co-servants of the deceased may have been guilty of negligence which contributed to produce the injury, that fact did not exempt the defendant from liability, assuming that the jury should find that there was negligence on the part of the corporation in the respect mentioned, without which the injury complained of would not have happened. The only question presented in this case, not involved in the Flike case, is that of contributory negligence on the part of Sprong, the plaintiff's intestate, which, it is claimed, consists in the fact that at the time of the injury he was upon the engine, and not at his post of duty." * * * *Affirming* 3 T. & C. 54.

BOOTH v. BOSTON & ALBANY R. R. Co., 73 N. Y. 38 (1878), was also an action arising out of the same accident as in the Flike and Sprong cases, the plaintiff in the Booth case being the engineer of the train. Plaintiff recovered a verdict for \$7,500, on which judgment was rendered and affirmed by the Supreme Court, and, on appeal, the judgment was affirmed by the Court of Appeals. [There was a former decision in the Booth case. See 67 N. Y. 593, mem.] ANDREW, J., said: "The present case arose out of the same accident as the Flike case, and the principle there decided must be applied in its determination. The decision in the Flike case was followed on the trial of this case."

of Henry Sipperly, plaintiff's intestate, alleged to have been caused by defendant's negligence. Sipperly was killed on February 3, 1870. A verdict was rendered in favor of plaintiff. Exceptions were ordered to be heard at first instance at General Term. The facts are stated in the opinion.

GEO. W. MILLER, for appellant.

MATTHEW HALE, for respondent.

Church, Ch. J. — The plaintiff's intestate was a fireman upon a freight train upon defendant's road which left Albany at an early hour on a cold day. Some miles east of Albany eleven cars of another freight train, a short distance in advance, became accidentally detached and ran back and collided with the train on which the deceased was employed, by means of which he was killed. The evidence tended to show that the forward train was deficient in brakemen; that but two were aboard, when there should have been three, which was the usual number; and that if a third brakeman had been there he would have been stationed upon the eleven runaway cars, and with the brakeman on them could have controlled their impetus and prevented the accident. The company had at Albany an agent, called a head conductor, whose business it was to make up the morning trains, hire and station the brakemen, and generally to prepare and dispatch these trains.

The general rule that the employer is not liable to one servant or laborer for an injury resulting from the carelessness or negligence of another servant or co-laborer has been recently so fully considered by this court in the two cases of *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521, 16 Am. Neg. Cas. 747, *ante*, and *Brickner v. N. Y. Cent. R. Co.*, 49 N. Y. 672, 16 Am. Neg. Cas. 747, *ante*, that discussion is unnecessary except as far as may be pertinent to determine its application to the facts of this case. This doctrine was first promulgated in England in 1837 (*Priestley v. Fowler*, 3 Mees. & W. 1), in South Carolina in 1841 (*Murray v. So. Car. R. Co.*, 1 McMull. 385), and in Massachusetts in 1842 (*Farwell v. B. & W. R. Co.*, 4 Metc. 49, 15 Am. Neg. Cas. 407), and has been adopted in this and most of the other States in the Union. There has been a diversity of reasons given for its adoption, which have led to some confusion in its application. The reasons for the rule are well stated by Pratt, J., in the first case in which it was applied in this State (*Coon v. Syr. & Utica R. Co.*, 6 Barb. 231,

affirmed in 5 N. Y. 492, and see 16 Am. Neg. Cas. 737, *ante*), and were, in substance, that the rule *respondeat superior* does not itself spring directly from principles of natural justice and equity, but has been established upon principles of expediency and public policy for the protection of the community; and that, in view of the unjust consequences which may ensue from its application for injuries by co-servants, the same principles of public policy demand its limitation, and that while the general rule was demanded for the protection of the community, the exception is demanded for the protection of the employer, especially in view of the manner in which the principal business of the country is now transacted. This view evinces the flexibility of the principles of the common law, which are capable of adaptation to new or changed circumstances, and enables courts to adjust the application of the principle not in obedience to a supposed arbitrary rule, but with such limitations and qualifications as best accord with reason and justice. In applying the rule we should be cautious not to violate the very principles upon which it is founded. While shielding the employer from unjust and burdensome liabilities, we should not withhold all redress from the employed for remissness and carelessness in respect to duties which fairly devolve upon the former as the principal, and over which the latter have no control. In 5 W. H. & G. 343, 352, the court very justly said: "Though we have said that a master is not generally responsible to a servant for an injury occasioned by a fellow-servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servants to unreasonable risks."

The master is liable if his own negligence or want of care produces the injury, and this may be manifested by employing unfit servants or agents, or furnishing improper or unsafe machinery, implements, facilities or materials for the use of the servant. *Wright v. N. Y. Cent. R. Co.*, 25 N. Y. 562, 16 Am. Neg. Cas. 752, *ante*; *Warner v. Erie R'y Co.*, 39 N. Y. 468, 16 Am. Neg. Cas. 734, *ante*. It was at first doubted by this court whether the exemption should not be limited to injuries by servants whose employment was the same (*Coon v. Syracuse & Utica R. Co.*, 1 Seld. 492, per Gardiner, J., which affirmed same case in 6 Barb. 231); but it has since been repeatedly held that injuries by servants or agents, engaged in the same general

business or enterprise, are within the exemption (1 Seld. 492). Hence the difficulty of applying the rule in actions against corporations whose whole business can only be transacted by agents who are in some sense co-servants. In *Warner v. Erie R'y Co.*, 39 N. Y. 468, 16 Am. Neg. Cas. 734, *ante*, the court decided that a corporation was liable if negligence causing an injury to a subordinate servant could be imputed to the directors, but did not establish any definite rule on the subject. The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed. If an agent employs unfit servants, his fault is that of the corporation, because it occurred in the performance of the principal's duty, although only an agent himself. So in providing machinery or materials, and in the general arrangement and management of the business, he is in the discharge of the duty pertaining to the principal.

In the case before us it was clearly the duty of the corporation, in making up and dispatching the advance train, to supply it with suitable machinery and sufficient help for the business and journey which it was about to undertake; and if there was any want of care in these respects, which caused the injury, it is liable. Rockefeller had the general charge of this business, and, within the principle decided in the *Laning* case, *supra*, represented the corporation itself.

It is claimed by the counsel for the appellant that the company are not liable, because the agent had, in fact, employed a third brakeman to go upon the train, who, by reason of oversleeping, failed to get aboard in time, and hence, that the injury must be attributed to his negligence, or, if attributable to the negligence of the general agent in not supplying his place with another man, such negligence must be regarded as committed while acting in the capacity of a mere co-servant, within the doctrine of responsibility. Neither of these positions is tenable. The hiring of a third brakeman was only one of the steps proper to be taken to discharge the principal's duty, which was to supply with sufficient help and machinery, and properly dis-

patch the train in question, and this duty remained to be performed, although the hired brakeman failed to wake up in time, or was sick, or failed to appear for any other reason. It was negligent for the company to start the train without sufficient help. The acts of Rockefeller cannot be divided up, and a part of them regarded as those of the company, and the other as those of a co-servant merely, for the obvious reason that all his acts constituted but a single duty. His acts are indivisible, and the attempt to create a distinction in their character would involve a refinement in favor of corporate immunity not warranted by reason or authority. As well might the company be relieved if the train was started without an engineer, or without brakes, or with a defective engine. The same duty rested upon the company, though every man employed had died or run away during the night, and if negligent in discharging it, either by acts of commission or omission, whether in employing improper help, or not enough of it, or in not requiring their presence upon the train, it is, upon every just principle, responsible for the consequences. Nor is the company relieved, although negligence may be imputed to the defaulting brakeman. The only effect of that circumstance would be to make the negligence contributory with the brakeman, but would not affect the liability of the company. It is unnecessary, therefore, to inquire whether the sleeping brakeman was so engaged in the common service as that the defendants could be exempted from liability if the injury was solely attributable to his neglect.

Assuming that the facts are, as the jury must have found, the liability of the defendant is clear. These heavy freight trains were dispatched only five minutes apart and traversed a very heavy grade, and were liable, especially in cold weather, to precisely such accidents as did occur, in which event collisions, with fatal results, were almost certain to ensue. The principal protection in such cases is the prompt and efficient application of the brakes, and the utmost care should be exercised in providing a sufficient number of reliable men to perform this duty. If we were called upon to spell out a contract between the parties, it would be implied that the company agreed to use proper care not to expose the deceased to risks of this character. He was engaged upon another train in the discharge of his duty, and was not only in no way connected with the broken train, but he could neither know of nor provide against the defect.

No authority has been cited which would justify us in relieving the defendant from this liability, nor have I been able to find any. In *Hayes v. Western R. R. Corp.*, 3 Cush. 270, 15 Am. Neg. Cas. 505ⁿ (1), the Supreme Court of Massachusetts intimate, although it was unnecessary to decide, that a railroad company is liable for an injury to an employee, caused by a deficiency of help upon another train.

Mr. Redfield, in a note in a recent edition of his work on Railways, expresses the opinion that corporations should be regarded as constructively present in all acts performed by their general agents, within the range of their employment; and the tendency of judicial opinion, while it adheres to the general rule of irresponsibility, is against extending it.

The judgment must be affirmed. PECKHAM, ANDREWS, and RAPALLO, JJ., concurred; ALLEN, GROVER, and FOLGER, JJ., dissented.

Judgment affirmed.

1. The HAYES case (Mass.) is referred to in *Cone v. Del. L. & W. R. Co.*, 15 Hun, 172, as follows:

"In *Hayes v. Western R. R. Corp.* (3 Cush. 270), a brakeman was injured by a collision of two trains belonging to the defendant, resulting from the negligence of another brakeman. The plaintiff's counsel insisted that the company neglected to furnish a sufficient number of brakemen to manage the train which ran against the other. Three brakemen were provided for it; one of them, without leave of any officer or agent of the company, failed to go with the train, and of the two who were on, the one whose duty it was to be on the rear car was not there, and the proof was that if a man had been stationed on the rear car, the collision would have been prevented. The evidence

was conflicting as to whether two brakemen were a sufficient number to manage the train. The court charged that, as to the number of brakemen, the defendant would be responsible, if the number was not sufficient to insure safety, if the brakemen had all done their duty; but if the jury believed that if the brakeman, whose duty it was to have been on the rear car, had been there doing his duty, the injury would not have taken place, then it was immaterial whether the train was short of hands or not. *Held*, no error. In the light of its facts, the case asserts the doctrine that while a master is not liable to his servant for an injury caused by the negligence of a fellow-servant, he is liable for the consequence of his own neglect."

SLATER ET AL., ADM'RS, ETC., V. JEWETT, RECEIVER.*Court of Appeals, New York, April, 1881.*

(Reported in 85 N. Y. 61.)

COLLISION BETWEEN TRAINS—FIREMAN KILLED—NEGLIGENCE OF CONDUCTOR AND TELEGRAPH OPERATOR IN TRANSMISSION OF ORDERS—FELLOW-SERVANTS—RECEIVER OF RAILROAD NOT LIABLE.—In an action to recover damages for the death of plaintiff's intestate, a fireman on an engine drawing a train on the Erie railway operated by defendant as receiver, the death being caused by a collision between trains, negligence of defendant through its telegraph operator being alleged, it appeared that the immediate negligence causing the accident was that of the conductor of the train which met the train on which the intestate was serving, co-operating with that of a telegraph operator, the latter having omitted to give to the engineer the orders received from the train dispatcher as to the place where the train should meet, as required by his instructions, and reporting a performance of the duty, and the conductor having signed the engineer's name, without his knowledge, to a receipt of the order and failing to inform the engineer, in consequence of which the engineer went on with his train, and the collision resulted. *Held*, that the negligence causing the injury was that of the fellow-servants of the injured party, for which defendant was not liable, and judgment for plaintiff reversed (1).

1. Among other actions against Receivers are the following:

In *DE FOREST v. JEWETT (RECEIVER OF THE ERIE RAILWAY COMPANY)*, 88 N. Y. 264 (1882), the case is stated in the opinion by TRACY, J., as follows: "We are of the opinion that this case cannot be distinguished from the case of *Gibson v. Erie R'y Co.*, 63 N. Y. 449, 16 AM. NEG. CAS. 735, *ante*, and must be controlled by it.

"In that case this court held that, having accepted service with knowledge of the character and position of structures from which he might be liable to injury, the plaintiff could not call upon the defendant to make alterations to secure greater safety, or, in case of injury from risks which were apparent, he could not call upon his employer for indemnity.

"In the present case the yard in

which the deceased worked was drained by a system of small, open ditches or sluices, running across the tracks, between the ties. The sluices were in existence long before deceased went into the employment of the defendant, and so remained without change or alteration throughout the time of his service. There were many of them, all constructed substantially alike and all in plain sight. He had been engaged as switchman and car-coupler in the yard in question for nearly two years. He worked in the day time. It appears that every one of these ditches or sluices were well known to him; he knew their location and, so far as could be determined by seeing them daily, he knew their width and depth, and the manner of their construction. Whatever there was of danger to one engaged in the

DUTY OF MASTER TOWARDS SERVANT. — The measure of the master's duty to his servant is reasonable care, having relation to the parties, the business in which they are engaged, and the exigencies which require vigilance and attention, and conforming to the circumstances in which it is to be exerted; but the master is not a guarantor of the safety of his servant.

JUDICIAL NOTICE—RUNNING OF TRAINS. — The courts may take judicial notice of the way railways are managed in the every day practical running of them, by overlooking officers at distant places, who use the telegraph to keep informed of the whereabouts of trains, and to direct their movements.

RULES AND REGULATIONS—TIME TABLE—VARYING RULES—SELECTION OF SERVANT—FELLOW-SERVANT—ASSUMPTION OF RISK. — The master (in this case, the receiver operating a railway) has the right, as regards his servants, to vary from the timetable he has set for the running of trains, and all that is required of him when he makes such variation is that he use due care and diligence in giving notice of the change, and in running trains upon the changed time. He is not required to see personally that such notice is put into the hands of each conductor and engineer, but must use due care in selection of servants and best means of communicating rules and regulations, and having performed that duty, a servant assumes the risk of negligence of such fellow-servants.

FELLOW-SERVANT. — A fireman on a locomotive, the conductor of the train and a telegraphic operator engaged in receiving and giving information as to whereabouts of trains and communicating orders as to their movements, are fellow-servants, in the same common employment, and for an injury to the fireman caused by negligence of the others, the employer is not liable.

coupling of cars in this yard must have been apparent and obvious to him. This is not a case therefore of a latent or secret danger unknown to the servant, but which should have been known to the master.

"We do not see how the defendant can be held liable in this case, without abolishing the well-established rule that the servant, by accepting the employment, assumes the risks and perils incident thereto, so far as they are apparent and obvious.

"The memorandum of the case of *Plank v. N. Y. Cent. R. Co.*, 60 N. Y. 607, upon which the learned judge relied at the Circuit, it is true states that the deceased knew of the existence of the ditch. This was founded upon, and perhaps justified by a

statement in the *per curiam* opinion in that case, as follows: 'He had been two months in the service of the defendant, and every week, probably, upon this turn-out on his avocations. He must have known of the existence of the trench,' and the court held that under the peculiar circumstances of that case, while the fact that the deceased knew of the existence of the ditch, 'though an important fact, is not a preponderating one,' on the question of contributory negligence. The question here presented was not under consideration. We have examined the record on which the case was heard in this court, and it does not appear, nor was it contended by the counsel for the defense, that the deceased had actual present knowl-

APPEAL from judgment of the General Term of the Supreme Court, Fourth Judicial Department, in favor of plaintiffs entered upon an order made January 6, 1880, denying a motion for a new trial and directing judgment on a verdict for \$3,500. The case is stated in the opinion. *Judgment reversed.*

JOHN G. MILBURN, for appellant.

JAMES F. GLUCK, for respondent.

Folger, Ch. J.— This action is brought by the plaintiffs, as administrators, to recover damages for the death of Adelbert D. Slater, their intestate. The cause of his death was the collision of two engines, each drawing a train on the Erie Railway operated by the defendant as receiver. It is claimed that the collision happened from negligence, chargeable to the defendant, though not proceeding immediately from him. The intestate was in the service of the defendant, as a fireman on one of the engines that came together. The immediate negligence that caused the accident and the death was that of the conductor on the train meeting that on which the intestate was serving, co-operating with that of a telegraphic operator at Salamanca, a station on the defendant's road. The latter having omitted to give to the engineer the orders received from the train dispatcher as to the place where the two trains should

edge of the existence of the ditch. The plaintiff was nonsuited at the Circuit. The nonsuit was set aside by the General Term, and the defendant appealed to this court, giving the usual stipulation.

"The decision in that case is not in conflict with the rule established in the case of *Gibson v. Erie R'y Co.*, *supra*.

"The judgment of the General Term should be affirmed, with costs." *Affirming* 23 Hun, 490. See former decision in 19 Hun, 509.

In *FULLER v. JEWETT* (Receiver, etc.), 80 N. Y. 46 (1880), where plaintiff's intestate, an engineer employed by railroad of which defendant was receiver, was killed by the explosion of a locomotive which had been sent to the shops for repair, the defects causing the explosion not being dis-

covered by the employees whose duty it was to attend to repairs, judgment for plaintiff on verdict for \$3,500 which was affirmed by the Supreme Court, was *affirmed*.

In *DURKIN v. SHARP* (RECEIVER OF LONG ISLAND RAILROAD), 88 N. Y. 225 (1882), where plaintiff's intestate, an engineer, was fatally injured by derailment of engine and train, caused by defective track, judgment for plaintiff on verdict for \$5,000 was *affirmed*.

In *DONNEGAN v. ERHARDT* (RECEIVER), 119 N. Y. 468 (1890), where plaintiff, a brakeman, was injured in railroad wreck caused by train running over a horse which escaped through defective fence onto track, judgment on verdict for \$1,000, which was reversed by Supreme Court, was *affirmed*, reversing Supreme Court.

meet, which his instructions required him to do, and having reported a performance of his duty, and the former having signed the engineer's name, without his knowledge, to an acknowledgment and receipt of order, and then having failed to communicate the order to him; in consequence of which the engineer went on with his train, instead of waiting at the station designated until the other train came up.

The complaint avers that it was the duty of the defendant to employ competent, trustworthy and skilful men, and to make proper regulations for the running of his trains so as to insure the safety of persons operating the same, and to provide, as far as practicable, against accident and injury to them in their employment, and in the performance of their service for him. This averment correctly states the duty of the defendant, unless it overstates it when it sets his duty at so high a mark as that of an insurer of the safety of his servants. The measure of the master's duty to his servant is reasonable care, having relation to the parties, to the business in which they are engaged, and the exigencies which require vigilance and attention, and conforming to the circumstances in which it is to be exerted. We agree that the defendant was bound to do all else that the averment puts upon him, unless it is read as making him a guarantor of the safety of his servants. The complaint avers that the defendant failed to employ proper and competent persons to manage and run his trains, and proper and suitable persons to give orders and information in respect thereto and properly to communicate the same to engineers and conductors of trains; and that he failed to make and enforce proper and reasonable rules and regulations for the running of his trains. The proofs of the plaintiffs did not seek to introduce into the case any other element of lack of duty in the defendant than these thus averred. And we think that the case is clear upon the proofs that the defendant made no failure of duty, unless it was in the enforcement of the rules and regulations made by him for the running of his trains. Whether he failed in that is, we think, a question of law properly brought up by some of the exceptions taken at Circuit by the defendant. It is not to be questioned that the telegraph operator and the conductor of the train were negligent, and that from their careless omission of duty and disobedience of rules the accident resulted. The rules that had been given to

them for their guidance had been prepared with great care, were minute, explicit and plain, and exceedingly well devised for safety. They had been in operation for several years before the disaster, and no accident had ever taken place in the use of them. The train dispatcher, who, concededly, was in the place of the defendant, had strictly observed these rules in this instance, and had received all the assurance needful and required by them, that they had been observed by all concerned.

Some contention was made on the argument that there was no proof that it was not an exceptional and unprecedented thing to interfere, as was done in this instance, with the moving of the two trains, and that no cause was shown for an interference with them. The case shows clearly that it was the usage of the defendant and his predecessor, the Erie Railway Company, to govern and direct the movement of trains by such order, and that there was reason for it in this instance. The order given was a special one, by reason of delay; but by special is not to be understood unusual and unprovided for. For nine years these rules had been in operation, and the witness who testifies to that, so applies his words as to plainly indicate that they had been in use in giving like directions to engineers and conductors on like occasions of delay. The proof shows that the time-card is the general order, and it comes from the superintendent. An order varying it on a special occasion comes from the train dispatcher. The special order is as much provided for by the general regulations as the general time-card or other general rules. It is the conductor's duty to obey the special order, which supersedes, for the particular train, the general order. A special order to stop at a station having been received, there is no right to go beyond that station until further direction. The rules proven and set forth in the case recognize the usage to stop and move trains by special order varying for the nonce the general time-card. Indeed, as we may take judicial notice of the way in which banks and like public institutions do business (*Agawam Bank v. Strever*, 18 N. Y. 502), so may we, that the great railways of the land are managed in the every-day practical running of them, by overlooking officers at distant places, who use the telegraph wires to keep all the while informed where trains are, and to direct their movements from hour to hour. We

have presented to us in this case, then, general regulations well calculated to insure safety in the running of the trains; a usage well understood, and provided for in these general regulations, to vary some particulars of these general rules on special occasions by special orders; specific, well-devised and promulgated rules for the mode of doing so with safety; an occasion arising for the giving of a special order to these two trains; a complete observance of all these regulations by an officer who was in the stead of the defendant; an assurance to him that they had been observed by others, and the use by him, to bring his special order to the mind of the agents in charge of the trains, of the customary means that had been safe and efficient for a series of years. We need not say that there was no fault in the higher officers of the defendant, for it is the law of the case, given to the jury by the trial court, that there was not. The personal failure of duty was in the telegraph operator and the conductor.

Each of those agents, in doing their ordinary work for the defendant, were fellow-servants of the intestate, in the same common employment. The conductor was engaged in the particular work in which the intestate was — that of moving trains. The telegrapher was engaged in a work closely connected therewith — that of receiving and giving information of the whereabouts of trains and communicating orders to those controlling them for stopping or going on. This was a branch of the general business of the defendant essential to the smooth and successful movement of the whole — that branch of it in which the intestate was engaged as much as any other. No question seems to have been made on the trial but that the operator and conductor were competent and skilful when the defendant took them into his employ. It cannot be contended that there was anything required of the conductor that raised him out of his relation to the intestate of a fellow-servant. The act required of the conductor, at the particular time, was to receive an order from an authorized source of command, and in a prescribed mode to acknowledge the receipt of it, and then to follow the direction. This was service merely. It is contended that the duty of the telegrapher at the time and the act required of him were those that the defendant was bound to perform as master, and that the negligent performance by the operator was the negligence of the master.

The argument to sustain this position consists, in part, in an effort to show that the duties of the operator were in no respect like to those of the intestate. They were not like, but they tended to the same end — that of the speedy, efficient and successful carriage of passengers and freight over the railway. There are many kinds of servants of a great railway company. Their duties are not in all cases the same, nor always like, yet they are all done to bring one result, and it is their conjoint, simultaneous and harmonious performance that does effect the finality sought through the whole complex organism. If it be so that this operator sometimes received and sent messages that had naught to do therewith, still, on this occasion, the act required of him had direct connection with the acts of those engaged in moving the two trains. The position that the operator was hired and discharged by one superior agent and the intestate by another, and that, therefore, they were not fellow-servants, is not sound. The general authority to hire and to turn away was in the defendant. It did radiate from him through different chiefs of department in his general work. His, however, was the ultimate power. The heads of bureaus were not independent contractors, doing a branch of his work on their own responsibility, and free from his interference with their subordinates. He had the right to step into their spheres of duty and act for himself.

There is more plausibility in the position that the act that was to be done on this occasion was so essentially one for the master to do in his duty to his servants, that whatever subordinate was taken by him to do it came to be the master in doing it. It is urged, and with reason, that clearly arranging and promulgating the general time-table of a great railway is the duty and the act of the master of it; that when there is a variation from the general time-table for a special occasion and purpose, it is as much the duty and act of the master, and he is as much required to perform it; that it is the duty and act of the master to see and know that his general time-table is brought to the knowledge of his servants who are to square their actions to it; that the same is his duty and act as to a variation from it, which is but a special time-table; and that, therefore, whoever he uses to bring those time-tables to the notice of his servants, he puts that person in his place to do an act in his stead, inasmuch as the responsibility is upon him to see and know that it

is done and done effectually; and that if, instead of doing it in person, he chooses to do it through an agent, that agent, *pro hac vice*, is the master, and he, the master, is responsible for a negligent act therein of that agent whereby a fellow-servant of him is harmed. The rule has been laid down in repeated cases in this court, in terms so broad as to come close to this case. *Flike v. B. & A. R. Co.*, 53 N. Y. 549, 16 Am. Neg. Cas. 765, *ante*; *Fuller v. Jewett*, 80 N. Y. 46, 16 Am. Neg. Cas. 774, *ante*; *Crispin v. Babbitt*, 81 N. Y. 516 (16 Am. Neg. Cas. 820). Attentive consideration, however, will perceive a distinction between the cases. That the master has the right, as regards his servants, to vary from the time-table that he has set cannot be doubted. It is at times a necessity so to do, and a necessity so frequent as to fall within the occurrences that a railway servant is bound to expect in the course of his employment. Even as regards the public and passengers, a railway manager has a right, when needs press, to vary from his general time-table. All that can then be required from him by the public and passengers is that when he makes the variation he act under it with reasonable care and diligence. (*Sears v. Eastern R. Co.*, 14 Allen, 433; *Gordon v. M. & L. R. Co.*, 52 N. H. 596.) That is to say, due care and diligence in giving notice of the change, and in running the train upon the changed time. A servant cannot ask for or expect more than this. In *Rose v. B. & A. R. Co.*, 58 N. Y. 217 (1), while recognizing the rule as laid down in *Flike v. B. & A. R. Co.*, 53 N. Y. 549, 16 Am. Neg. Cas. 765, *ante*, it was said: "It may be conceded that it is the duty of railroad corporations to prescribe, either by means of time-tables or by other suitable means, regulations for running their trains with a view to their safety; but it is obvious that obedience to these regulations must be intrusted to the employees having charge of the trains; such obedience is matter of exec-

1. In *ROSE, ADM'X, v. BOSTON & ALBANY R. R. Co.*, 58 N. Y. 217 (1874), action for damages for death of plaintiff's intestate, a brakeman on defendant's freight train, caused by train breaking apart and one section of train colliding with other section, judgment for plaintiff was *reversed*. Defendant appealed from judgment of General Term of Supreme Court, Third Judicial Depart-

ment, affirming judgment on verdict rendered for plaintiff. The reversal was upon the ground that plaintiff failed to establish negligence on defendant's part as to rules and regulations, as the company may have prescribed proper rules which were violated by a fellow-servant of the plaintiff's intestate, there being no proof to the contrary.

utive detail, which, in the nature of things, no corporation or any general agent of it can personally oversee, and as to which employees must be relied upon." These views seem applicable to this case. The argument for the plaintiff's position, as we have stated it above, breaks just at the part where to be successful it ought to be the strongest. It is not true that, on an occasion like this, it is the duty of the master, or a part of his contract, to see to it, as with a personal sight and touch, that notice of a temporary and special interference with a general time-table comes to the intelligent apprehension of all those whom it is to govern in the running of approaching trains. It is utterly impracticable so to do, and a brakeman or a fireman on a train knows that it is, as well as any person connected with the business. He knows that trains will often and unexpectedly require to be stopped and started by telegraphic orders from distant points, and that such orders must, from the nature of the case, be given through servants skilled in receiving and transmitting them. If there is due care and diligence in choosing competent persons for that duty, a negligence by them in the performance of it is a risk of the employment that the co-employee takes when he enters the service. Such a variation, and the giving notice of it, is not like the supply of suitable and safe machinery, or of competent and skilled fellow-workmen. It is the act of an hour or of an instant, which for any useful effect to be got from it must be done at the instant, and that, too, from a distance. It is, from its nature and need, looked for as such. Of necessity it must be done through the best means of communication that experience, the safe and successful use of years, has demonstrated it to be prudent to employ. The act of supplying machinery or fellow-servants is one for which time may be taken and deliberation had, and it may be learned before hazard is run whether the effort at supply has been well made and is sufficient. So, in *Flike v. B. & A. R. Co.*, 53 N. Y. 549, 16 Am. Neg. Cas. 765, *ante*, it was easy to know before the train was started that the brakeman detailed for duty had failed to be at his place. And in *Fuller v. Jewett*, 80 N. Y. 46 (16 Am. Neg. Cas. 774, *ante*), that the engine sent to the shop for repairs was still faulty, before it was put on the road again. Hence, it was not one of the risks of the service that the fireman, in one of those cases, and the engineer, in the other, took upon himself, that the brakeman did oversleep, or

that the boiler did explode. From the nature of things, communication on these special occasions of which we are speaking, must be had through intermediate agents, with no or but little opportunity of testing their immediate fidelity or accuracy. Would it do to lay down a rule that, when the master has chosen those agents with due care and diligence as to their skill and competency, he must further take the responsibility to his other servants that the agents thus selected will never lapse into carelessness? The alternative is, that he must in person place into the hands of each conductor and each engine driver the general time-table and every deviation from it, or abandon the mode of supervising and directing the movement of his trains by means of telegraphic communication. The reasonable rule in such case hath this extent, and no more, that he must first choose his agents with due care for their possession of skill and competency, and that then he must use the best means of communication according to prescribed general rules and regulations devised from the best experience in such business, and if among those means is the service of a fellow-servant, competent for his place, his possible carelessness is a risk of the employment that his fellows take when entering into the service. The liability of the master to his servant arises from his duty to him or his contract with him. Expressed in general terms, that duty or contract is to supply the servant with suitable and safe machinery and appliances, with competent and skilful co-workers, and to make and promulgate sufficient rules and regulations for the conduct of the business in its ordinary run and for any extraordinary occasions that may be reasonably anticipated. It is not seriously contested but that all these things were done by the defendant. We think that it is a misconception of the case, to hold that the order of the train dispatcher was a change of the rules of the road, as established and promulgated by the superintendent. The train dispatcher acted in exact accord with the general rules and regulations which foresaw and with minuteness provided for such an occasion as this, as much and as fully, so far as we can see from the case, as for the ordinary running of trains on the general time-card. The order of the train dispatcher was but a carrying out of those rules, and an application of certain provisions of them to a case for which they were made, and the arising of which had been foreseen as probable. In what other

way could they be carried out in the detail of them, but through the service of servants previously chosen and assigned to their parts? And can it with propriety be said that the parts of that detail are acts of the master, that he must do himself, or be liable for their negligent doing? The liability of the master is then made to depend upon the character of the act in the performance or nonperformance of which the injury arises. If the act is one pertaining to the duty which the master owes to his servants, he is responsible to them for the manner of the performance of it. If it is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for the improper performance of it. *Crispin v. Babbitt*, 81 N. Y. 516 (16 Am. Neg. Cas. 820).

The query then is, in the case before us: Is it the duty of the master to give personal notice to every operative of a train of a special deviation from an established general time-table, or is his duty done when he has beforehand provided rules, minute, explicit, and efficient, and made them known to his servants, which, if observed and followed by all concerned, will bring such personal notice to every one entitled to it? We think that in the circumstances of this case the latter clause of the query propounds the true rule, and should be answered affirmatively. It is the duty of the master to provide rules and regulations for the running of the trains. He has done so here. One of them is, that by telegraphic message, sent at any time through operators at the ends of the wires, to the conductor and engineer of a train, that train may be stopped at a station, or hurried forward to another, or made to go out of general order. These rules with that provision are made known to all servants. If, when the intestate entered the employment of the defendant, these rules had been read to him and his especial attention called to this one, and he had agreed to serve under it, would not he have taken the risk of the carelessness of the operators and conductor in carrying it out? Is this case any different in substance from that? Really, by entering the employment with these rules in force, he did in effect agree that special orders might be so sent. The bargain between him and the defendant was not only that special orders might be given interfering with the general time-table, but that they might be given in this way. It is this feature of the case that distinguishes it from some of those that we have cited.

The case was not given to the jury on this theory. It was, in the words of the learned counsel for the plaintiff, submitted to them on the theory that "the act of the operator was the act of the master." This we think was an error that calls for a reversal of the judgment and a new trial. All concur, except DANFORTH and FINCH, JJ., dissenting.

Judgment reversed.

FIREMAN ON FREIGHT TRAIN INJURED IN COLLISION WITH ANOTHER TRAIN — NEGLIGENCE OF TRAIN DISPATCHER — FELLOW-SERVANT — AGENT — RULES AND REGULATIONS — RAILROAD COMPANY LIABLE. — In connection with the case of *SLATER v. JEWETT*, 85 N. Y. 61 (the preceding case reported), *compare* the case of *HANKINS v. NEW YORK, LAKE ERIE & WESTERN R. R. Co.*, 142 N. Y. 416 (June, 1894), where a fireman was injured by a collision between trains caused by the negligence of a train dispatcher.

The facts in *HANKINS v. NEW YORK, LAKE ERIE & WESTERN R. R. Co.*, 142 N. Y. 416 (where judgment of nonsuit which was *affirmed* by the Supreme Court was *reversed*), are stated in the opinion by PECKHAM, J., as follows:

"The nonsuit in this case was granted on the ground that, assuming the negligence of the train dispatcher, the plaintiff cannot recover because it was the negligence of a fellow-workman. Whether the train dispatcher bore that relation to the plaintiff is, in truth, the only question in the case.

"The facts are not complicated, and those which we regard as material are as follows: The division upon which the accident happened extends from Dunkirk on the west, to Hornellsville on the east. The plaintiff was a fireman on a freight train (No. 340), which, on October 19, 1887, had started from Dayton and arrived at Salamanca, a station on defendant's road, and within the above-named division, early in the morning, on its way east towards Hornellsville, but the train had left Dayton and arrived at Salamanca several hours behind its schedule time, and its movements since leaving Dayton had been entirely controlled by special telegraphic orders from the train dispatcher at his office at Hornellsville. At 7:57 of the day mentioned, the engineer and conductor of this train received, while at the Salamanca station, an order by telegraph from Hornellsville, and signed by the division superintendent and the train dispatcher, which order directed them to 'meet trains 341, 339, and 349 at Carrollton ahead of train 348.' Carrollton was a station a few miles east of Salamanca. The train consisted of 113 cars, and was about half a mile in length, and it started to go east as far as

Carrollton under the above order very soon, or within a few moments after the order was received. The west-bound train No. 341 had arrived at Carrollton several hours behind its regular time, and it was also being run by special telegraphic orders from the train dispatcher's office at Hornellsville. While at Carrollton, on its way west, the conductor and engineer of this train received their telegraphic order at 8:43 A. M., which directed them to 'meet train 334 at Carrollton, 348 at Salamanca, not pass Salamanca without orders.' It was the duty of the conductor and engineer of this train, upon receipt of the order, to move their train west to Salamanca. This they at once proceeded to do.

"Neither the engineer nor the conductor has any voice in running a train by special order; they are simply charged with the duty of carrying out the orders that come to them from the train dispatcher's office. These orders to the conductors and engineers of the trains Nos. 340 and 341 were at once attempted to be carried out by them, and in consequence thereof the two trains came into collision not far from Carrollton, and between 9:05 and 9:10 A. M.

"The plaintiff was fearfully injured, his leg being almost torn from his body, and he was pinned down between the engine and tender and very badly scalded by the hot water from the boiler of his engine. Amputation near the thigh was soon after performed, and the plaintiff, as might be assumed, suffered great agony from the injury, and is rendered a maimed and wrecked individual for the balance of his life. There is no question of contributory negligence in the case, and it cannot be contended that the plaintiff was, at the time of the accident, engaged in anything other than an honest and careful performance of his duty. If these orders were negligently given, the sole question as to defendant's liability becomes one of law. There was enough evidence as to negligence on the part of the train dispatcher, in the giving of the orders, to require the submission of the question to the jury, provided the defendant ought to be held liable for his negligence. It frequently becomes very difficult to determine whether the particular act in any case is that of the master in his character as such, or only as an order or act delegated by the master to another, and performed by such other as an employee. The rule as to the liability of the master for the act of a servant is well known. CHURCH, CH. J., said, in the *Flike* case, that the master must be held liable for negligence in respect to such acts or duties as he is required to perform as master, and without regard to the rank or title of the agent whom he has intrusted with its performance. *Flike v. B. & A. R. Co.*, 53 N. Y. 549, 16 Am. Neg. Cas. 765, *ante*. This language was repeated in *Crispin v. Babbitt*, 81 N. Y. 516 (16 Am. Neg. Cas. 820, *post*), where the liability of the master for the negligence of his servant,

by which another servant has suffered injury, was said not to depend upon the doctrine *respondeat superior*, but upon the omission of some duty of the master which he has confided to such inferior employee. If the act omitted were of the kind which the master owed to the employee the duty of performing, he would be responsible to the employee for the manner of its performance. It is not a question of rank among the different employees. The rule thus laid down has been since frequently approved in this court. *Slater v. Jewett*, 85 N. Y. 62, 16 Am. Neg. Cas. 772, *ante*; *Cullen v. Norton*, 126 N. Y. 1. Its application to a particular case is sometimes difficult, and the boundary line between an act of the master and an act of the employee is sometimes quite vague and shadowy. In this case the evidence would seem to be quite conclusive that the defendant had fully discharged the duty which it owed its employees in the way of establishing and promulgating appropriate and sufficient rules and regulations for the government and operation of the various trains upon its road, and its furnishing general time-tables pertaining thereto. Whether the train dispatcher violated one or all of such rules is not material in the view we take of the case, because the defendant had not performed its whole duty in promulgating rules, nor is a defense made out when it is shown that if the train dispatcher had obeyed the rules the accident would not have occurred. If the defendant owed a duty as master to give correct orders to these trains, or at least to take due and reasonable care to give them, the failure to perform that duty is the failure of the master, in his character as such, although he intrusted the performance of the duty to the train dispatcher.

“ These trains were being run without regard to their ordinary time-tables; they were several hours late, proceeding in opposite directions, and each was approaching the other in entire ignorance of the other’s whereabouts. Both were necessarily dependent upon the special orders they received from Hornellsville. As was said in the *Slater* case, *supra*, the master had the right to vary from the regular time schedules laid down for these trains. It was part of the details incident to the operation of the road, but when a variation, or, in other words, when a special time-table is made out for two trains by which they are to run, if it is the duty of the master not alone to take reasonable care that the alteration shall be made known to the parties interested, but also to take reasonable care that the variation ordered and by which the trains are run shall not necessarily or probably lead to disaster when obediently carried out. Reasonable care in originating and formulating the order is necessary, and is the duty of the master. When the train dispatcher originates and promulgates such orders as were given in this case, he is acting as the master, or, as it is said, his *alter ego*, and the

master is liable for the negligence of the agent he has employed to do his, the master's, particular work.

"In this case it appears that the train dispatcher had his office at Hornellsville for the whole division, and that while he used the name of the division superintendent in giving orders for the movement of trains, yet by the rules they were essentially his orders and signed with his initials in addition to those of the superintendent. It is not claimed that the division superintendent was even bound to know about these movements or special orders. There were three dispatchers at Hornellsville, but there was only one man at a time on duty, and his duty was for eight hours, and while on duty, by a rule of the company, no order could be issued by any other dispatcher. In this way provision was made for full knowledge by each dispatcher of everything going on on his division as to the movement of trains during the time when he was on duty. It is said the accident resulted from a disobedience of these rules, in that the dispatcher, who was about to relinquish his post, sent, at the request of his successor, and in his name, the order to the east-bound train at Salamanca, and the successor, forgetting the transmission of such order at his request by the preceding dispatcher, gave the order to the train at Carrollton and bound west, which caused it to move forward and encounter the other train.

"If the successor of the train dispatcher, instead of asking the one who was just off duty to send the order to the Salamanca train, had sent it himself, as the rule required, all that can be said is that there might have been more probability of his remembering it, but it cannot be said that his failure to obey the rule in such case was the cause of the accident. The same want of memory might have existed in either case. I do not, however, lay any weight upon this fact, because, whether the train dispatcher did or did not obey a rule of the defendant, he was acting when the orders were given on this subject as the master, and was discharging the master's duties, and if he negligently performed them the master must be held liable therefor. We do not say this duty went further than to use reasonable care, measured by the gravity of the interests at stake, to give originally correct orders. If they were correct, as originally given, and subsequently, through the negligence of some employee, they were incorrectly interpreted, or copied, or mistakenly repeated, or delivered to the wrong person, in these and in many other supposable cases there might, perhaps, be reason for the application of the doctrine as to negligence of a co-employee. It is not so as the case appears here.

"In the Flike case, *supra*, the accident happened because of the absence of a third brakeman on a train sent out from East Albany. The company had provided a man at that station, called a head

conductor, whose duty it was to make up the trains, and hire and station the brakemen, and on account of one of the brakemen oversleeping himself, the train went out without a sufficient number of brakemen. The court held the company had not discharged its duty to send out only a properly equipped train when it provided a head conductor and made rules for his presence there and gave to him a superintendence over the trains. The defendant owed a duty to the employees to send out only such a train, and that duty was not complied with by adopting rules governing such a case. It is also the duty of the company to use care in the furnishing of proper cars and machinery, but the duty is not performed by adopting a rule providing for proper inspection and in furnishing proper persons to perform such inspection, so long as they negligently omit to inspect. Proper inspection of the equipment and machinery of a train is itself part of the duty of the company. *Bailey v. Rome, etc., R. R. Co.*, 139 N. Y. 302 (1).

"These cases make it plain that whenever the act is that of the master, or the duty to be performed is particularly his duty, the liability resting upon him for the proper performance of the act or duty is not shifted by the adoption of rules or regulations providing for the performance of the act or duty by the agent of the master.

"Nor is the holding that a train dispatcher in the dispatch of trains performs for the master a duty which it owes as such, a new departure in the branch of the law under discussion. While the cases cited below do not necessarily proceed upon that basis, yet it is plain that it was in all of them regarded as an indisputable proposition so far as a train dispatcher acted in ordering the movement of trains. In *Slater v. Jewett, supra*, it was assumed that the order of the train dispatcher was the act of the master, but it was held that the order was in fact correct, and the injury happened from a negligent performance of duty by subordinate servants who were co-employees of plaintiff's intestate. The same holds true in the case of *Sheehan v. N. Y. Cent., etc., R. R. Co.*, 91 N. Y. 332, and Judge DANFORTH there says that no servant takes the risk of an injury by the very act of the master himself. In *Dana v. N. Y. Cent., etc., R. R. Co.*, 92 N. Y. 639, a judgment of nonsuit in an action brought to recover damages for an injury received in the same accident in which Sheehan was injured, was reversed in this court, and upon the same reasoning employed in the Sheehan case,

1. In *BAILEY v. ROME, WATERTOWN & OGDENSBURG R. R. Co.*, 139 N. Y. 302 (1893), brakeman thrown from freight car and injured by the train, owing to defective brake rod, judgment in favor of defendant was re-

versed, it being the duty of railroad company to properly inspect cars; evidence that other brakes on similar cars were defective was competent as bearing upon the question of inspection, and it was error to reject same.

supra (1). And in *Sutherland v. Troy & Boston R. R. Co.*, 125 N. Y. 737, this court assumes, in the opinion there delivered, that if the accident occurred from the omission of the train dispatcher at Troy

1. In *SHEEHAN v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 91 N. Y. 332 (1883), fireman injured in collision owing to inadequacy of rules provided by defendant, the plaintiff's intestate running "wild" train by special orders, judgment of Supreme Court reversing judgment on verdict for plaintiff for \$8,500, was *reversed* and judgment ordered on verdict. The court (per DANFORTH, J.) said: "As between servant and employer, the latter is bound to use reasonable care in the prosecution of the business in which he engaged the former, and it cannot be made out upon principle, or from any case of authority, that he shall not be liable for damages arising from a failure to do so. *Laning v. N. Y. C. R. Co.*, 49 N. Y. 521 (16 Am. Neg. Cas. 747, *ante*); *Cone v. D. L. & W. R. Co.*, 81 N. Y. 206; *Flike v. B. & A. R. Co.*, 53 N. Y. 549 (16 Am. Neg. Cas. 765, *ante*); *Booth v. B. & A. R. Co.*, 73 N. Y. 38 (16 Am. Neg. Cas. 766, *ante*). So, where the master delegates to another entire control over a particular branch or circumstance of his business, the person to whom such power is delegated stands in the place of the master as to all duties resting upon him to his servant, and his acts or omissions relative thereto are the acts or omissions of the master himself. *Flike v. B. & A. R. Co.*, 53 N. Y. 549 (16 Am. Neg. Cas. 765, *ante*). These rules apply here. The relation of master and servant existed between the defendant and Dennis Sheehan, and the jury have found that his injuries were caused by the omission of the defendant to provide against the event which occasioned them; but their verdict has been set aside in deference,

it is said, to a decision lately made by this court in *Slater v. Jewett*, 85 N. Y. 61 (16 Am. Neg. Cas. 772, *ante*). We think that case has been misapplied. There the defendant changed the time of the running of its train, but only after setting in motion a series of operations designed to carry personal notice to its employee of the intended change and bring to the master an acknowledgment in writing that he had received notice of it. The rule which required these precautions, provided for all supposable contingencies, but they failed by reason of the omission of duty of a fellow-servant. Not so here. The rules of the defendant imply the necessity of care similar to that taken in the case cited, but they do not extend to such an emergency as put the plaintiff in danger, and were inadequate for his protection. The business of the defendant was prosecuted over a single track railway by means of regular trains moving at times prearranged and noted on cards or time tables, and also by occasional trains moving without prearrangement, but by special order without reference to any schedule of the regular trains, and conforming to no conditions save the immediate order of the owner, which were styled 'wild' or 'wild cat.'" * * *

After setting out the rules, the court said: "It is argued, however, by the respondent's counsel that the plaintiff took the risk of defects in the defendant's system of running trains by telegraphic orders. There are cases where such an argument might apply, but I am not aware of any principle which releases the master from liability to an employee who has been injured by the very act of his em-

to exercise proper care to notify the train, a case was made out on the question of defendant's negligence. (1).

"I think this is a fair and wholesome rule, fair to the master, while at the same time affording some protection to the employee. The defendant ought not to escape liability for negligently issuing, as master, and in the course of the performance of its duty as such to its employees, an improper order, and whether it has done so should be submitted to the jury.

"I have looked at the various cases cited by the learned counsel for the defendant, and I have found none in this court which conflicts with these views. It is not necessary to cite each one, and criticise it in detail. It is sufficient to say they do not conflict with our decision in the case at bar." Judgment *reversed*. (W. H. HENDERSON and W. T. THRASHER, appeared for appellant; JAMES H. STEVENS, for respondent.)

ployer, or by the omission, on its part, to provide rules which faithfully carried out, would ensure safety. There was no such bargain between the parties, and public policy forbids that one should be implied. Moreover, the question raised by the defendant, was, at the request of his counsel, submitted to the jury, and they found that the plaintiff neither knew, nor had the opportunity of knowing, the methods employed by the defendant in running its trains by telegraphic orders, but, however the fact might be, the peremptory order of the superintendent to go forward, regardless of 'No. 50,' was an assurance that the track would be free and safe for the journey, and required the defendant to take reasonable precautions to make it so. The rule of the defendant did not require Kieffer to submit the message, received by him, to the conductor or engineer of train 'No. 50,' nor a communication back from those persons, that they had received, and understood the order; an omission of either circumstance was the act of the defendant, and in the absence of other precautions, might properly be held to constitute negligence. The jury have found, upon sufficient evidence, that such precautions were not taken." Judgment of Supreme Court reversed

and judgment ordered on verdict for plaintiff.

DANA v. N. Y. CENTRAL & HUDSON RIVER R. R. Co., 92 N. Y. 639 (1883), was an action arising out of the same accident as in the Sheehan case (preceding paragraph), the plaintiff's intestate being the engineer who was killed in the collision. Nonsuit which was affirmed by the Supreme Court was *reversed* and new trial ordered.

1. In SUTHERLAND, ADM'X, v. TROY & BOSTON R. R. Co., 125 N. Y. 737 (1891), locomotive engineer killed in collision of trains caused by alleged negligence and incompetency of telegraph operator, judgment of Supreme Court affirming judgment on verdict for plaintiff for \$3,000, was *reversed*. It was held that the violation of rule as to speed of train by plaintiff's intestate contributed to the accident. It was also held that the mere fact that the telegraph operator was only a little over seventeen years of age did not warrant an inference that he was incompetent in fact from his age only. The case is reported more fully in 35 N. Y. State Rep. 853. Upon a former trial of the Sutherland case, plaintiff was nonsuited, but the judgment was reversed by the General Term of the Supreme Court. See 46 Hun, 372.

LABORER IN GRAIN ELEVATOR WORKING IN BIN KILLED BY FALL OF GRAIN — SUPERINTENDENT VICE-PRINCIPAL — DUTY TO FURNISH SAFE PLACE TO WORK — QUESTIONS OF NEGLIGENCE FOR JURY. — In **McGOVERN, ADM'X, v. CENTRAL VERMONT R. R. CO.**, 123 N. Y. 280 (October, 1890), plaintiff's intestate, a laborer employed by defendant to shovel grain in its grain elevator, killed while in bin by the fall of grain, which buried him while he was at work in the bin under the direction of defendant's superintendent. Judgment of nonsuit, *affirmed* by the Supreme Court, was *reversed*. C. A. KELLOGG, appeared for appellant; LOUIS HASBROUCK, for respondent. The case is stated in the opinion by RUGER, CH. J., as follows:

"Thomas McGovern, the plaintiff's intestate, a laborer in the employ of the defendant, was killed while engaged in cleaning out a bin containing grain. The defendant operated a railroad and owned a grain elevator at Ogdensburg, and was engaged in the business of transporting grain and other freight upon its railroad. The elevator contained 144 bins; wooden structures about fifty feet in height and twelve or fourteen feet square, terminating at the bottom in a sort of double hopper, from which spouts several feet in length and about six inches square ran to places provided for its reception, when grain was being loaded for transportation. When the spout was open, the grain, in its natural condition, would, by its own gravity, empty the bin and discharge itself through the spout. Sometimes, however, the grain became heated, in which case it would adhere and become banked up in greater or less quantities on the sides of the bin. The various bins had an aggregate capacity of upwards of 600,000 bushels, and each bin must, therefore, have been capable of containing about 4,000 bushels. In the side of the hopper, at the bottom of each bin, a trapdoor eleven inches by thirteen had been constructed to allow workmen to enter for the purpose of cleaning out the bin. These doors swung on hinges and opened inward and upward. Of course, when the bin was full, they could not be opened; but, when the grain ran out, so that the doors were relieved from the pressure, they could be opened and then rested upon the inclined sides of the bottom of the bin, secured only by their own weight. The bins could also be entered from the top, where a man was usually stationed with lanterns, ladders, and other appliances, to examine and determine the condition of the grain in the bins, whenever a knowledge of that fact was deemed necessary. Two men, of whom the plaintiff's intestate was one, were employed to clean out the bins after the grain had been discharged therefrom, or when, for any reason, it had ceased to run through the spouts provided for its discharge. These men alternated in this work, and when bin No. 101, in which the accident

happened, 'went to shoveling,' as it was called, or ceased to discharge grain, it was the turn of McGovern to enter and clean it out.

"It does not appear that there were any arrangements for keeping an account of the quantity of grain discharged from the bins, or that remaining in the respective bins as they were being discharged, and those facts could be determined only by actual inspection. Obviously, this could only be discovered with accuracy by an inspection from the top, since the bottom of the bin was dark and the vision obscured by dust and other substances remaining in it, and was inaccessible when any considerable quantity of undetached grain remained in the bin. It was originally intended that the bins should be entered and cleaned from the top; but, for some reason not appearing, the defendant, at some time, substituted the trapdoors and that mode of entrance for the former mode. The plaintiff's intestate had been employed in the business by the defendant for a period of about thirteen years, and, so far as appears, no accident had happened to him during that period. He knew that grain was liable to become heated and sticky, and while in that condition would adhere to the sides of the bin to some extent. No rules for the inspection of the bins had been adopted by the defendant, and the workmen employed to clean them were left to work according to their own devices, except as they were specially ordered from time to time to enter the bins from the bottom, by the defendant. On the day in question the plaintiff's intestate was called upon to enter the bin and clean it out. When he arrived on the ground he found the trapdoor open and a ladder, running from the floor to the door, placed there by the superintendent. That officer had already examined the bin with a pole from the trapdoor, and had, apparently, been unable to discover the location of the grain supposed to be in the bin. Fackerell, an associate of the deceased, had, by the superintendent's orders, also been in the bin at the bottom, and had loosened and discharged all the grain he could reach with a pole from that point. The lower part of the elevator contained no grain, and it was obvious that if any remained therein it adhered to the sides of the bin at some place between the top and the point which could be reached from the bottom; but where it was could not be discovered from the bottom. It could have been easily and safely discovered from the top by letting down a lantern or descending by a ladder until the grain was reached. These means were not, however, employed, and McGovern was, either impliedly or expressly, directed to enter the bin through the trapdoor and clean it out. This he proceeded to do, and shortly after entering it Fackerell, his associate, was directed to assist him. Fackerell also went into the bin with a pole, and after remaining a few minutes and finding that the grain was probably piled up on the side of the bin beyond his reach, told

McGovern that they had better get at it from the top; that it was not safe to do so from the bottom. Fackerell then started to get out, and as he was passing through the trapdoor was ordered by the superintendent to call McGovern out. Fackerell repeated this order to McGovern, and as he reached the floor he saw McGovern with his legs partly out of the door in the act of attempting to descend the ladder. Soon thereafter the legs disappeared and the door became closed. It was then evident to the superintendent and the other bystanders that the grain had fallen and closed the door and imprisoned McGovern. The superintendent and workmen then went to the upper story and entered the bin from the top, where they found a large quantity of grain in the bottom of the bin. After shoveling some time they came to McGovern's dead body in the bottom of the bin near the spout.

"The danger to persons in the bottom of a bin arising from the presence of large quantities of grain therein, which had become attached to its sides by heat, and was liable to break away and fall from a slight jar or other cause, was so obvious that it must have been apparent to those who constructed the trapdoors as well as to all who were engaged in conducting the business. The precaution adopted by the master for inspection from the top of the bin showed that he was aware of the danger, and that there might be occasions when it was impossible or dangerous to inspect from the bottom. * * *

"The case is not entirely free from doubt, but we are of the opinion that the questions involved are those of fact which required a submission to the jury. The measure of the duty which rests upon those who are prosecuting a dangerous business which is intrinsically hazardous to human life, is not made so definite and clear by the authorities that a person can always readily determine from the facts of a given case whether injuries occur from the omission of some duty imposed upon the master, or from the risks which are incident to the business and assumed by the servant. Employments which are carried on by the aid of machinery and the use of mechanical power, or the movement of large bodies, are generally either dangerous in themselves or are made so by the carelessness of those who are engaged in carrying them on.

"It may, we think, be laid down as a general rule that the dangers connected with such a business, which are unavoidable after the exercise by the master of proper care and precaution in guarding against them, are risks incident to the employment, and are assumed by those who consent to accept employment under such circumstances. But those dangers, which are known and can be mitigated or avoided by the exercise of reasonable care and precaution on the part of those carrying on the business, and injuries from which

happen through neglect to exercise such care, are not incidents to the business, and the master is generally liable for damages occurring therefrom. For instance, if the servant puts himself in the way of dangerous machinery, with knowledge of its character, or places himself in the way of bodies moving in their accustomed orbit with irresistible force, and is thereby injured, it will generally be regarded as the result of his own carelessness; but if he is engaged in a business which may be safely carried on according to the degree of care and caution used in prosecuting it, but by omission of such care may become hazardous to human life, it is the duty of those carrying on such business to adopt all reasonable precaution to avoid the occurrence of such danger, by adapting the modes of conducting the business to the avoidance of the ascertainable dangers accompanying its exercise. In other words, it is the duty of the master, having control of the times, places, and conditions under which the servant is required to labor, to guard him against probable danger in all cases in which that may be done by the exercise of reasonable caution. The master is required to furnish the servant adequate and suitable tools and implements for his use, a safe and proper place in which to prosecute his work, and when they are needed, the employment of skilful and competent workmen to direct his labor and the performance of his duties. *Pantzar v. Tilly Foster I. M. Co.*, 99 N. Y. 376 (16 Am. Neg. Cas. 832). * * *

"When directing the performance of work by the servant in a place which may become dangerous, and such danger may be foreseen and guarded against by the exercise of reasonable care and prudence on the part of the master, it is his duty to exercise such care and adopt such precautions as will protect the servant from avoidable danger. This is the master's duty, and however he may choose to exercise it, whether through the supervision of a superintendent or some lower grade of employment, it still continues his duty, and not until he shows that it has been properly performed, can he claim exemption from liability for injuries occasioned by its non-performance. *Laning v. N. Y. C. R. Co.*, 49 N. Y. 521-532, 16 Am. Neg. Cas. 747, *ante*; *Corcoran v. Holbrook* 59 N. Y. 517 (1).

"Can it be said, as a matter of law in this case, that the master had performed the duties to its servants, which the rules referred to imposed upon it? The defendant was a corporation and neces-

1. In *CORCORAN v. HOLBROOK*, 59 N. Y. 517 (1875), employee riding on freight elevator in defendant's mill injured by the elevator falling, defendant's manager having knowledge of defective condition and employees being allowed to ride, judgment of Supreme Court ordering new trial after report for plaintiff for \$1,000, was *reversed* and judgment on report affirmed. Delegation of master's duty to a servant does not relieve former from liability for negligent performance by the latter.

sarily performed all of its duties through agents. It had a superintendent, who, it appears, had entire control over the elevator in question, and the men employed in it. This superintendent was present at the scene of the accident, and knew the place where, and the conditions under, which the servant was required to work. He had reason to know that the grain had not been entirely discharged from the bin, and had examined it for the purpose of discovering its location and condition, and had failed to do so. He also knew that the grain was heated, and liable in that condition to stick together and adhere to the sides of the bin, and it was for the purpose of detaching this grain that he sent the plaintiff's intestate into the bin. When detached, he knew the grain must, under the operation of natural laws, fall into the bottom of the bin, and jeopardize the lives of those who might then be there. He opened the trapdoor, placed the ladder in position, and sent for the plaintiff's intestate to enter the bin, and practically required him to enter the trapdoor. He made no effort to cause the bin to be examined from the top with a view of ascertaining the quantity of grain remaining therein, or its location. Before the accident happened he recognized the danger, and ordered McGovern out of the bin, but too late to avoid the catastrophe.

"We have said the superintendent was aware of these facts, and performed the acts referred to. That officer stood in the place of the corporation with respect to its servants, and what he knew, the corporation knew, and what he said and did, was the speech and act of the corporation.

"We think, under the circumstances, it was the province of the jury to determine whether the defendant discharged the duty which it owed to its servants. They might have found that the master was negligent in performing the duty of making proper inspection before ordering its servants to enter a place which was obviously dangerous. The place in which the master required the servant to work was clearly unsafe, and it was a question for the jury to determine whether the master had adopted all reasonable precaution to shield him from the danger he was exposed to in the place assigned to him for labor, before requiring him to occupy that place.

"We think the question might also have been left to the jury to determine whether the omission to make rules and regulations prescribing the conditions under which servants should be required or permitted to enter the bins at the bottom, was or was not a neglect of such reasonable care and precaution as a master engaged in such business was bound to take under the circumstances of this case.

"We are, therefore, of the opinion that the case ought to have been left to the jury on the question of the defendant's negligence.

"The question as to whether the plaintiff's intestate was guilty of contributory negligence is, perhaps, one of more doubt than the other; but we are of the opinion that that also was a question for the jury. The deceased was a mere laborer, employed solely to shovel grain, and having no duty of inspection or supervision to perform, he worked when and wherever he was directed to do so by his superiors. On the occasion in question he was sent for by the superintendent to enter the bin from the bottom. He found the trap-door open, the ladder in position, and his superior officer awaiting his action. If he had ventured, under such circumstances, to refuse to enter the bin, or delayed work until an inspection had been made from the top, it would obviously have been considered an impertinence by his employers. The master had provided the place for, and prescribed the mode of doing the work, and it is quite unlikely that any suggestions from the servant would, at that time, have been heeded by his superiors. He knew nothing about the condition of the grain in the bin, except that as it was expelled from the spout earlier in the day it appeared to have been heated. It is suggested that when he was informed the bin had gone to 'shoveling,' he remarked that that couldn't be so, as he had been in the bin the day before. We do not see what this remark indicated. Certainly nothing in regard to a knowledge of a condition of the bin on a subsequent day. How or where he entered the bin the day before did not appear, and whatever he might then have discovered would not affect the condition of the bin the next day after three or four carloads of grain had been removed from it. The question whether there was danger in entering the bin depended altogether upon the quantity of grain remaining in it. If it was a small amount adhering only to the sides, needing only to be scraped off, it would be comparatively safe. If, however, it was a large quantity, sufficient when loosened to fill up the bottom of the bin, it would be unquestionably dangerous. He did not know, and could not know, with his means of knowledge, how much grain there was left in the bin. He had a right to assume that the superintendent did know, and had not ordered him to enter the bin when it was manifestly dangerous to do so.

"We are, therefore, of the opinion that there was evidence in the case from which the jury might have found that the plaintiff's intestate was free from negligence." Judgment *reversed*. PECKHAM, J., *dissenting*.

MINOR EMPLOYEE SUFFOCATED BY CAVE-IN OF EARTH AT MACHINE SHOP PREMISES — SAFE PLACE TO WORK — QUESTION FOR JURY. — In **KRANZ, Adm'r, v. LONG ISLAND R'Y CO.**, 123 N. Y. 1 (1890), employee fatally injured

by cave-in of earth while he was cleaning out water pipes on defendant's premises, judgment of nonsuit was *reversed*, as the question of defendant's negligence should have been submitted to the jury. FINCH, J., stated the facts as follows:

"The plaintiff's intestate was a young man about eighteen years of age, who had entered the machine shops of the defendant company to learn the trade, and pursued that branch of labor. He was ordered to go to the depot at Bay Ridge to clean or aid in cleaning certain water pipes placed under ground at that point. A trench was opened for that purpose by the sectionman, and laborers under his direction, some hours before the intestate began work upon the pipes. That was a necessary step to furnish him a suitable place and proper opportunity for the performance of his own duty. He entered the trench and began to disconnect the pipes, and, while so engaged, the earth caved in upon him, and he died of suffocation.

"The defendant owed to its servant the duty of providing a place reasonably safe for the work which he was directed to do. Those who opened the trench were performing the master's duty to the deceased in preparing a suitable place and opportunity for the labor of the intestate in discharge of his duty. The General Term conceded so much, but held that the danger, if any, was as obvious to the servant as the master, and the former chose to take the risk. That proposition is incorrect as a legal conclusion from the proof, and is scarcely defended on this appeal; but the nonsuit is sought to be sustained upon the ground that they who opened the trench were fellow-servants of the intestate engaged with him in a common enterprise, and whose negligence, if any, in bracing or protecting the sides of the trench was one of the risks which the deceased assumed. I think the decisions of this court are adverse to that view. The general question was very much discussed and quite fully considered in *Slater v. Jewett*, 85 N. Y. 61, 16 Am. Neg. Cas. 772, and later applied to different facts in *Pantzar v. Tilly Foster Iron Mining Co.*, 99 N. Y. 368 (16 Am. Neg. Cas. 832), and *Benzing v. Steinway*, 101 N. Y. 547. In these cases the duty of the master to exercise reasonable care in furnishing to the servant safe tools and appliances, competent co-servants, and a safe place in which to work was fully recognized." *Murphy v. B. & A. R. Co.*, 88 N. Y. 152, and *Cook v. N. Y. Cent. & H. R. R. Co.*, 119 N. Y. 653, *distinguished*. In referring to the *COOK* case the court said: "The cause of the injury in that case was a caving in of the sides of a trench as in the action before us. The respondent suggests to us that the decision of the *COOK* case turned wholly upon the defendant's negligence in failing to employ a competent superintendent. That is true. The workman there was steadily making or assisting in making his own place in which to work. If it became unsafe, his own negligence co-

operated and barred his remedy unless he acted under the master's orders given by an incompetent superintendent. But here the deceased had nothing to do with the preparation of the trench. It was prepared not by him, but for him, and reasonable care in its preparation, we think, was the master's duty to the servant."

ENGINEER KILLED — COLLISION — INCOMPETENT BRAKEMAN — IMPROPER SIGNAL — RAILROAD COMPANY LIABLE. — In **MANN v. DELAWARE & HUDSON CANAL CO. (President, etc.)**, 91 N. Y. 495 (1883), engineer of freight train killed in collision, judgment for plaintiff for \$5,000 was *affirmed*. It appeared that the accident was caused by improper signaling by incompetent brakeman who although without much, if any, experience was directed by conductor to signal train. Defendant held liable for act of incompetent employee, the evidence showing that he was incompetent to discharge the duties of flagman and did not know of the rule requiring the use of torpedoes. As to whether defendant was liable for conductor's negligence the court (per ANDREWS, J.) said:

"It is claimed by the defendant that assuming the incompetency of Townsend [the flagman], his selection for the duty of flagging the intestate's train was the negligent act of Benedict, the conductor, and that the defendant having furnished other competent and experienced brakemen, who might have been selected by Benedict, the company is not liable. We think this claim cannot be supported in view of the doctrine now firmly settled in this State, that no duty belonging to the master to perform for the safety and protection of his servants can be delegated to any servant of any grade, so as to exonerate the master from responsibility to a co-servant, who has been injured by its non-performance. The duty to use due care in the selection of competent servants is one of the master's duties. The duty of selection, in case of corporations, must be delegated. But any negligent act or omission in its performance is the act or omission of the master. In *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521, 16 Am. Neg. Cas. 747, *ante*, the actionable negligence upon the case as presented was found in the employment of Westman, who had, after his original employment by the defendant, become incompetent by intemperate habits, and who selected the incompetent men to build the scaffold. But *Flike v. B. & A. R. Co.*, 53 N. Y. 549, 16 Am. Neg. Cas. 765, *ante*, and *Booth v. B. & A. R. Co.*, 73 N. Y. 38, 16 Am. Neg. Cas. 766, *ante* show that if Westman had been a fit man to be intrusted with the duty, his negligent employment of incompetent men would have rendered the defendant liable. In the **FLIKE** case, Rockfeller was a competent man, but his omission to see that the proper number of brakemen were sent with the

train, was held to be an omission of the master for which the principal was responsible. In the *Booth* case, arising out of the same accident as the *Flike* case, the point was made that as it then appeared, that by the rules of the company, it was the conductor's duty to report to Rockefeller any deficiency of brakemen, and that the conductor omitted to perform this duty, the omission was that of a co-servant merely; but this court overruled the point on the ground that no matter whose immediate negligence it was to start the train without sufficient brakemen, it was in law the negligence of the defendant. In *Fuller v. Jewett*, 80 N. Y. 46, 16 Am. Neg. Cas. 774, *ante*, the same rule was applied with respect to the duty of the master to provide suitable machinery and keep it in repair. The work of repairing the engine in that case was committed to competent mechanics with proper instructions, but they failed to perform the duty properly, and the master was held responsible for the omission. In this case it does not appear that Benedict knew that Townsend was an unfit person to be sent to flag the train. The company had apparently, without any inquiry as to his qualifications, put him in the position of an extra man, who might be selected by a conductor to fill a vacancy, thereby giving an assurance of his competency for the position. Even if Benedict was negligent in selecting Townsend, he was in so doing acting in place of the master, and his negligence was the defendant's negligence. The power to select a temporary brakeman from the extra men was conferred upon Benedict. The brakemen were subject to his orders. It would be unreasonable that the master should confer upon a subordinate the power to select a man for so important a duty as they intrusted to Townsend, and be exonerated from responsibility on the ground that the subordinate was negligent in its performance. The primary wrong was the placing of Townsend among the extra men without inquiry as to his fitness, or instructing him as to the rules of the company. The negligence of Benedict, if it existed, was secondary and co-operative merely. These views cover the questions presented." Judgment affirmed.

EMPLOYEE MOVING DAMAGED CARS TO SHOPS CRUSHED BETWEEN CARS — BACKING TRAIN — NEGLIGENCE OF YARDMASTER — FELLOW-SERVANT — In *McCOSKER, Adm'x, v. LONG ISLAND R. R. CO.*, 84 N. Y. 77 (1881), appeal by defendant from judgment for plaintiff (21 Hun, 500), judgment was *reversed* and new trial granted for error in denying defendant's motion to dismiss the complaint. EDWARD E. SPRAGUE, appeared for appellant; CLIFFORD A. H. BARTLETT, for respondent. The case as stated in the opinion by FINCH, J., is as follows:

The doctrine established by our decision in *Crispin v. Babbitt*, 81

N. Y. 516 (16 Am. Neg. Cas. 820), is fatal to the plaintiff's claim. The yardmaster, through whose negligence the injury occurred, must be deemed to have been a fellow-servant of the deceased, as to all acts done within the range of the common employment, except such as were done in the performance of some duty which the master owed to his servants. The act, in the present case, was very plainly not of that character. The yardmaster was charged with the duty of making up the trains and distributing the cars in and about the yard, and the repair shops of the defendant, and the deceased was employed by him to assist in that service. As a necessary consequence, broken and disabled cars had to be handled and moved to the repair shops, and whatever of risk was inseparable from their damaged condition, and the inconvenience, and even danger, of getting them to the shops was an open and palpable risk of his employment which the deceased assumed. It is, of course, no ground of liability of the company that the bumpers of this car were broken, and it could not be coupled in the ordinary way. The deceased was employed to handle and move to the repair shops damaged and disabled cars, and took the risk of his employment in that respect. While engaged in attaching the broken car to the one in front with the aid of a chain, and by direction of the yardmaster, the latter negligently, and at the wrong moment, signaled to the engineer to back his train, and as a consequence the deceased was crushed between the cars. The negligence which caused the injury was in no sense that of the master. In moving this train the yardmaster was acting not as the agent of the master in the performance of the master's duties, for it was not the latter's duty to effect the coupling of these cars and their movement to the repair shop. What the yardmaster was doing was the work of a servant, in the department of labor and duty assigned to him as such. No duty which the master owed to his servants was being done by the yardmaster from the negligent performance of which the injury resulted. The question of liability was distinctly raised upon a motion for a non-suit, based upon the grounds that the acts of the yardmaster, so far as they tended to cause the injury, were those of a fellow-servant with the deceased, and that there was no evidence of any failure to perform the duties which defendant owed to deceased, either on its part or on the part of any person to whom it had delegated the performance of such duties. The motion should have been granted. and its denial was error, for which the judgment should be reversed." All concurred, except DANFORTH, J., not voting, and RAPALLO, J., absent. Judgment reversed, new trial granted, costs to abide the event. Reversing 21 Hun, 500, 69 How. Pr. 258.

EMPLOYEE OF ANOTHER COMPANY INJURED ON GRAIN ELEVATOR AT DEFENDANT'S PIERS—LICENSEE—RULE OF LAW.—In **FLYNN v. CENTRAL R. R. CO. OF NEW JERSEY**, 142 N. Y. 439 (1894), judgment of Superior Court of city of New York affirming judgment on verdict for plaintiff for \$2,500, was *reversed*. The court (per BARTLETT, J.) stated the facts as follows:

"The plaintiff, a grain shoveler, at the time of his injury was employed by the firm of Edward Annan & Co., on board of one of their grain elevators, engaged in transferring grain from a canal boat to the cars of the defendant's road. The elevator was made fast to one of defendant's piers in Jersey City, and the canal boat laid at the side of the elevator away from the pier, while the cars on which the grain was being loaded stood on a track of defendant's said piers. Between these cars and the side of the pier to which the elevator was secured was another track on which stood empty cars which were in the control of defendant, but with which plaintiff and his employers had nothing to do. In loading the grain it was necessary for plaintiff and others to pass frequently from the elevator to the cars being loaded, and for convenient passage a space of about six feet had been left between two of the cars standing on the intermediate track. While plaintiff, in the discharge of his duty, was passing through this space the cars were suddenly forced together and he was very seriously injured. This is an outline of the facts as alleged by plaintiff, and to some extent controverted by the defendant, and concerning which a large amount of evidence was submitted to the jury. As we are of opinion that there was legal error in the learned trial judge's charge to the jury which leads to the reversal of this judgment it is unnecessary to consider many of the questions discussed on the argument and in the briefs of counsel. The main question in this case is whether, upon the facts submitted to the jury, the defendant is liable. The court charged as to the rule of law governing this liability as follows: 'The rule of law is that if a person invites another to come upon the former's premises, and premises which the former controls, he is responsible for any injury which ensues from the other person going upon those premises where he is invited. And it is so in this case.' The defendant's counsel excepted to this part of the charge, and the court said: 'I repeat that unless the fact is that the person is negligent himself.' The effect of this charge was to practically instruct the jury that if one invites another upon his premises he becomes the absolute insurer of his safety unless the person invited is guilty of negligence. There is no such rule of law, and it is impossible to say that the jury were not misled by this part of the judge's charge. The general rule applicable to per-

sons occupying real property for business purposes is that they must use reasonable prudence and care, to keep their property in such a condition that those who go there shall not be unreasonably and unnecessarily exposed to danger. The measure of their duty is reasonable prudence and care." *Larkin v. O'Neill*, 119 N. Y. 225; *Newell v. Bartlett*, 114 N. Y. 399; *Hart v. Grennell*, 122 N. Y. 374; *Ackert v. Lansing*, 59 N. Y. 646.

NOTES OF NEW YORK CASES ARISING OUT OF INJURIES TO RAILROAD EMPLOYEES.

- 1. Baggage man.**
- 2. Brakemen.**
 - a. Coupling cars.*
 - b. Defective appliance.*
 - c. Derailment of train.*
 - d. Miscellaneous.*
- 3. Car coupler.**
- 4. Car inspector.**
- 5. Car repairer.**
- 6. Engineers.**
- 7. Firemen.**
- 8. Flagman.**
- 9. Loading and unloading cars, etc.**
- 10. Machinists, mechanics, carpenters, etc.**
- 11. Switchmen.**
- 12. Track hands, laborers, etc.**
- 13. Yardmaster.**
- 14. Employees of other companies.**

Among the numerous cases decided in the New York Court of Appeals, relating to injuries to railroad employees, not reported in this volume of AM. NEG. CAS., are the following:

1. Baggage man injured.

Contract releasing company from damages for its negligence.

In *PURDY v. ROME, WATERTOWN & OGDENSBURGH R. R. Co.*, 125 N. Y. 209 (1891), baggage man injured while in performance of duties for defendant, the question turned upon the validity of the contract of employment which released defendant from all liability for injuries sustained by the plaintiff by negligence of defendant. The court held that the contract was void for want of consideration. There was no promise of continued employment, no consideration was paid for it, and there was no condition of continued employment on execution of the contract. Judgment on verdict for plaintiff for \$5,000, which was affirmed by the Supreme Court (52 Hun, 267), was affirmed. Opinion by PECKHAM, J.

2. Brakemen injured.

- a. *Coupling cars.*
- b. *Defective appliances.*
- c. *Derailment of train.*
- d. *Miscellaneous.*

a COUPLING CARS.

Brakeman coupling cars stepping into dangerous place.

In *PLANK v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 60 N. Y. 607 (1875), brakeman coupling moving cars at night under conductor's orders, fatally injured by stepping into a sluiceway, of which he had notice, judgment of Supreme Court reversing nonsuit and ordering new trial, was *affirmed*, and judgment rendered against defendant. Employee not guilty of contributory negligence, although he had knowledge of dangerous place, where he was ordered to couple cars in motion. *Affirming* 1 Sup. (T. & C.) 319.

Brakeman injured coupling cars — Foreign cars — Inspection.

In *GOTTLIEB v. NEW YORK, LAKE ERIE & WESTERN R. R. Co.*, 100 N. Y. 462 (1885), brakeman crushed between two cars while trying to couple them, the cars being of different gauge, judgment of Supreme Court affirming judgment on verdict for plaintiff for \$5,000 was *affirmed*. A railroad company is bound to inspect the cars of another company used upon its road, just as it would upon its own cars, and is responsible for such defects as would be discovered by ordinary inspection, and when such defects are so discovered it must either remedy such defects or refuse to take the cars.

See also *GOODRICH v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 116 N. Y. 398 (1889), where judgment of nonsuit was *reversed*, in action by brakeman for injuries sustained by him while coupling a car received from another road to defendant's cars.

Brakeman struck by engine — Run over by ash car.

In *LILLY v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 107 N. Y. 566 (1887), brakeman, while engaged in coupling cars in defendant's yard, struck by an engine while in the act of swinging himself onto an ash car, thrown from car and run over, the wheels crushing both legs, judgment of Supreme Court affirming nonsuit was *reversed*, the questions of defective brake and negligence being for the jury. Opinion by PECKHAM, J.

Brakeman coupling cars — Defective drawhead — Obvious defect.

In *ARNOLD v. DELAWARE & HUDSON CANAL Co. (President, etc.)*, 125 N. Y. 15 (1890), brakeman injured in railroad yard while attempting to couple two cars, one of which had a broken drawhead, the defect being obvious, judgment of nonsuit was *affirmed*. The court (per FINCH, J.), in distinguishing the case of *Goodrich v. N. Y. Central & H. R. R. Co.*, 116 N. Y. 398, said: "In that case the cars were being coupled for the purpose of proceeding on their journey. The plaintiff was required in the night-time, and with the aid of a lantern, to make the coupling, and found a broken

drawhead, in seeking to use which his arm was crushed between the dead-woods. The case was so close upon its facts that the reversal was by a bare majority of the court, but it stands upon the distinct ground, not at all applicable to the present case, that the master had failed in his duty of inspection and repair, and the servant had a right to assume that the cars were perfect, and act on that assumption. Precisely the contrary is the fact here. There had been inspection, the coupling was for the purpose of repairs, and the servant had no right to assume that the cars were perfect and act on that assumption. The rule and custom of the business in the yard was to chain up or prop up a defective drawhead, which had fallen below its proper level, in order to make the couplings meet. That was a detail of the servants' work in the yard and not the master's duty to the servants. The neglect of that precaution, if not chargeable in some degree to the plaintiff himself, was, at least, the neglect of his co-servants, and not a failure of duty on the part of the master. The case was, therefore, correctly decided."

Brakeman coupling cars — Foot catching between ties on track — Contributory negligence.

In *FINNELL v. DELAWARE, LACKAWANNA & WESTERN R. R. Co.*, 129 N. Y. 669 (1891), brakeman injured while coupling car, walking on track in day-time behind a slowly-backing engine, his foot catching between two ties, the track being unballasted, and legs run over, judgment on verdict for \$8,500 affirmed by the Supreme Court, was *reversed* on the ground of contributory negligence.

Brakeman killed coupling cars — Assumption of risk.

In *BERRIGAN, ADM'R, v. NEW YORK, LAKE ERIE & WESTERN R. R. Co.*, 131 N. Y. 582 (1892), brakeman fatally injured while coupling cars, negligent act of engineer in moving train being alleged, judgment of Supreme Court affirming judgment on verdict for plaintiff was *reversed* on the ground that the deceased assumed the risks.

b. DEFECTIVE APPLIANCE — BRAKEMAN INJURED.

Brakeman, a minor, thrown from freight car — Defective brake-chain.

In *DE GRAAF v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 76 N. Y. 125 (1879), brakeman, a minor, thrown from freight car by breaking of a brake-chain, his left hand and right foot being cut off, judgment of Supreme Court reversing judgment on verdict for plaintiff for \$5,500 was *affirmed*, and judgment absolute against plaintiff on the ground of assumption of risk. See another decision in 3 Sup. (T. & C.) 255.

Brakeman thrown from car — Defective eyebolt.

In *PAINTON v. NORTHERN CENTRAL R. R. Co.*, 83 N. Y. 7 (1880), brakeman thrown from car while applying brake, the eyebolt breaking owing to a defect, and brakeman's arm injured, requiring amputation, judgment of Supreme Court reversing judgment for plaintiff was *reversed*, and judgment on verdict for plaintiff for \$5,250 *affirmed*.

Brakeman thrown from train — Defective brake-wheel.

In *DISHER v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co.*, 94 N. Y. 622 (mem.), brakeman thrown from moving train by reason of the breaking of a brake-wheel, negligence alleged being defective and insufficient brake-wheel which was known to defendant, and failure to inspect fracture in wheel, it was *held* that the evidence did not sustain the allegations, and judgment for plaintiff was *reversed*.

Brakeman killed — Collision between lumber car and freight train.

In *BYRNES, ADM'R, v. NEW YORK, LAKE ERIE & WESTERN R. R. Co.*, 113 N. Y. 251 (1889), brakeman getting upon a lumber car which was to be attached to freight train at a way station but owing to alleged defective loading of the car the brake would not work and a collision occurred, and he was thrown from car and killed, judgment of Supreme Court affirming judgment for plaintiff for \$5,000 was *reversed* and new trial granted on the ground that the evidence failed to show negligence of defendant in its performance of duty towards its employee. Opinion of PECKHAM, J.

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c. DERAILMENT OF TRAIN — BRAKEMAN INJURED.

Brakeman injured — Derailment of train — Negligence of switchman.

In *COPPINS v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 122 N. Y. 557 (1890), brakeman injured [leg, head and breast] by derailment of train caused by neglect of switchman to close switch, the habit of the latter to leave his post being known to defendant, and the engineer of the train being also negligent in failing to observe the open switch, judgment for plaintiff was *affirmed*. The rule as to concurring negligence of fellow-servant, stated in *Cone v. D., L. & W. R. Co.* 81 N. Y. 206, and in *Ellis v. N. Y., L. E. & W. R. Co.*, 95 N. Y. 546, applied. The verdict was for \$13,500, but the amount was reduced at Supreme Court and, as modified, was affirmed, which was affirmed by the Court of Appeals. The rule in the *Cone* and *Ellis* cases was that the master was not excused by the fact that the negligence of a fellow-servant co-operated with that of the master in causing an injury to a servant.

Brakeman injured — Derailment of train — Disobedience of rules.

In *LACROY v. NEW YORK, LAKE ERIE & WESTERN R. R. Co.*, 132 N. Y. 570 (1892), judgment of Supreme Court (57 Hun, 67) affirming judgment on verdict for plaintiff for \$3,500 was *reversed*. The syllabus to the official report sets out the facts and the decision as follows:

"Plaintiff was employed as a brakeman upon one of defendant's freight trains. One of its printed rules required brakemen, before starting, to test the hand-brakes. 'and see that they are in proper condition and work easily.' This was not done by plaintiff or any of the brakemen upon the train in question. The train stopped for about two hours at a station where the cars were usually inspected, but no inspection was made. The train stopped at another station, just beyond which was a steep down grade, but although plaintiff and his associates well knew of this grade and of the dangers incident to an attempt to take such a train down without the brakes

being in good order, and also, that the brakes of heavily-loaded moving cars were apt to get out of order, made no examination. Upon attempting to set the brakes, after the train started upon the down grade, it was discovered that a number of them would not work, and in consequence the speed of the train could not be checked, a greater portion of it was thrown from the track and plaintiff was injured. In an action to recover damages, it appeared that plaintiff knew of and had read the printed rules. *Held*, that as disobedience of the rules caused the accident, plaintiff was not entitled to recover.

"It seems that had plaintiff been acquainted with the rules he would not be entitled to recover, as with full knowledge of the dangers, it was incumbent upon him and his associates to ascertain before reaching the down grade that a sufficient number of the brakes to properly check the train were in order."

d MISCELLANEOUS INJURIES TO BRAKEMEN.

Brakeman caught between cars and killed — Collision.

In *ELLIS, ADM'R, v. NEW YORK, LAKE ERIE & WESTERN R. R. Co.*, 95 N. Y. 546 (1884), brakeman on freight train seeing a collision was imminent leaving front door of caboose to go to coal car to which caboose was fastened, caught between the ends of the two cars and crushed to death, judgment of Supreme Court which affirmed judgment dismissing complaint was *reversed*, the defendant failing to furnish properly equipped car for use of employees.

Brakeman thrown from defectively-loaded freight car.

In *BUSHBY v. NEW YORK, LAKE ERIE & WESTERN R. R. Co.*, 107 N. Y. 374 (1887), brakeman on freight train while upon a lumber car which was alleged to be negligently loaded thrown with the lumber upon the track and severely injured, one of the "stakes" breaking as the train was running around the curve at a high rate of speed, order of the General Term of Supreme Court granting new trial, after trial court had granted nonsuit, was *affirmed*, and judgment absolute ordered for plaintiff. *Affirming* 37 Hun, 104.

Brakeman stepping on manhole on tender.

In *MCQUIGAN v. DELAWARE, LACKAWANNA & WESTERN R. R. Co.*, 122 N. Y. 618 (1890), brakeman injured by slipping of cover to manhole on tender, having stepped on it while passing from engine to car, judgment on verdict for \$5,000 affirmed by Supreme Court was *reversed*, for error in refusing to charge that if plaintiff knew of the defect it was negligent in him to step on the cover.

Brakeman killed — Trap on coal car giving way — Assumption of risk.

In *SHIELDS v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 133 N. Y. 557 (1892), plaintiff's intestate, a brakeman on coal car in defendant's yard, fatally injured by trap giving way on loaded car, he knowing of defect, and could have selected good car, judgment of Supreme Court on verdict for \$2,300 was *reversed*, the deceased having assumed the risk.

Brakeman killed — Negligent running of train.

SHERMAN *v* ROCHESTER & SYRACUSE R. R. Co., 17 N. Y. 153 (1858), brakeman, acting under orders of conductor and engineer, fatally injured by train being negligently run at a dangerous place; fellow-servant; judgment sustaining demurrer to complaint *affirmed*. *Affirming* 15 Barb. 574.

Brakeman killed in railroad wreck — Nonsuit.

In WOODEN *v*. WESTERN NEW YORK & PENNSYLVANIA R. R. Co., 147 N. Y. 503 (1895), brakeman on freight train killed in railroad wreck, order of General Term of Superior Court of city of Buffalo setting aside nonsuit and granting new trial was *reversed* and judgment of nonsuit ordered for defendant as directed by the trial court. It was alleged that the place where train was wrecked was dangerous and that there should have been rules as to inspection. *Held*, there was no evidence that company was derelict as to this duty. If conductor was at fault, then it would be that of a fellow-servant. There was no evidence that roadbed was unsafe. The learned counsel (JOHN G. MILBURN, for appellant, and HARLOW C. CURTISS, for respondent) cited a great number of New York authorities in support of their arguments. Opinion rendered by GRAY, J.

3. Car coupler injured.

Car coupler falling into uncovered hole — Negligent act of employees.

In FILBERT *v*. DELAWARE & HUDSON CANAL Co., 121 N. Y. 207 (1890), where car coupler in defendant's employ was injured by falling into uncovered hole in pit, other employees having removed the cover to execute repairs and failing to replace cover, judgment on verdict for \$5,000 affirmed by the Supreme Court was *reversed*.

4. Car inspector killed.

Car inspector crushed by impact of cars.

In POTTER *v*. N. Y. CENTRAL & HUDSON RIVER R. R. Co., 136 N. Y. 77 (1892), plaintiff's intestate, a car inspector, crushed by impact of two other cars shunted on track where cars between which deceased was standing inspecting the bumpers, judgment on verdict for \$5,000 affirmed by the Supreme Court was *reversed*. There was no brakeman on the shunted cars, but the defendant was not liable where there was no proof of insufficiency of servants or failure of proper rules for government of employees.

5. Car repairers injured.

Car repairer killed — Fellow-servant rule applied.

In BESEL *v*. N. Y. CENTRAL & HUDSON RIVER R. R. Co., 70 N. Y. 171 (1877), judgment on verdict for plaintiff for \$4,000 (see 9 Hun, 457) was *reversed*, the syllabus to the official report stating the case as follows: "B., plaintiff's intestate, a car repairer in the employ of defendant, was at work in the performance of his duty under a car standing on a repair track; other cars on the same track were being drawn away by an engine, when a coupling-pin broke and the cars thus disconnected, ran back, struck the cars

remaining and put in motion the one under which B. was at work, and he was run over and killed. There was a head brakeman and three others on the train which was moving the cars, but none on the detached cars, and not the usual number on top of the moving cars. In an action to recover damages for the death of B., it did not appear, and was not claimed, that a sufficient number of men were not employed or that they were not competent. There was a yardmaster, with an assistant, in charge of the yard where the cars were, but it did not appear that they had notice or knowledge that the brakemen were not in their proper places, and they had no especial duty to perform in this respect. The yardmaster employed the men who distributed the cars, but not the car repairers. These worked together, and when cars were ready to be moved one of them gave notice to the man having charge of the switch engine. The head brakeman had immediate charge of the starting and distribution of cars. *Held*, that the court erred in denying a motion for a nonsuit; that the head brakeman and yardmasters were co-employees of B., for whose negligence, if any, defendant was not liable; that the work of moving cars in the yard was of such a nature that it could not be arranged with exactness and governed by rules, as in the running of regular trains. *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 533 (16 Am. Neg. Cas. 747, *ante*) and *Flike v. B. & A. R. Co.*, 53 N. Y. 549 (16 Am. Neg. Cas. 765, *ante*), *distinguished*." Opinion by MILLER, J.

Car repairer caught between cars.

In *CONE v. DELAWARE, LACKAWANNA & WESTERN R. R. Co.*, 81 N. Y. 206 (1880), car repairer while examining a car with a view to repairing it, which was standing on defendant's side track, injured by being caught between it and another car which was run against him by taking motion from the engine to which it was attached, the motion being caused by steam escaping into the cylinder through a leaky valve, and the defect being known to the engineer who omitted the proper precautions to prevent the steam escaping, defendant was held liable and judgment for plaintiff for \$2,000 was *affirmed*. *Affirming* 15 Hun, 172. Opinion by DANFORTH, J.

Car repairer killed — Collision of cars.

In *ABEL v. DELAWARE & HUDSON CANAL Co. (President, etc.)*, 103 N. Y. 581 (1886), car repairer fatally injured, judgment of nonsuit was *reversed*, the facts and decision being stated in the syllabus to the official report, as follows:

"The law imposes upon a railroad company the duty to its employees of diligence and care, not only in furnishing proper and reasonably safe appliances and machinery, and skillful and careful co-employees, but also of making and promulgating rules, which, if faithfully observed, will give reasonable protection to the employees.

"A., plaintiff's testator, a car repairer in defendant's employ, was under one of its cars, standing on a side track, engaged in making repairs. Another car was carelessly backed against it by other employees, causing his death. In an action to recover damages, it appeared that other railroad companies have adopted a rule, providing for the placing of a blue flag by day, and blue light by night, upon a car under which repairmen were at work, and

prohibiting the coupling or moving of a car thus protected until the signal is removed by the repairmen. No similar rule, or rule applicable to such a case, had been adopted by the defendant. *Held*, that the question of negligence on its part was one of fact for the jury, and that a nonsuit was error. *Held, also*, that it was immaterial that there was a custom among the repairmen at the place where the accident happened, to place a red flag at each end of cars which they were repairing, it not appearing that a rule to that effect had been promulgated or obedience thereto required by defendant, or that it was printed or generally known to the engineers engaged in running trains."

Car repairer injured — Negligent act of yardmaster — Fellow-servant.

In *CORCORAN v. DELAWARE, LACKAWANNA & WESTERN R. R. Co.*, 126 N. Y. 673 (1891), car repairer while working under car injured by negligent act of yardmaster in causing another car to be let in upon the track in defendant's yard which struck plaintiff's car, judgment of General Term of the Superior Court of Buffalo, which *affirmed* judgment on verdict for plaintiff was *reversed*, the injury being caused by the act of a fellow-servant. Question of rules passed upon, it being error to submit same to jury where there was no proof of neglect on part of defendant to make suitable rules for its employees. Citing several cases. O'BRIEN, J., read for reversal and new trial; all concurred.

6. Engineers injured.

Engineer killed — Incompetency of train dispatcher — Intoxication — Notice.

In *CHAPMAN v. ERIE R'Y Co.*, 55 N. Y. 579 (1873), engineer killed, negligence of train dispatcher being alleged, incompetency through intoxication, etc., judgment for plaintiff for \$5,752.47, was *reversed*, defendant not being shown to have had notice of irregular habits and incompetency of the train dispatcher. *Reversing* 1 Sup. (T. & C.) 526.

Engineer killed — Derailment of train — Misplaced switch — Nonsuit.

In *PIPER, ADM'X, v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 56 N. Y. 630 (March, 1874), judgment of nonsuit (in a memorandum opinion) was *affirmed*. The action was for damages for death of plaintiff's intestate, an engineer in defendant's employ, who was killed by his engine running off the track, caused by a misplaced switch. It appeared that a patent switch had been changed for a common switch for sufficient reasons. *Held*, that there was no evidence of negligence on defendant's part. RAPALLO, J., read for affirmance. All concurred. *Affirming* 1 Sup. (T. & C.) 290.

Engineer killed by derailment of engine — Defective track.

In *MEHAN v. SYRACUSE, BINGHAMTON & N. Y. R. R. Co.*, 73 N. Y. 585 (1878), plaintiff's intestate, an engineer, killed by derailment of engine owing to defective track, judgment for plaintiff for \$4,500 was *affirmed*.

Engineer injured — Engine overturned.

In *HAWLEY v. NORTHERN CENTRAL R. R. Co.*, 82 N. Y. 370 (1880), engineer injured by overturning of engine on defective track, judgment for plaintiff for \$1,000 was *affirmed*. *Affirming* 17 Hun, 115.

Engineer jumping to avoid collision — Flat car projecting on track.

In *ALBERT v. SWEET. ET AL.*, 116 N. Y. 363 (1889), where it appeared that the plaintiff was an engineer in charge of an engine attached to a freight train traveling at the rate of fifteen miles an hour, and that as it approached a grade crossing of the railroad of the defendants, and was 250 feet therefrom, the plaintiff saw that a flat car projected over the track on which his train was running, and as a collision was inevitable he jumped from the engine and was injured, he was not guilty of contributory negligence as matter of law from the fact that according to a time-table relied on by the defendants and in use by them for six months previous, there was no train due for sixteen minutes, and that the flat car could have been removed before that time expired, as the defendant's negligence caused the flat car to be across the track, nor could he be deemed negligent as matter of law from the fact that he failed to observe a man 200 yards from the crossing sent by the defendant's employees to signal the plaintiff's train and give warning of the danger. Judgment of Supreme Court affirming judgment for plaintiff entered upon report of a referee for \$4,600, was *affirmed*. Opinion by BRADLEY, J.

7. Firemen injured.

Fireman killed — Engine overturned — Open switch — Fellow-servant.

In *SALTERS v. DELAWARE & HUDSON CANAL Co.*, 3 Hun, 338, the injury complained of was caused by a switch being carelessly left open, whereby an engine was overturned and the fireman was killed. It was a common switch, properly constructed and in good repair. In an action brought by the representatives of the deceased, the plaintiff's counsel argued that the company was negligent in not having provided a target switch. In answer to that argument, the court said, that assuming that the presence of a target would have indicated to the plaintiff's intestate that the switchman was negligent, to require its presence as a matter of right, is to require that the master shall, by mechanical appliances, exempt one servant from the negligence of another, and the case was decided upon the ground that the master was not under that duty. At the same time the doctrine was reaffirmed that a railroad company is bound to place its employees under no risk from imperfect or inadequate machinery.

Fireman killed — Engine derailed — Misplaced switch — Nonsuit.

In *TINNEY v. BOSTON & ALBANY R. R. Co.*, 52 N. Y. 632 (1873), fireman on engine hauling freight cars in defendant's railroad yard fatally injured by engine being derailed owing to misplaced switch, another employee having taken place of regular switchman, judgment of nonsuit *affirmed*. No sufficient evidence to prove allegation of incompetency of servant. *Affirming* 62 Barb. 218.

Fireman killed — Wrong signal at switch — Nonsuit.

IN *BAULEC, ADM'X, v. NEW YORK & HARLEM R. R. Co.*, 59 N. Y. 356 (1874), fireman fatally injured by negligence of defendant's switchman in changing signal after passage of another train at a junction of defendant's road with another railroad, judgment of nonsuit was *affirmed*. Affirming 62 Barb. 623. Evidence was offered of a similar accident caused by the act of the same switchman, but such single act did not tend, *per se*, to prove such employee careless or unfitted for his duties, or make the railroad company liable for retaining him in its employ, where the employee has previously shown his carefulness and fitness and acquired a reputation therefor. The case of *Frazier v. Penn. R. Co.*, 38 Pa. St. 104, was disapproved, on the point of admissibility of evidence of prior acts of an employee showing carelessness in order to charge the general agent with knowledge thereof; the *Frazier* case holding such evidence inadmissible.

Fireman killed — Negligent act of switchman — Fellow-servant.

IN *HARVEY v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 88 N. Y. 481 (1882), plaintiff's intestate, a fireman in defendant's employ, killed by the negligent act of a switchman in failing to properly adjust switch, judgment on verdict for plaintiff for \$3,000, was *reversed*, the injury being caused by the negligence of a fellow-servant.

Fireman killed — Collision — Rules and regulations — Railroad liable.

IN *WHITTAKER, ADM'R, v. DELAWARE & HUDSON CANAL Co.*, (President, etc.), 126 N. Y. 544 (1891), appeal from order of the General Term of the Supreme Court in the Fourth Judicial Department, made November 25, 1890, which reversed a judgment entered upon a decision of the court on trial at Circuit, dismissing the complaint, and *reversed* an order denying a motion for a new trial and granted a new trial, the order of the General Term was *affirmed* and judgment absolute ordered for plaintiff. The action was for damages for death of plaintiff's intestate, a fireman on defendant's freight train, caused by a collision at night between the train and an engine left standing on the main track in defendant's railroad yard, in violation of company's rules, by its engineer while he was waiting in the office near by for orders. The question of negligence of defendant was for the jury; neither the engineer nor deceased were guilty of negligence; question of speed of train in violation of rules was for jury. "A railroad company does not discharge its whole duty to the public by merely framing and publishing proper rules for the conduct of its business and the guidance and control of its servants, but it is also required to exercise such a supervision over its servants and the prosecution of its business as to have reason to believe that it is being conducted in pursuance of such rules." Citing several cases. Opinion by RUGER, Ch. J.

Fireman found dead on track — Train parting — No evidence how accident occurred.

IN *BORDEN, ADM'X, v. DELAWARE, LACKAWANNA & WESTERN R. R. Co.*, 131 N. Y. 671 (1892), judgment in favor of defendant company was *affirmed*, there being no evidence showing negligence or how the accident occurred.

It appeared (as per opinion) that "the deceased [plaintiff's intestate] was a fireman and at time of injury was employed on a locomotive attached to a freight train. The train was running from Binghamton to Utica in the night-time, and at the station of Greene took on a coal car, attaching it next to the tender. Shortly after leaving that station the train parted between the tender and this car. The train being coupled together again proceeded on its way, but soon afterwards, the deceased being missed, it was stopped at the next station and a search was made, which resulted in finding the dead body within the rails at about the place where the train had become uncoupled. The evidence tended to show that the coal car was out of repair, and in such wise as to cause it to jump up and down while in motion. When the train broke apart it was found that the coupling pin had worked itself out of the link, so as to cause the separation of the train at that point." There was no evidence as to how the accident occurred, and in the absence of proof as to same and freedom from contributory negligence, there was no case for the jury.

8. Flagman injured.

Flagman run over by detached car — Defective switch — Nonsuit.

In *SAMMON v. N. Y. & HARLEM R. R. Co.*, 62 N. Y. 251 (1875), flagman run over by car which had become detached from a freight train owing to a slightly defective switch which might have been remedied by the switch-tender, judgment of nonsuit was *affirmed*. Affirming 38 Super. (J. & S.) 414.

In the Sammon case, *supra*, the injury resulted from the displacement of a switch caused by the dropping out of a pin used to fasten the lever. It appeared that the pin was rather large for the hole which received it, so that it would not go clear through. By reason of this defect it was claimed by the plaintiff's counsel that negligence was imputed to the company. But it appeared that the switch was new, and had been put in the day before the accident; before that, the rails were moved by a crow-bar; the switch-tender had changed the switch a number of times during the day, and he had not reported any defect. The court held that the accident, within the rules of law, was attributable to the switchman, and that the slight defect shown was not imputable to the company as a principal.

9. Loading and unloading cars, etc.

Loading and unloading — Laborer boarding dirt train — Negligence of fellow-servant.

In *HENRY v. STATEN ISLAND R'y Co.*, 81 N. Y. 373 (1880), where it appeared that the plaintiff was employed in loading and unloading a dirt train that consisted of four cars and a locomotive operated by an engineer, fireman and two brakemen, the latter of whom also assisted in shoveling and had only set two of the five brakes of the cars of the train that was standing on a down grade and was being loaded at the time of the accident, when the engineer who was on the tender called to the laborers to jump on board, and the plaintiff in attempting to climb up between two of the cars was injured by reason of them starting from some unexplained cause, and it was proved that the brakes were in good order and the brakemen not incompe-

tent, the court erred in refusing to dismiss the complaint, and the only reasonable inference of the cause of the movement of the cars was the failure to set more than two of the brakes, which was negligence on the part of co-servants for which the railroad company was not liable. It was also *held* that the fact that the cars moved forward two or three times and each time the fireman let on a little steam and backed the train to its former position was not evidence that the fireman's conduct was not discreet and prudent, even assuming that the plaintiff was injured by the backing of the train. *Held*, also, that the defendant was not negligent in failing to send a conductor with the train as upon the facts proved, no presumption arose that if the engineer had been upon the engine the accident would not have happened. Judgment for plaintiff for \$550 *reversed*. Opinion by ANDREWS, J.

10. Machinists, mechanics, carpenters, etc., injured.

Employee injured by saw machine in car shops — Notice of defect — Contributory negligence.

In *ODELL v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 120 N. Y. 323 (1890), employee injured by machinery in defendant's car shops, judgment of Supreme Court affirming judgment for plaintiff for \$5,500 was *reversed* (BRADLEY, J., *dissenting*). The opinion by PARKER, J., states the case as follows:

"For some months prior to the accident plaintiff had been engaged in the operation of sawing machines in defendant's car shops at West Morrisania. The injury resulted from the unexpected starting of the machinery while the plaintiff was engaged in changing saws. It is alleged that the starting was occasioned by the fact that the square bolt or pin, which holds the weight or binder from the belt, called the lever pin, had become so nearly round by frequent use, that it slipped out of the square slot into which it was entered, thereby causing the weight or binder to drop upon the belt and start the saws. The defendant's evidence tended to show that the plaintiff, having full knowledge of the existence of the defect complained of, nevertheless continued to use the machinery until the happening of the accident. If such were the fact, defendant is not chargeable with the consequences resulting therefrom. *Powers v. N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 274; *Mona-ghan v. N. Y. C. & H. R. R. Co.*, 45 Hun, 113. But upon this point the evidence was conflicting, and thus was presented a question of fact for the jury.

"The counsel for the defendant, at the close of the charge, requested the court to instruct the jury 'that if the plaintiff knew or had notice that the machine was out of order, and with this knowledge placed his left hand upon the saw, that the placing of his hand upon the saw, with this knowledge and under the circumstances, constitutes contributory negligence, and the plaintiff cannot recover.' The request was denied and an exception taken. Inasmuch as the court had omitted to instruct the jury upon this subject previous to the making of the request, the refusal to charge as requested was error. *Laning v. N. Y. C. & H. R. R. Co.*, 49 N. Y. 521, 16 Am. Neg. Cas. 747, *ante*; *Gibson v. E. R. Co.*, 63 N. Y. 449, 16 Am. Neg. Cas. 735, *ante*."

Mechanic injured — Negligence of foreman — Fellow-servant.

In *NEUBAUER v. NEW YORK, LAKE ERIE & WESTERN R. R. Co.*, 101 N. Y. 607 (1885), plaintiff, a mechanic in defendant's employ, injured by alleged negligence of the latter, judgment for defendant was *affirmed*, in the following memorandum of opinion: "Here the defendant as master discharged its whole duty to the plaintiff. It furnished suitable materials, implements and machinery, and skilled and competent fellow-workmen, and the plaintiff's injuries were due to the carelessness of a co-servant, who at the time was acting as his foreman and boss. The principles laid down in *Crispin v. Babbitt*, 81 N. Y. 516, control the decision of this case, and require the affirmance of this judgment." Affirming 18 Weekly Dig. 402.

Carpenter killed by falling arch — Question of proximate cause.

In *HOFNAGLE v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 55 N. Y. 608 (1873), carpenter in defendant's employ while removing certain appliances under direction of a contractor who was building a culvert for defendant, killed by a falling arch, judgment for plaintiff for \$2,600, was *reversed*. Deficiency in number of appliances not proximate cause where injury was caused by negligent use of the appliances. Reversing 1 Sup. (T. & C.) 346.

Carpenter injured — Defective appliance — Foreman — Knowledge of Defect.

In *KAIN v. SMITH* (Director, etc.), 89 N. Y. 376 (1882), carpenter in defendant's employ ordered by foreman to assist in loading car wheels on a car, injured by appliance falling and causing wheels to run against plaintiff, judgment of Supreme Court (23 Hun, 146) reversing nonsuit and ordering new trial was *affirmed* and judgment absolute rendered for plaintiff. It appeared that defendant was one of the board of directors of Vt. Cent. R. R. Co., who were operating the Ogdensburg & Lake Champlain R. R. The master mechanic (having power, etc.) hired plaintiff as carpenter and set him to work in the railroad yard under the foreman of the carpenters. The latter knew of the defect in the appliance used, but ordered it to be used in the work. Plaintiff saw the defect, but did not know it was dangerous. Whether latter was negligent in using it was question for jury. There was a former appeal in the case. See *Kain v. Smith*, 80 N. Y. 458 (1880).

II. Switchmen injured.

Switchman uncoupling cars run over and killed — Foot catching in frog — Obvious danger.

In *APPEL, ADM'X, v. BUFFALO, NEW YORK & PHILADELPHIA R'Y Co.*, 111 N. Y. 550 (1888), switchman engaged in coupling and uncoupling cars in railroad yard, run over and killed by reason of foot catching in frog; judgment of Supreme Court affirming judgment on verdict for plaintiff of \$4,590.90 was *reversed*, the danger being obvious and assumed by the deceased, who had worked for many years in the yard, etc. *De Forest v. Jewett*, 88 N. Y. 264, 16 Am. Neg. Cas. 772, *ante*, followed.

Switchman's arm crushed by stepping into cattle-guard while coupling cars.

In *FREDENBURG v. NORTHERN CENTRAL R'Y Co.*, 114 N. Y. 582 (1889), judgment of Supreme Court affirming judgment on verdict for plaintiff for \$4,000

was *affirmed*. The syllabus to the official report states the case as follows: "Plaintiff, a switchman employed in defendant's yard at E., while engaged in coupling cars stepped into a cattle-guard and was injured. In an action to recover damages, it appeared that the cattle-guard was near scales where defendant weighed its cars, and the cars, when pushed from the scales, passed over it; it had been there for several years, and no injury, so far as appeared, had resulted from it. Plaintiff had been in defendant's employ three days. The accident happened in the evening. Plaintiff had a lighted lantern and was directed to couple a car just pushed from the scales with one that had preceded it; the ends of the two cars which he sought to couple were over the cattle-guard; he stepped into it and the injury resulted. Plaintiff's duties had not previously called him to the place in question. *Held*, the fact that the location of the cattle-guard was at a place where cars, when weighed, were habitually coupled, imposed upon defendant the duty to use care to make that place reasonably safe for its employees, and the evidence authorized a finding that defendant, in permitting the cattle-guard to remain in that place in the condition it was, failed to perform its duty to its employees, and so was chargeable with negligence; also, that the evidence justified a finding that plaintiff had no knowledge of the cattle-guard, and was not guilty of negligence in failing to observe it." Opinion by BRADLEY, J.

Switchman injured coupling cars — Evidence as to similar accidents — Error.

In *DYE v. DELAWARE, LACKAWANNA & WESTERN R. R. Co.*, 130 N. Y. 671 (1891), plaintiff, member of switching gang, injured while coupling cars, the deadwoods failing to properly meet, this being a usual occurrence, judgment on verdict for \$1,500 affirmed by the Supreme Court, was *reversed*, for erroneous admission of evidence as to similar accidents.

Switchman killed by timber falling from passing train — Improper loading of car.

In *FORD v. LAKE SHORE & MICHIGAN SOUTHERN R. R. Co.*, 117 N. Y. 638 (1889), where plaintiff's intestate, a switchman in defendant's employ, was killed by fall of timber from passing car, negligent act of servant in loading same being the alleged cause, judgment on verdict for \$4,000, affirmed by the Supreme Court, was *reversed*.

A subsequent trial in the Ford case resulted in verdict and judgment for plaintiff for \$5,000, which was *affirmed* by the Supreme Court and Court of Appeals. See 124 N. Y. 493 (1891). Improper loading of freight cars was the cause of the injury, and defendant was liable for failure to provide a proper rule for the loading of lumber cars.

Passenger injured — Gross negligence of switchman — Intoxication — Notice of intemperate habits — Punitive damages — Erroneous instruction.

In *CLEGHORN v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co.*, 56 N. Y. 44 (1874), where passenger was injured by train running off main track onto side track and colliding with train standing there, the switchman having left the switch open onto a side track, judgment of Supreme Court affirming judgment on verdict for plaintiff for \$10,000 was *reversed* for erroneous instruction on question of punitive damages. Evidence as to intoxication of the

switchman at the time of the accident and as to his intemperate habits being known by defendant's agent was competent on the claim of exemplary damages for gross negligence. The instruction referred to was: "In awarding damages in this class of cases it will be your duty always to award to the plaintiff full compensation for the injuries that she received; and to that you may add such sum for exemplary damages as the case calls for; depending in a great measure of course upon the conduct of the defendant." This was error, as it left the jury to infer that they might award punitive damages without limit or restriction, without finding the necessary facts authorizing such award.

12. Track hands, laborers, etc., injured.

Track hand killed — Derailment of train — Defective track — Assumption of risk — Fellow-servant.

In *BRICK v. ROCHESTER, NEW YORK & PENNSYLVANIA R. R. Co.*, 98 N. Y. 211 (1885), plaintiff's intestate, a track repairer in defendant's employ, killed by reason of the construction train on which he was riding running off the track at a crossing, the track being in process of reconstruction, and its decayed condition being known to deceased, judgment on verdict for plaintiff for \$5,000 was *reversed*. Deceased assumed the risks, and being an employee engaged with others, including the foreman, in the construction of the road, the defendant would not be liable for the injury caused by act of fellow-servant.

Track hand run over on track — Fellow-servant.

BOLDT v. N. Y. CENTRAL R. R. Co., 18 N. Y. 432 (1858); laborer employed in constructing new track run over by train while walking along old track to work; plaintiff and those running the train, fellow-servants; judgment for plaintiff *reversed*.

Laborer on gravel train injured — Negligence of engineer — Fellow-servant.

RUSSELL v. HUDSON RIVER R. R. Co., 17 N. Y. 134 (1858); laborer on gravel train being carried to work, injured by negligence of the engineer of the train; fellow-servant; judgment for plaintiff *reversed*. Reversing 5 Duer, 39.

Laborer riding to work killed in collision — Fellow-servant.

In *VICK v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 95 N. Y. 267 (1884), employee while riding on train, under agreement to be carried free to and from work, fatally injured in collision, judgment for plaintiff for \$3,000 was *reversed*, the defendant not being liable for injuries to a "free passenger," a servant, caused by negligence of other servants. Reversing 17 Weekly Dig. 267. See another decision in 22 Weekly Dig. 474.

Laborer killed — Thrown from hand car — Impending collision — Contributory negligence.

In *POWERS v. N. Y., LAKE ERIE & WESTERN R. R. Co.*, 98 N. Y. 274 (1885), laborer killed by being thrown from hand car on which, with others, he was riding in the attempt to get to a switch to avoid a collision with an approach-

ing train, instead of moving the car onto another track as was the usual custom, judgment of Supreme Court reversing nonsuit and granting new trial was *reversed* and *nonsuit sustained*, on the ground of contributory negligence of plaintiff's intestate in using the hand car contrary to the general custom. An appliance of the hand car was broken and another appliance was used. *Held*, that deceased assumed the risk. *Reversing Power v. N. Y. L. E. & W. R. Co.*, 32 Hun, 415.

Laborer removing snow from track struck by train.

In *BRADLEY v. N. Y. CENTRAL, ETC., R. R. Co.*, 62 N. Y. 99 (1875), employee, under defendant's foreman, engaged in removing snow from track, struck by train owing to failure of foreman to warn plaintiff of approaching trains as promised, judgment for plaintiff for \$2,000 was *affirmed*. *Affirming* 3 Sup. (T. & C.) 288.

Laborer struck by dirt plow falling over cars.

In *DE VAU v. PENNSYLVANIA & N. Y. CANAL & R. R. Co.*, 130 N. Y. 632 (1891), employee struck by dirt plow as it fell over dirt cars, judgment on verdict for \$1,000 affirmed by the Supreme Court was *reversed*, it being error to leave to jury question as to proper construction of plow where there was no defect shown.

Shoveler in ashpit run over by engine.

In *REICHEL v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 130 N. Y. 682 (1892), shoveler in ashpit in track near defendant's houndhouse, run over while trying to escape from approaching engine, judgment of Supreme Court on verdict for \$3,000 was *reversed*.

Laborer on trestle injured by fall of coal cars.

In *GRANT v. PENNSYLVANIA & N. Y. CANAL & R. R. Co.*, 133 N. Y. 657 (1892), employee injured by fall of coal cars off end of trestle at which he was at work, a drawhead of one of the cars breaking, judgment of Supreme Court on verdict for \$5,000 was *reversed*, the evidence as to cause of breaking of drawbar being doubtful.

Employee detaching cars run over — Defective appliance — Declarations of injured persons — Erroneous admission.

In *MARTIN v. NEW YORK, NEW HAVEN & HARTFORD R. R. Co.*, 103 N. Y. 626 (1886), employee engaged in detaching cars from freight train run over and fatally injured, judgment of Supreme Court affirming a judgment for plaintiff on verdict for \$3,000 was *reversed*. The principal question was as to the admission of declarations of the injured person. *RAPALLO, J.*, said: "The decision of this appeal is controlled by the case of *Waldele v. N. Y. C. & H. R. R. Co.*, 95 N. Y. 374, in which it was held, after much discussion, that the declarations of a person who had been fatally injured upon a railroad, made after he had sustained the injuries, explaining the manner in which the accident had happened, was not competent evidence in favor of his administratrix, in an action brought by her against the railroad company for

causing his death by negligence. The plaintiff was allowed to prove in the present case, under objection and exception, that after the deceased had been taken out from under the car by which he had been injured, and while he was being conveyed to the switch-house by his fellow-employees, some one asked him how the accident had happened, and he said, 'I pulled the pin and made a grab for the car, and there was nothing there for me to grab.' Another version given by the witness was that deceased said he cut off the car, and made a grab for the handle of the car, and there was nothing there for him. The deceased was an employee of the defendant, and the sole ground upon which the plaintiff's claim to recover was founded was that the car which he was directed to detach from the train was not furnished with a horizontal grab-handle on its side, and that that alleged defect was the cause of the injury. The testimony thus erroneously admitted, therefore, tended to sustain the vital point of the plaintiff's case."

Employee injured in collision between engine and freight car — Burden of proof as to negligence.

IN *SMITH v. NEW YORK CENTRAL & HUDSON RIVER R. R. Co.*, 118 N. Y. 645 (1890), employee riding on locomotive injured in collision with freight car, judgment of Supreme Court affirming judgment on verdict for plaintiff for \$15,000, was *reversed*, plaintiff having failed to establish his case. PARKER, J., stated the facts as follows: "The plaintiff, while in discharge of his duty as an employee of defendant, was, without fault on his part, seriously injured by the collision of the locomotive, upon which he was riding, with an unattended freight car. The accident took place on defendant's road, about a mile east of East Palmyra, on the 19th day of February, 1884. It appears that the defendant placed three freight cars on a side track at Newark for loading at the warehouse of Perkins & Co. They were coupled together, and the brakes on the westerly and middle cars set. Perkins & Co., for their convenience in loading, moved the middle and easterly cars further east, leaving the westerly car standing where it was originally placed. Some time during the night of the accident this car was moved off the side track onto the main track, and thence to the point of collision. No one saw the car moved or could account for it, except on the theory that the car had been driven out upon and along the main track by an easterly wind, which the evidence demonstrated had blown with great velocity during the night. It is not questioned but that the station agent and other employees of defendant at Newark were competent and skilful. The trial court rightly held that the defendant had given to the station agent at Newark proper instructions as to the method of securing the cars while upon the side track." As to whether brake was defective, it was incumbent upon plaintiff to prove that the brake could not be applied, or when applied, it was not as effective as it should have been. This he failed to do.

13. Yardmaster injured.

Foot caught by brake-beam of car — Run over — Defendant not liable

IN *BAJUS v. SYRACUSE, BINGHAMTON & NEW YORK R. R. Co.*, 103 N. Y. 312 (1886), it appeared that plaintiff was the defendant's yardmaster at Syracuse, and as such it was his duty to superintend and aid in the shifting

of cars and to couple and uncouple cars. The shifting engine at that place, on the day alleged in the complaint, was attached to twelve cars, and after drawing them a short distance up an ascending grade, it became stalled, and then, under the direction of plaintiff, the engine was backed so as to enable him to uncouple some of the cars. For that purpose he went between two cars while they were moving slowly backward, and his foot caught under a brake-beam and he was dragged along, about forty-five feet, when a car wheel ran over one of his legs and crushed it so as to make amputation necessary. The claim of plaintiff is that the injury was due solely to neglect chargeable to defendant. Plaintiff does not complain that the roadbed, or the cars, or any of the appliances which he was required to use were insufficient or out of order. His sole complaint is that the engine was out of repair and insufficient for the use to which it was devoted. EARL, J., after stating the foregoing facts and discussing the alleged defect in the engine, said that the engine was not a dangerous one and did not cause the injury. That was caused by the brake-beam accidentally catching plaintiff's foot, and the engine simply failed to rescue him from the danger in which he was placed. It was an accident which the defendant had no reason to anticipate and, hence, it was not bound to have an engine there adequate to avert its consequences.

In discussing *Marsh v. Chickering*, 101 N. Y. 396, where it is said the rule is that the master does not owe to his servants the duty to furnish the best known or conceivable appliances; he is simply required to furnish such as are reasonably safe and suitable, such as a prudent man would furnish, if his own life were exposed to the danger that would result from unsuitable or unsafe appliances, EARL, J., said: "Suppose in that case the ladder had when new been furnished with hooks and spikes and they had by use been broken off, how could it have been claimed that the liability of the master would be different? Would the master have been bound to replace hooks and spikes which had come off while he owed no duty to his servant originally to place them upon the ladder? So, here, was the defendant bound to restore this engine by repairs to the power which it originally possessed while it owed no duty to purchase a new engine of greater horse power than this then possessed? It is plain that the answer to these questions should be in the negative." (Citing authorities). *Judgment reversed.*

The Supreme Court in the *BAJUS* case (34 Hun, 153), affirmed the judgment on verdict for plaintiff for \$7,000, which, however, was reversed by the Court of Appeals in 103 N. Y. 312.

14. Employees of other companies injured.

Car repairer in employ of another company injured by negligent act of defendant's employee — Defendant liable.

In *MURPHY v. N. Y. CENTRAL & HUDSON RIVER R. R. Co.*, 118 N. Y. 527 (1890), car repairer in employ of another company at work between two cars standing on side track injured by an unattended freight car which, while being shunted from defendant's track by an employee of defendant who had charge of an engine, ran against the car on which plaintiff was working, causing the bumpers of the cars to come together and crushed plaintiff's arm, judgment of Supreme Court affirming judgment on verdict for plaintiff for \$1,000 was *affirmed*.

Engineer of another company killed — Negligence of defendant's switchman — Defendant liable.

SMITH *v.* N. Y. & HARLEM R. R. Co., 19 N. Y. 127 (1859); engineer of train of another company running over defendant's road killed through negligence of defendant's switchman; switch inferior to those in general use on other roads; judgment for plaintiff for \$5,000 *affirmed*. Affirming 6 Duer, 225.

Engineer of another company killed at crossing — Defendant liable.

In WOOD, ADM'R, *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 70 N. Y. 195 (1877), engineer on another railroad killed in collision with a train of defendant at a crossing, caused by negligent act of defendant's agent in giving signal, judgment for plaintiff for \$5,000 was *affirmed*. Opinion by CHURCH, Ch. J.

Loading ore on car — Fall of derrick appliance — Defective appliance.

In DERRENBACHER *v.* LEHIGH VALLEY R. R. Co., 87 N. Y. 636 (1882), plaintiff loading ore on defendant's cars injured by fall of tub to derrick, caused by defective rope, judgment for plaintiff for \$3,000 was *reversed*. The pier was not owned by defendant, nor was the loading done by it, and it was not shown that defendant owned or furnished the derrick or employed the men working it.

Employee of stevedore unloading coal from boat struck by guy rope.

In KILROY *v.* DELAWARE & HUDSON CANAL Co., 122 N. Y. 22 (1890), where plaintiff, an employee of a stevedore unloading coal from defendant's boat was struck by a guy rope and skull fractured, caused by negligence of a boy who was placed in charge of the guy rope temporarily by the captain of defendant's boat, defendant was held liable, the boy not being a fellow-servant of the plaintiff, and judgment on verdict for \$5,000 was *affirmed*.

Employee of contractor unloading boat injured by defective derrick belonging to defendant.

In KING *v.* N. Y. CENTRAL & HUDSON RIVER R. R. Co., 66 N. Y. 181 (1876), where plaintiff, an employee of a contractor unloading rails from a boat to a car on defendant's track, was injured by the breaking of a hook on defendant's derrick, which was furnished in good condition for the work to the contractor by the defendant, it was held that defendant was not liable in the absence of an agreement with the contractor to keep the derrick in repair for the use of the contractor's employees. Also held that where there is an agreement by defendant with a contractor to keep machinery (in this case a derrick) in repair on notice being given of need of repair, there is no duty of the former, in the absence of such notice, to keep the same in repair. Judgment for plaintiff for \$4,000 *reversed*. Reversing 4 Hun, 769.

A subsequent trial of the KING case resulted in verdict and judgment for plaintiff for \$4,275, which was affirmed by the Supreme Court, and on appeal was *affirmed* in 72 N. Y. 607.

Employee of another company run over in railroad yard — Defendant liable.

In *SULLIVAN v. TIOGA R. R. Co.*, 112 N. Y. 643 (1889), plaintiff's intestate, employee of another company, while removing ashes from pit in railroad yard used by two companies, run over by defendant's engine through negligence of defendant's engineer, judgment on verdict for \$2,600 was affirmed.

CRISPIN V. BABBITT.

Court of Appeals, New York, September, 1880.

[Reported in 81 N. Y. 516.]

FELLOW-SERVANT — RESPONDEAT SUPERIOR. — The liability of a master to a servant injured while in his employ by the wrongful act or negligence of a fellow-servant does not depend upon the grade or rank of the servant causing the injury, but upon the character of the act in the performance of which the injury arises.

ASSUMPTION OF RISK. — A servant assumes all risks of injuries incident to his employment, except such as result from the act of the master himself, or from a breach by the master of some term, express or implied, of the contract of service, or of his duty to employ competent servants, furnish safe appliances, etc.

EMPLOYEE INJURED BY GEARING WHEELS OF ENGINE — SUPERINTENDENT LETTING ON STEAM — REPRESENTATIVE OF MASTER — FELLOW-SERVANT — INSTRUCTIONS — QUESTION OF LAW AND FACT. — Plaintiff, a laborer in defendant's iron works, was injured by being thrown onto the gearing wheels of a pumping engine, the wheels being started by defendant's alleged superintendent carelessly letting on the steam. It appeared that defendant did not reside at the place where his works were located, and that his nephew, John L. Babbitt, acted as his general superintendent. There was also a foreman of the works. While plaintiff, with others, was performing certain duties the superintendent let on the steam, which caused the wheel to start, resulting in the injuries complained of. The trial court charged that although the superintendent may have represented the defendant, he did so only in respect of those duties pertaining to superintendence, but refused to charge that as to any other acts or duties performed by him, the superintendent was not to be regarded as defendant's representative, but as an employee or servant of defendant and a fellow-servant of plaintiff. The court left it to the jury as a question of fact. *Held*, error, as the question was one of law and the instruction requested should have been granted. *Held, also*, error to refuse to charge that in letting on the steam the superintendent was not acting in defendant's place. (EARL, DANFORTH and FINCH, JJ., dissented on both points.)

APPEAL by defendant (Benjamin T. Babbitt) from judgment of the General Term of the Supreme Court, in the Fourth

Judicial Department, affirming a judgment in favor of plaintiff (George Crispin), entered upon a verdict for \$10,000, and affirming an order denying a motion for a new trial. *Judgment reversed.*

"At the time of the accident, plaintiff was working as a laborer in the iron works of the defendant, at Whitesboro, Oneida county. Plaintiff had assisted to draw a boat into a drydock connected with the works; after the boat was in the drydock, it became necessary to pump out the water; this was done by means of a pump, worked by an engine. While plaintiff, with others, was engaged in lifting the flywheel of the engine off its center, one John L. Babbitt carelessly let the steam on and started the wheel, throwing the plaintiff on to the gearing wheels, and thus occasioned the injuries complained of. Defendant lived in the city of New York, coming about once a month, for a day or two, to the iron works, of which, as the evidence tended to show, said Babbitt had general charge; being at one time the general superintendent and manager, at another time styled the "business and financial man." The substance of the evidence, as to the position occupied by Babbitt, and the particulars as to the accident, are fully set forth in the dissenting opinion of EARL, J."

A. J. VANDERPOEL, for appellant.

NICHOLAS E. KERNAN, for respondent.

Rapallo, J — The liability of a master to his servant for injuries sustained while in his employ, by the wrongful or negligent act of another employee of the same master, does not depend upon the doctrine of *respondeat superior*. If the employee whose negligence causes the injury is a fellow-servant of the one injured, the doctrine does not apply. *Conway v. Belfast, etc., Ry. Co.*, 11 Irish Com. L. 353 (1).

A servant assumes all risk of injuries incident to and occurring in the course of his employment, except such as are the result of the act of the master himself, or of a breach by the master of some term, either express or implied, of the contract of service, or of the duty of the master to his servant,

1. In *CONWAY v. BELFAST & NORTHERN COUNTIES R'Y CO.*, 11 Irish Com. L. 345, 353, a milesman and a traffic manager in the employ of the railway company were held to be fellow-servants, in the absence of evidence

showing that the traffic manager was in a superior position to that of the milesman, and the latter could not recover damages for injuries sustained by him owing to the negligence of the former.

viz., to employ competent fellow-servants, safe machinery. etc. But for the mere negligence of one employee, the master is not responsible to another engaged in the same general service.

The liability of the master does not depend upon the grade or rank of the employee whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow-servant of the other operatives. *Albro v. Agawam Canal Co.*, 6 Cush. 75, 15 Am. Neg. Cas. 655ⁿ; *Conway v. Belfast Ry. Co.*, 11 Irish Com. L. 353; *Wood's Master and Servant*, § 438; also §§ 431, 436, 437. On the same principle, however low the grade or rank of the employee, the master is liable for injuries caused by him to another servant, if they result from the omission of some duty of the master, which he has confided to such inferior employee. On this principle *Flike v. Boston & Albany R. R. Co.*, 53 N. Y. 549, 16 Am. Neg. Cas. 765, *ante*, was decided. Church, Ch. J., says at p. 553: "The true rule, I apprehend, is to hold the corporation liable for negligence in respect to such acts and duties as it is required to perform as master, without regard to the rank or title of the agent intrusted with their performance. *As to such acts* the agent occupies the place of the corporation, and the latter is liable for the manner in which they are performed."

The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employee performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employee performing it is a mere servant, and the master, although liable to strangers, is not liable to a fellow-servant for its improper performance. *Wood's Master and Servant*, section 438. The citation which the court read to the jury from 21 Am. Rep. 2, does not conflict with, but sustains this proposition; it says: "Where the master places the entire charge of his business in the hands of an agent, the neglect of the agent *in supplying and maintaining suitable instrumentalities for the work required is a breach of duty for which the master is liable.*" These were masters' duties. In so far as the case

from which the citation is made goes beyond this, I cannot reconcile it with established principles. In England, by a late Act of Parliament, the rules touching the point now under consideration have been modified in some respects, but in this State no such legislation has been had.

The point is sharply presented in the present case by the 13th, 14th, and 17th requests to charge.

“ 13. That although John L. Babbitt may, as financial agent or superintendent, overseer or manager, have represented defendant, and stood in his place, he did so only in respect of those duties which the defendant had confided to him as such agent, superintendent, overseer or manager.” This the court charged.

“ 14. That as to any other acts or duties performed by him in and about the defendant's works or business at said works, he is not to be regarded as defendant's representative, standing in his place, but as an employee or servant of the defendant, and a fellow-servant of the plaintiff.” This the court refused to charge, but left as a question of fact to the jury, and defendant's counsel excepted. I think this was a question of law, and that the court erred in submitting it to the jury, but should have charged as requested.

The court was further specifically requested to charge (17th) that in letting on the steam John L. Babbitt was not acting in defendant's place. This, I think, was a sound proposition, as applied to the present case. It was the act of a mere operative for which the defendant would be liable to a stranger, but not to a fellow-servant of the negligent employee. As between master and servant, it was the servant's and not the master's duty to operate the machinery.

The judgment should be reversed.

Earl, J., dissenting. — This is an action for injuries alleged to have been received by the plaintiff through the negligence of the defendant. At the time he received the injuries he was a laborer in the employment of the defendant at his iron works in Oneida county. He was at work about an engine, and one John L. Babbitt, also in the employment of the defendant, carelessly let on the steam, and in consequence thereof his injuries were caused. The defense now claimed is that John L. Babbitt was a fellow-servant of the plaintiff, and that the defendant is not, therefore, responsible for his negligence. Whether John

was a fellow-servant merely, or a representative of the defendant in such sense as to make the latter responsible for his acts, is the sole question upon the merits now to be considered.

It is not easy always to determine whether the person immediately causing the injury is to be regarded as a fellow-servant or not, and the rules laid down upon the subject in England and in the various States of this country are somewhat discordant. The subject in many of its phases, has been so thoroughly treated in various decisions in this court that much writing thereon now is not needed. *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521, 16 Am. Neg. Cas. 747, *ante*; *Flike v. B. & A. R. Co.*, 53 N. Y. 549, 16 Am. Neg. Cas. 765, *ante*; *Hofnagle v. N. Y. Cent., etc., R. Co.*, 55 N. Y. 608, 16 Am. Neg. Cas. 813, *ante*; *Malone v. Hathaway*, 64 N. Y. 5 (1); *Besel v. N. Y. Cent., etc., R. Co.*, 70 N. Y. 171, 16 Am. Neg. Cas. 806, *ante*. These cases show that the relation of one servant to another is not determined by the fact that one has a superior position to the other, or has some control over other servants or some management of the business in hand. To place a servant in a position where the master will become responsible for his negligence to other servants, he must *pro hac vice* be in the place of the master, and his representative. In other words, to use a phrase found in some of the books, he must be the *alter ego* of the master. He need not, however, have all the powers which the master would have if present, nor all the powers of an absolutely general agent; but he must either be clothed with the general powers and charged with the general powers of the master, or he must, for the work in hand at least, be the superior whose commands are to be obeyed, whose acts are not to be questioned by other servants, and who thus for the time being represents the master. And whether a servant whose acts are complained of occupies such a position to other servants is a question of fact to be determined, when disputed, upon sufficient evidence, by a jury. *Mullan v. Phila. & So. Mail S. S. Co.*, 78 Pa. St. 25.

1. In *MALONE v. HATHAWAY* 64 N. Y. 5 (1876), employee in defendant's brewery killed by the fall of a tub, a decayed support of which tub broke, judgment for plaintiff for \$3,500, was reversed. It appeared that defendant had employed a competent carpenter to keep their place in good condition,

who almost a year before the accident had put in new supports. *Held*, that in such case defendant was not liable for the negligence of the carpenter in performing his duty, failure to inspect the support being alleged. *Reversing* 3 Hun, 553; s. c., 6 Sup. (T. & C.) 1.

In this case the law was laid down by the judge in his charge, favorably enough to the defendant, in the following language: "If you find that John L. Babbitt had the control, standing really in the footsteps of his principal; had a right to discharge all the duties and everything that took place at this establishment; had it in his hands, so that he was, although not the owner, really acting for the owner, and the owner being away from home, doing all the business generally in that establishment; then you will look into all this evidence in regard to the negligence of John L. Babbitt, and whether his negligence caused the injury."

The question, therefore, is whether there was some evidence tending fairly to show, and which authorized the jury to find that John L. Babbitt occupied the place of the defendant, in the sense above stated.

The defendant's iron works were at Whitesboro, Oneida county. He lived in New York and carried on an extensive business there. He visited his works about once a month and stayed a day or two. There were employed in and about his works a large number of men. John L. Babbitt was his nephew, and lived at Whitesboro in a house belonging to the defendant; and when the latter visited his works, he usually made that house his home. John was a practical engineer. When he first went to Whitesboro, he was placed in charge of the works and was the general superintendent and manager, having foremen under him. Some time before the accident which injured the plaintiff, John testified that one Minot was appointed by the defendant foreman of the works. Precisely what his powers were was not shown. Although near at hand at the time of the trial, he was not called as a witness; neither was the defendant called. The claim is that Minot superseded John in the practical management of the works; and yet, in the temporary absence of Minot, it is not disputed that John was in control, as he was after Minot left the employment of the defendant, without, so far as appears, any new delegation of authority. Substantially all the correspondence of the defendant in reference to his works was carried on with John, and John was the medium of communication between the defendant and others connected with the works, when the defendant was absent. John employed and discharged laborers, bought and paid for material, and paid the laborers, and reported to

the defendant whatever he noticed about the works which he deemed it important for him to know. Prior to the accident, there were posted in the works printed rules and regulations to be observed by the workmen, which were signed as follows: "B. T. Babbitt, proprietor; H. P. Minot, foreman of the works; John Babbitt, business and financial man." What was meant by "business and financial man?" The meaning of these words was, under all the circumstances, to be determined by the jury. They certainly will bear the interpretation that John was in the charge of the business there carried on, and had the financial management thereof. As to the facts thus far stated, there was substantially no dispute. There was also proof tending to show that John was understood by the workmen to be the head man there, whose orders were to be obeyed, and that when he chose to he ordered the men about their work, and that he had the general oversight of the work. Upon all these facts, giving due weight to the circumstance that the defendant resided nearly 250 miles from his works, which he rarely visited, and that unless it was John Babbitt, there was no local manager and general superintendent of a very extensive business in the absence of the principal, we think the jury were authorized to find that John, at the time of the accident, occupied the place of the defendant, within the law as hereinbefore stated. It is undisputed that Minot was "foreman of the works" — whatever that may mean. He may have been foreman in the sense that he was a skilled machinist having the direction of the laborers and the execution of the work; and yet the inference was authorized that he was subordinate to John, from whom, in the absence of the defendant, he received his general directions.

It is suggested that John was not in the line of his duty when he interfered with the engine at the time of the accident, and that in that act he did not represent or stand in the place of the defendant. Just before the accident, John had ordered the plaintiff and other laborers to put a canal boat into defendant's drydock, and under his direction they did so. After the boat was thus placed, it was necessary to pump the water out of the dock, and there was for that purpose a pump worked by this engine, and the plaintiff and others went to start the pump, and while they were thus engaged, and meeting with some difficulty, John came and let the steam on the engine, for

the purpose of aiding them. The suggestion is, that while he may have been the general superintendent and manager of the defendant, standing in his place for other purposes, in this act he was a fellow-servant of the plaintiff. The rule is claimed to be that, where a middleman, by the appointment of the master, exercises the executive duties of master, as in the employment of servants, and in the selection of machinery, apparatus, tools, structures, appliances and means suitable and proper for the use of other and subordinate servants, then his acts are the acts of the master, for which the master is responsible; but that when such middleman does a mere mechanical act which any laborer could do, or labors with other laborers, his negligence while thus acting is the negligence of a co-laborer, which imposes no liability upon the master to a co-laborer injured by such negligence; that the middleman, therefore, occupies a dual position, that of a co-servant, as to all matters within the scope of the employment and the discharge of such duties as are not personal to, or absolute upon the master and as a vice principal as to all matters where he abuses his authority, or is charged with the discharge of duties which the master himself should have discharged, or which rest upon the master as absolute duties. I have made a thorough examination of the reported cases in this country and in England, and think I may safely affirm that there is no case in which the question was involved, where this dual relation has been recognized and the rule thus laid down. The rule is thus stated in Wood's Master and Servant, §§ 438, 451, and 453; and there is a dictum to the same effect by Judge Potter in *Brickner v. N. Y. Cent. R. Co.*, 2 Lans. 506, 516, 16 Am. Neg. Cas. 747, *ante*. The only case in which I have been able to find in which the precise point was involved and decided is that of *Berea Stone Co. v. Kraft*, 31 Ohio St. 287. In that case Kraft was a laborer in a stone quarry of the company, and one Stone was the agent of the company and foreman of its quarry. Stone carelessly and improperly fastened certain hooks to a soft stone, for the purpose of raising it with a derrick about which Kraft was also engaged, and the hooks broke away from the stone and fell, injuring Kraft, who then brought suit against the company to recover his damages. At the close of the evidence the counsel of the company requested the trial judge to charge: First. "That a corporation is liable to an employee for negligence, or want of

proper care in respect to such acts and duties as it is required to perform as master or principal, without regard to the rank or title of the agent intrusted with their performance." Second. "That if the injury happened by the negligence of the defendant's foreman, when he was doing the work of a co-laborer with the plaintiff, and not when in the discharge of his duties as foreman and representative of the defendant, the plaintiff cannot recover, unless the plaintiff shows that the defendant did not exercise reasonable care and prudence in the selection of a foreman." Both requests were refused, and the refusal was held to be proper. Boynton, J., writing the opinion of the court, said: "The fact, if it be true, that Stone's negligence in assisting in fastening the hooks to the stone to be raised may have caused the injury, and that he was then performing the duty of a common workman, and not those strictly pertaining to the duties of foreman, in nowise relieves the company from liability. If the act done by him had been done under his direction, as he did it, by one of the employees of the company, its liability could not be doubted, and for the reason that the negligent act, although committed by the hand of another, was, in law, the act of the foreman, and consequently the act of the master. And it could be no less the act of the master when performed by the foreman in person."

It is the general rule, founded on principles of natural justice, that every person shall be responsible only for his own personal wrongs, including such as he employs or directs another to commit. If one selects a suitable agent to do a lawful and proper act, and is guilty of no negligence in making the selection, or in directing and instructing his agent, and the agent does a negligent or wrongful act, causing injury to another, there is no principle of natural law or abstract justice by which the master can be held responsible for such injury. Judged by such standard, the wrongdoer alone must respond. Wharton's Law of Negligence, §§ 156, 157; *Coon v. Syr. & U. R. Co.*, 6 Barb. 231, 16 Am. Neg. Cas. 737, *ante*; *Flike v. B. & A. R. Co.*, 53 N. Y. 549, 16 Am. Neg. Cas. 765, *ante*; *Farwell v. B. & W. R. Co.*, 4 Metc. 49, 56, 15 Am. Neg. Cas. 407. The doctrine of *respondeat superior* has its foundation in public policy. Shaw, Ch. J., in the case last cited, said that it is adopted "from general considerations of policy and security." It has been deemed the wisest and safest rule, that the master

who selects the servant and puts him in motion, and reaps the benefit of his labor, should be held responsible for negligent and wrongful acts committed in his service. To enforce the responsibility of the master, the rule has sometimes been invoked that where one of two innocent parties must suffer by the wrongful act of a third party, he must bear the burden of loss who placed the third party in the position which enabled him to commit the wrong. But it is held in England, and in most of the States of this country, that the responsibility of the master employing several servants should not be so far extended as to make him liable for injuries sustained by one servant in consequence of the negligent acts of a co-servant engaged in a common business or employment. As the master's responsibility has been extended by the doctrine of *respondeat superior* from considerations of public policy, so that doctrine has been limited by similar considerations in respect to the master's responsibility to his servants. The limitation has no foundation in abstract or natural justice, and all attempts to place it upon any other foundation than that of public policy will prove unsatisfactory when brought to the test of careful and logical analysis.

As most of the enterprises of modern times, which contribute to human progress and the welfare of society, must be carried on by numerous servants working to the same end under common masters, it has been supposed that it would cast upon a master too much responsibility to hold him liable for injuries, against which he could by no possibility guard, sustained by one servant from the negligence of a co-servant, and that the servants would be better protected if they were obliged to rely upon their own care and vigilance rather than those of the master. Hence, to enforce the supposed public policy, a fiction has been invented by which the servant is said to assume all the risks of the service in which he engages, which include the risks of injuries caused by the negligence of co-servants engaged in the same common employment. If this fiction were literally applied, if it were held that every servant entering into the service of a master assumed all the risks incident to such service, then the master would not be responsible to such servant for his own negligence, as that would be as much an incident to the service as the negligence of a co-servant. The maxim *volenti non fit injuria* would shield the master. But the

fiction is not applied to shield the master. He is held responsible for his own negligence, whether engaged in the discharge of the duties peculiar to him as master or working side by side with his servants in the same kind of labor. So the fiction should not be applied to shield the master from responsibility for the negligence of the middleman standing in his place and representing him. Public policy does not require that the doctrine of *respondeat superior* should be thus far limited. It is not too much for the master to be responsible for his negligence. He is generally a person selected with care, of superior judgment and skill, and is more generally, than other servants, able to respond to his master for his own negligence. I can perceive no reason founded upon public policy, as there is none founded upon any principle of natural justice, for limiting the doctrine of *respondeat superior* in its application to the relation existing between a master and such an agent. The master should be responsible for all his negligence while engaged in his service, because he stands in his place representing him as his *alter ego*; and I can perceive no reason founded on public policy or expediency for enforcing that doctrine in such a case in favor of strangers, which does not exist for enforcing it in favor of the other servants of the common master.

A rule that a master shall be held responsible for some negligent acts of his representative, and not responsible for other negligent acts, done possibly at the same time, within the scope of his employment in the same service, would be illogical, perplexing and inconvenient. Take the case of a general superintendent of a railway. It is conceded that for negligence in his discharge of the absolute duties which a master owes to his servants, the master — the corporation — would be responsible. But suppose instead of such duties he should, in furtherance of his master's business, carelessly perform a mechanical act about which common laborers were also engaged, would there be any reason, founded upon principle or public policy, for distinguishing the two cases and imposing upon the master a liability in the one case and not in the other? Suppose the superintendent carelessly ordered a train to be started, and some one was thus injured, the corporation would undoubtedly be liable for the damages. Would it not be thus liable if, instead of ordering the train to be started by others, he placed his own hand to the lever and carelessly started it himself? Would he

be the responsible representative of the corporation in the one case and not in the other? Suppose he was standing upon a train of cars and carelessly started that train himself, causing an injury to some one, and at the same moment of time he carelessly ordered an engineer to start another train, also causing an injury; would the corporation be liable for the damages in the one case and not in the other? The question in all this class of cases, the negligent act and consequent injury being proved, is whether the servant whose act is complained of stood in the place of the master — represented him as his *alter ego*? That is always mainly a question of fact. If he did, then the rule of law to be applied is plain and simple, and is the same which would measure the responsibility of the master to a stranger to his service.

On the one hand, it is claimed that in determining the responsibility of the master in such cases, we must look solely at the duties which were devolved upon the servant whose acts are complained of, and that if we find that the duty which he was engaged in discharging when he committed the negligent act or wrong was one of those absolute duties which the master owed to his servants, then the master is responsible, no matter what was the grade or position of the servant. On the other hand, I claim the rule to be that in determining the responsibility of the master for the negligent acts of his servant, we must look solely at the position of such servant, and we must consider the duties devolved upon him, solely for the purpose of determining such position, and if we find that he was the representative of the master, within the rules above stated, then the master must be held responsible for all his acts of negligence committed within the scope of the business intrusted to his hands, as well as to co-servants as to strangers.

It cannot be claimed that what John L. Babbitt did was an idle thing, having no pertinency to the business in hand. If he was there in defendant's works, as we have assumed the jury found, standing in his place and having the general charge of his business, then he was empowered to do what ever he saw fit in and about that business and in furtherance of its objects. Whatever he could order or employ another to do, he could do himself. Did he represent the defendant when he ordered the laborers to put the boat into the drydock, and not represent him a few minutes later when he put his hands to the engine to

further the same work? If he had ordered another servant to do this careless act, the defendant would have been liable, and does the defendant escape liability because John did the act himself? I say, no.

Our attention has been called to some exceptions taken on the part of the defendant to the refusals of the trial judge to charge as requested. They have been substantially disposed of by the foregoing discussion, and need, therefore, no further attention.

The judgment should be affirmed. FOLGER, Ch. J., ANDREWS, and MILLER, JJ., concurred with RAPALLO, J. DANFORTH and FINCH, JJ., concurred with EARL, J.

Judgment reversed.

PANTZAR V. THE TILLY FOSTER IRON MINING COMPANY (1).

Court of Appeals, New York, June, 1885.

[Reported in 99 N. Y. 368.]

FALL OF ROCK IN COAL MINE — MINER INJURED — DANGEROUS PLACE — NOTICE OF DEFECT — FAILURE OF DEFENDANT TO TAKE PRECAUTIONS FOR SAFETY OF EMPLOYEES — LAW OF MASTER AND SERVANT — SAFE MACHINERY — SAFE PLACE TO WORK — COMPETENT EMPLOYEES — DELEGATION — SUPERINTENDENT — VICE-PRINCIPAL — ASSUMPTION OF RISK. — A master owes the duty to his servant of furnishing adequate and suitable tools and implements for his use, a safe and proper place in which to prosecute his work, and, when they are needed, the employment of skilful and competent workmen to direct his labor and assist in the performance of his duties.

1. New York Master and Servant Cases. — The text for this volume having taken more than the usual allotted space in this series of AM. NEG. CAS., the editor is under the necessity of limiting the number of New York cases for publication in this volume, but desiring to include New York cases, a selection from the numerous decisions has been made which includes practically all the cases relating to injuries to railroad em-

ployees decided in the Court of Appeals. A few of the leading cases on other branches of employment are also reported, such as CRISPIN v. BABBITT; PANTZAR v. TILLY FOSTER IRON MINING CO.; BUCKLEY v. GUTTA PERCHA, ETC., Co.; cases which are frequently cited throughout the volume. The remainder of the New York cases in the Supreme Court, the Appellate Division, and the Court of Appeals will be reported in volume 17

No duty belonging to the master to perform for the safety and protection of his servants can be delegated to any servant of any grade so as to exonerate the master from responsibility to another servant who has been injured by its non-performance.

When the general management and control of an industrial enterprise or establishment is delegated to a superintendent with power to hire and discharge servants, to direct their labors and obtain and employ suitable means and appliances for the conduct of the business, such superintendent stands in the place of the master, and his neglect to adopt all reasonable means and precautions to provide for the safety of the employees constitutes an omission of duty on the part of the master, rendering him liable for any injury occurring to the servant therefrom.

The rule that the servant takes the risk of the service presupposes that the master has performed the duties of caution, care and vigilance which the law casts upon him. It is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master that the servant assumes.

In an action to recover damages for injuries sustained by plaintiff, while working in defendant's coal mine, which was conducted by a superintendent with full power of control in directing the work, it appeared that the injury was caused by the fall of a mass of rock in the pit where plaintiff was at work on a wall in course of construction. The wall was being constructed with a view of supporting the overhanging cliff from which the rock fell. It was shown that a crack in the cliff had long existed and was plainly visible, the attention of the superintendent had been called to it, but no precautions were taken to support the rock while the workmen were engaged under it, although such precautions were practica-

AM. NEG. CAS., which volume will conclude the topic of MASTER AND SERVANT.

Employers' Liability Act. — Attention is called to the New York Employers' Liability Act (Laws 1902, chap. 600), the text of which appears in volume 13, AM. NEG. CAS. 863-865.

Damages for death of injured persons. — By an amendment to the Constitution of the State of New York, in effect on January 1, 1895, the \$5,000 limit theretofore prevailing in actions for damages for death was abolished, and there is now no restriction as to the amount which may be recovered in such actions. See Art. 1, sec 18, Const. N. Y. 1894.

Appellate Division of the Supreme Court and Jurisdiction of

the Court of Appeals, New York.

— By the Constitution of the State of New York, adopted in 1894, which went into effect January 1, 1895 (with the exception of a few sections which went into effect January 1, 1896), several changes were made in the judicial departments.

Under sec. 2, art. 6, of the Constitution, the legislature created an Appellate Division of the Supreme Court (in effect January 1, 1896), conferring upon such Appellate Division the jurisdiction then exercised by the Supreme Court at its General Terms, and by the General Terms of the Court of Common Pleas for the city and county of New York, the Superior Court of the city of New York, the Superior Court of Buffalo, and the City Court of Brooklyn.

ble. The rock broke off where the crack was observed and, with the fall, the crack disappeared. *Held*, that the facts justified the verdict for plaintiff.

APPEAL from judgment of the General Term of the Supreme Court, in the First Judicial Department entered upon an order made January 13, 1883, which affirmed a judgment in favor of plaintiff, entered upon a verdict for \$12,000. The facts are stated in the opinion. *Judgment affirmed.*

LUTHER R. MARSH, for appellant.

J. EDWARD SWANSTROM, for respondent.

Ruger, Ch. J.—The general principles upon which this action depends have been so frequently discussed in recent cases that anything more than a brief summary would be unprofitable. Thus it has been held that a master owes the duty to his servant of furnishing adequate and suitable tools and implements for his use, a safe and proper place in which to prosecute his work, and, when they are needed, the employment of skilful and competent workmen to direct his labor and assist in the performance of his duties. *Bartonshill Coal Co. v. Reid*, 3 Macq. 275; *Laning v. N. Y. C. R. R. Co.*, 49 N. Y. 522, 16 Am. Neg. Cas. 747, *ante*; *Brydon v. Stewart*, 2 Macq. 34; *Booth v. B. & A. R. R. Co.*, 73 N. Y. 40, 16 Am. Neg. Cas. 766, *ante*. That no duty belonging to the master to perform, for

By section 5, the Superior Court of the city of New York, the Court of Common Pleas for the city and county of New York, the Superior Court of Buffalo, and the City Court of Brooklyn are abolished (in effect January 1, 1896), and all actions and proceedings then pending in such courts were transferred to the Supreme Court for hearing and determination.

From January 1, 1896 (under section 9), the jurisdiction of the Court of Appeals, except where the judgment is of death, is limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court, shall be reviewed by the Court of Appeals. Ex-

cept where the judgment is of death, appeals may be taken as of right to said court only from judgments or orders entered upon decisions of the Appellate Division of the Supreme Court, finally determining actions or special proceedings, and from orders granting new trials on exceptions, where the appellants stipulated that upon affirmance judgment absolute shall be rendered against them. *The Appellate Division in any department may, however, allow an appeal upon any question of law, which, in its opinion, ought to be reviewed by the Court of Appeals.*

See NOTE ON THE JURISDICTION OF THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, 5 AM. NEG. CAS. 630-639.

the safety and protection of his servants can be delegated to any servant of any grade so as to exonerate the master from responsibility to a servant who has been injured by its non-performance." *Mann v. Del. & H. C. Co.*, 91 N. Y. 500, 16 Am. Neg. Cas. 797, *ante*; *Booth v. B. & A. R. R. Co.*, *supra*. And that when the general management and control of an industrial enterprise or establishment is delegated to a superintendent with power to hire and discharge servants, to direct their labors and obtain and employ suitable means and appliances for the conduct of the business, such superintendent stands in the place of the master, and his neglect to adopt all reasonable means and precautions to provide for the safety of the employees constitutes an omission of duty on the part of the master, rendering him liable for any injury occurring to the servant therefrom. *Corcoran v. Holbrook*, 59 N. Y. 517, 16 Am. Neg. Cas. 793, *ante*.

The case shows that the defendant was the owner of a coal mine in Putnam county, New York, conducted under the management of a superintendent. He was invested by them with full power of control over the same, and ample discretion and authority in directing the work, and using all suitable measures and precautions for carrying on the business of mining, and securing the safety of the workmen employed in the prosecution of the enterprise.

The action under review was brought by a servant of the defendant to recover damages for personal injuries received by him through the fall of a mass of rock, while working in a pit in which the mining operations in question were carried on. The plaintiff, at the time of the accident, was upon a wall in the course of construction, for the purpose of furnishing a place behind which to deposit the refuse material of the mine, and, as claimed by defendant, also with a view of supporting the overhanging cliff from which the rock injuring plaintiff fell. At the time of the accident this wall had been raised to the height of about sixty feet, and was still some fifty feet below the surface of the ground. While thus engaged with a number of other workmen a large mass was detached and fell from the brow of the projecting cliff under which the work was in progress, and caused the death of some and the serious injury of others, among whom was the plaintiff. The evidence as to the condition of the rock at the time of the accident was conflicting, and

raised questions of fact peculiarly within the province of the jury to determine. On the part of the defendant, it tended to show that the cliff was composed of gneiss, a mineral naturally marked by seams, joints and foliations, and that it was in the frequent and continued habit of causing it to be examined for the purpose of discovering, if possible, appearances indicating immediate danger, and that no such indications had been observed before the accident. On the other hand, the plaintiff's evidence showed that a large crack, parallel with and about ten feet back from the upper angle of the face of the cliff, had long existed and was plainly visible; that the attention of the superintendent and foreman had been called to it, and they were warned of its character; that they had instituted an experiment to determine whether it was growing or not, and that such experiment did show that it was increasing in width, and still took no precautions to support the rock while the workmen were engaged under it, although such precautions were practicable and frequently adopted in other mines. In some cases braces of timbers extending across from the side of the pit to the rock liable to fall were used, and in others the overhanging rock had been blasted off. It was also shown that a wall, such as that in process of construction, would, when completed, have furnished a support to the projecting mass. The plaintiff's evidence also tended to show that the rock broke off at the place where the crack had been observed, and that with the fall, the crack disappeared. It must, therefore, be assumed from the verdict of the jury, that it was determined that the rock fell from a cause of which the defendant had notice, and that precautions which would have prevented the injury were not adopted, although they were practicable and of easy and safe application.

The evidence tended to show that the wall, then in course of construction, was not a safe and suitable protection for the laborers engaged in working upon it. It obviously required a long time to complete it, and its main design seemed to be to furnish a place for the deposit of refuse material. During the course of its erection it certainly afforded a protection to those working below the cliff, and the jury was authorized to infer from the fact that it was not completed after a lapse of several years, that it was not originally designed as a means of present protection from the dangers of falling rock.

The degree of vigilance and care required of a master in the adoption of means of protection toward his servants has been much discussed by elementary writers as well as in reported cases, and the conclusions reached applicable to such a case as the present are not disputed. To accept the rule extracted from *Leonard v. Collins*, 70 N. Y. 90, and adopted in the appellant's brief, it is to inquire whether "the master did everything which in the exercise of reasonable and ordinary care and prudence he ought to have done." "Did he omit any precaution which a prudent and careful man would take or ought to have taken." It is difficult to see how the defendant can claim exemption from liability.

But one exception was taken by the defendant in the case and that was to the denial by the court of its motion to nonsuit at the close of the plaintiff's evidence. It might very well be said that the broad question argued before us by the learned counsel for the defendant was not properly in the case as it was based to some extent upon evidence given subsequent to the taking of the exception; but as we think the judgment must in any event be affirmed, no injustice is done the plaintiff, by considering all of the evidence taken on the trial in determining the validity of this exception. The motion for a nonsuit was placed upon grounds stated concisely as follows: 1. That the accident causing plaintiff's injury was incident to the hazardous nature of his employment and from a risk assumed by him on entering upon it. 2. That it did not occur through an omission on the part of the defendant or its agents to perform any duty which it owed to the plaintiff. 3. That there being no proof of the incompetency of the superintendent when originally employed, the defendant was not liable for an accident caused through an omission of duty on his part causing injury to a fellow-servant. It may be said with reference to the ground last stated that it is disposed of by reference to the general proposition laid down at the outset of this opinion, and the other grounds involved questions of fact upon which the evidence was quite sufficient to take the case to the jury. The motion assumes that the injury to the plaintiff occurred solely from a hazard incident to the nature of the employment, and not from a cause which could have been foreseen and guarded against by the exercise of proper care and prudence on the part of the master. This, however, was the very question which

was disputed before the jury and decided by it adversely to the appellant.

The defendant's contention is based upon the evidence showing that it is the nature of gneiss rock to disintegrate and fall from time to time at unexpected intervals through the action of the elements operating upon it; but it does not follow from this fact that the master is excused from using proper precautions to protect his workmen from danger known to the master arising from such a cause. The very fact that the material was likely to fall upon and injure the defendant's servants at unexpected times imposed upon defendant the duty of inspection and frequent and careful examinations, and upon the discovery of any indications of danger, to adopt all suitable precautions to protect its servants from injury. The rule that the servant takes the risk of the service presupposes that the master has performed the duties of caution, care and vigilance which the law casts upon him. *Booth v. B. & A. R. R. Co.*, *supra*. It is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the master, that the servant assumes.

It was for an omission to observe the dangerous appearances to which the evidence shows its attention had been called and its neglect to adopt suitable and proper means of protection that the defendant has been held liable by the jury. The evidence tends to show that the plaintiff was ignorant of the dangerous condition of the rock, and that his duties did not call him to any place from which it could be observed. He, therefore, had a right to rely upon the performance of the duty owing by the master of adopting proper and suitable measures of precaution to guard him against the consequence of any danger arising from the obviously unsafe condition of the rock, and is not justly censurable for an omission to discover the impending danger himself in time to avoid it. The master, however, had notice that the rock was in motion and was liable to fall at any moment and was, therefore, chargeable with the duty in the exercise of reasonable care and prudence of taking immediate steps to avoid the danger and of warning the men working under it of the hazard to which they were exposed.

We, therefore, think that there was evidence sustaining the verdict of the jury, and that the judgment should be affirmed.

Judgment affirmed. All concur.

MINOR EMPLOYEE INJURED IN MINE — INFANT — GUARDIAN — PRACTICE — CODE — STATUTE — DEFENDANT LIABLE. — In **RIMA v. THE ROSSIE IRON WORKS**, 120 N. Y. 433 (*June, 1890*), minor employee injured while working in defendant's mine, the principal question at issue turned upon the question of practice in regard to the bringing of suit by infant and the appointment of guardian, etc. On the trial plaintiff recovered verdict and judgment for \$2,400, which was affirmed by the Supreme Court, and on appeal to the Court of Appeals, was *affirmed*. See 47 Hun, 153. LOUIS HASBROUCK and CHARLES R. WESTBROOK, appeared for the appellant; C. H. WALTS and W. F. PORTER, for respondent. The opinion was delivered by VANN, J., as follows:

The trial of this action was commenced on September 23, 1886, and during its progress it appeared by the cross-examination of the plaintiff that he was an infant, and that he would not be twenty-one years of age until the third of the following month. The defendant was ignorant of this fact on June 16, 1886, when the action was commenced, and did not hear of it until two days before the commencement of the trial. At the close of the evidence a motion was made for a nonsuit upon the ground, among others, that the plaintiff, although under age, was prosecuting the action without a guardian *ad litem*, whereupon an application was made to the court for the appointment of a guardian *nunc pro tunc*. The application was granted, and before the case was submitted to the jury, an order was entered in the minutes of the court, which, after reciting the substance of the affidavit upon which it was founded, appointed a guardian *ad litem* "for said infant plaintiff for the purposes of this action," and provided "that all pleadings herein be amended accordingly." It was further directed that the order "be and hereby is entered as of a date previous to the service of the summons herein." The defendant insists that the court had no power to make said order, and that the motion to nonsuit should have been granted. The question is also raised by a direct appeal from the order as made.

The Code of Civil Procedure provides that where an infant has a right of action, he is entitled to maintain an action thereon; that the same shall not be deferred or delayed on account of his infancy, but that, before a summons is issued in his name, a competent and responsible person who shall be responsible for the costs, must be appointed to appear as his guardian for the purpose of the action. (Sections 468, 469.) The corresponding section of the Code of Procedure provided that "when an infant is a party he must appear by guardian." (Section 115.) These sections had their origin in the Revised Statutes, which declared that when an infant had a right of action to recover real property or the possession

thereof, or to recover any debt or damages, he should be entitled to maintain a suit thereon, and that the same should not be deferred or delayed on account of such infant not being of full age, but required that a competent and responsible person should be "appointed to appear as next friend for such infant" before any process should be issued in his name. (2 R. S. 542, §§ 1, 2.) Thus it appears that for many years a statute, mandatory in form, has required the appointment of a guardian or next friend before process could be issued in the name of an infant plaintiff. The decisions, under these statutes have held, almost without exception, that the omission to appoint a special representative of the infant was an irregularity only, and that it did not affect the jurisdiction of the court. Thus in *Fellows v. Niver*, 18 Wend. 563, 564, which arose while the Revised Statutes were in force, the court said: "It is a question of irregularity merely, not, as defendant's counsel supposes, a question of jurisdiction."

In *Rutter v. Puckhofer*, 9 Bosw. 638, decided under the Code of Procedure, it was declared that "the learned judge who granted the motion erred in deciding that this was a jurisdictional question. The court had jurisdiction of the parties and of the subject of the action, and the omission, therefore, to procure the appointment of a guardian was an irregularity, which might be cured or waived."

In the following cases judgment was rendered upon the same principle, necessarily involved, although not always distinctly announced: *Treadwell v. Bruder*, 3 E. D. Smith, 596; *Freyberg v. Pelerin*, 24 How. Pr. 202; *Parks v. Parks*, 19 Abb. Pr. 161; *Wolford v. Oakley*, 43 How. Pr. 118.

Under the Code now in force the decisions, with a single exception, are to the same effect. In *Smart v. Haring*, 14 Hun, 276, one of the plaintiffs was an infant when the action was commenced, but was of full age at the time of the trial. Although no guardian had been appointed for him, it was held that the court acquired jurisdiction and that the irregularity was waived by pleading to the merits.

In *Sims v. New York College of Dentistry*, 35 Hun, 344, the defendant first learned from the cross-examination of the plaintiff on the trial that she was an infant when the action was commenced, and a motion was made to dismiss the complaint on this ground. Following the case last cited, it was held that the plaintiff, being then of age, was *rectus in curia*, and that the omission to appoint a guardian did not deprive the court of jurisdiction.

In *Imhoff v. Wurtz*, 9 Civ. Pro. Rep. 48, the County Court of Erie county dismissed the complaint because it appeared upon the trial that the plaintiff was an infant and no guardian had been appointed. An application to set aside the order was denied and the case does not appear to have proceeded further.

We think that it should now be regarded as settled that the failure to appoint a guardian *ad litem*, for an infant plaintiff affects the regularity of procedure, but not the jurisdiction of the court. This seems to have been the theory of the legislature in enacting title 1 of chapter 8 of the Code of Civil Procedure, entitled "Mistakes, omissions, defects, and irregularities." This article provides that where a verdict has been rendered, the judgment shall not be stayed, impaired, or affected by reason of "the appearance, by attorney, of an infant party," if the verdict or judgment is in his favor, and confers ample power upon courts of record to afford relief against irregularities of every nature, unless it should be contrary to the right and justice of the matter or should alter the issue between the parties. (Code Civ. Pro., §§ 721-725.)

The order complained of, was therefore, within the sound discretion of the court, and we think that, under the circumstances, the power conferred by the statute was discreetly exercised.

The conclusion of the jury that the draw-iron had been fractured and that the "mine boss" knew of the fact before the accident, is not without evidence to support it within the rule governing appeals to this court, and thus negligence on the part of the defendant was established.

There was evidence tending to show that before the loaded car started up the ascent the "mine boss" said to the plaintiff and his associates: "Run back this empty car and load it and hurry up; we want to get out of the mine;" that they then attempted to shove the car back, but meeting with some impediment on the track, they were engaged in removing it, when some one shouted: "Get out of the way the truck is coming," and a noise "like a roar of thunder was heard;" that the plaintiff jumped behind the car to get on the main track and run to a place of safety, which, as he testified, was his only chance, but, as he reached the main track, his foot slipped on a piece of ice and before he could recover himself he was hit by the descending truck. It also appeared that ice had recently been removed from the track and piled up several feet high on each side, forming a bank or ridge. Under these circumstances it was a question of fact for the jury whether the plaintiff was negligent, and their verdict in his favor, under the careful charge of the court, established the absence of negligence on his part. Upon the facts as found, therefore, he was entitled to recover, and the judgment should stand unless some error was committed during the progress of the trial, to which exception was taken.

After carefully examining all of the exceptions relied upon by the appellant, we find no error that entitles it to a new trial, and the judgment and orders should, therefore, be affirmed, with one bill of costs.

BUCKLEY v. THE GUTTA PERCHA AND RUBBER MANUFACTURING CO.

Court of Appeals, New York, June, 1889.

[Reported in 113 N. Y. 540.]

MINOR EMPLOYEE INJURED BY MACHINERY—DANGER—INSTRUCTING EMPLOYEE—ACCIDENT—MASTER NOT LIABLE.—In an action to recover damages for injuries sustained by plaintiff, a boy about twelve years old, while assisting to operate a machine in defendant's factory, it appeared that defendant's foreman placed him in charge of a workman who had charge of one of defendant's machines with directions to the boy to do whatever he was requested to do by such workman. While attempting to put a heavy cylinder in place, under directions of the aforesaid workman, his foot slipped and he threw out his hand to save himself from falling and thrust it into the cogs of some wheels about nine inches from the end of the cylinder, and his hand was crushed. *Held*, that the danger being obvious, it was not necessary to instruct the plaintiff that the cogs were dangerous; that the injury was caused solely by the accidental slipping of plaintiff, and not from the latter's ignorance of the machinery or the danger therefrom; and that defendant was not liable and nonsuit should have been granted (1).

1. *Minor employees injured by machinery, etc.* See the following cases:

In *FINNERTY v. PRENTICE*, 75 N. Y. 615 (1878), minor in defendant's employ injured while operating machine, his arm being crushed, necessitating amputation, judgment for plaintiff for \$1,000 was *affirmed*.

In *HICKEY v. TAAFFE*, 99 N. Y. 204 (1885), where plaintiff, a girl under 16 years of age, had her hand crushed while working in defendant's steam laundry, being caught between rollers of machine used for ironing collars, judgment on verdict for \$950, which was affirmed by the Supreme Court, was *reversed*, it being held that the statute known as "The Children's Protective Act" (Laws 1876, chapter 122), did not apply to the case. *Reversing* 32 Hun, 7.

A subsequent trial resulted in verdict and judgment for plaintiff for

\$3,300, which was affirmed by the Supreme Court. On appeal judgment was *reversed* and new trial ordered. It was alleged that defendant failed to instruct the plaintiff as to the danger, but it appeared that she had been using the machine for some weeks and was aware of the danger. *Held*, that failure to instruct was immaterial. The fact that defendant had placed a lever on the machine as an additional safeguard, using the same as an experiment, and then discarding it as not working satisfactorily, was not negligence. See *HICKEY v. TAAFFE*, 105 N. Y. 26 (1887).

The ruling in *Hickey v. Taafe*, 99 N. Y. 204, was applied in *HAYES v. BUSH & DENSLOW MFG. CO.*, 102 N. Y. 648 (1886), where plaintiff's son, a boy fifteen years of age, had his fingers crushed between the dies of a stamping machine on which he was at work,

MINOR EMPLOYEE — MACHINERY — INSTRUCTING EMPLOYEE.

— There is no rule of law that a minor may not be employed about a dangerous machine, and the simple fact that a machine is dangerous does not make an employer liable for an injury received by a minor employed upon such machine. All the law requires is that the minor should be properly instructed as to the danger to which he is exposed, and if he is injured because he has not received such instruction, then, as a general rule, the employer may be held responsible.

KNOWLEDGE OF DANGER — ASSUMPTION OF RISK. — But where the minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the danger to be apprehended from working the machine, the fact that he is a minor does not alter the general rule that the employee takes upon himself the risks which are patent and incident to the employment.

and judgment on verdict for \$250, which was affirmed by the Supreme Court, was *reversed*. *Reversing* 19 Weekly Dig. 436. See subsequent decision in 41 Hun, 407.

See also the two following cases, where *Hickey v. Taaffe*, 105 N. Y. 26, is cited and applied:

In *WHITE (an infant, etc.) v. WITTE-MANN LITHOGRAPHIC CO.*, 131 N. Y. 631 (1892), where plaintiff, a boy thirteen years of age, while tending a machine in defendant's factory, was injured by his left hand being caught by the cogs and crushing two of his fingers, it appeared that at time of accident the machine was not in motion and that the injury occurred while carrying out a request of another employee who was cleaning the machine; that plaintiff knew of the danger and had been warned thereof, and was acting not in regular duty, but in violation of instructions; that there were no guards on the machine, which plaintiff knew. Plaintiff charged violation of the Factory Act (Laws 1887, chapter 462, section 11, amending Laws 1886, chapter 409), requiring the placing of guards upon all gearing and belting in factories where women and children are employed. *Held*, that the master was not liable where a minor employee, knowing of the absence of guards, voluntarily meddles with machinery.

On the question of instructing minor employees, the court said that "The rule of law laid down is that the omission by the employer of instructions in such a case does not impose upon him liability, provided the boy knew, by experience or observation, the nature of the machine and the dangers to be apprehended therefrom. And so we held in *Hickey v. Taaffe*, 105 N. Y. 26." It was also charged that the above cited statute was violated as to employment of plaintiff, namely, "No child under the age of thirteen years shall be employed in any manufacturing establishment within this State." The court said that as the plaintiff was contessedly over thirteen years of age, his employment was not in violation of the statute, nor that of Laws 1889, chapter 560, placing the age limit at fourteen. Judgment for defendant *affirmed*. *Affirming* 58 Hun, 381.

In *OGLEY v. MILES ET AL.*, 139 N. Y. 458 (1893), plaintiff, a boy nearly sixteen years of age, injured by a buzz saw in defendant's sash and blind factory, several of his fingers being cut off, judgment on verdict for plaintiff, which was affirmed by Supreme Court, was *reversed*, refusal of trial court to nonsuit being error. The court said: "We think it appears without contradiction and from the plaintiff's own

APPEAL from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered upon an order made July 23, 1886, which affirmed a judgment in favor of plaintiff entered upon a verdict for \$1,200. See 41 Hun, 450. The facts are stated in the opinion. *Judgment reversed.*

JESSE JOHNSON, for appellant.

JAMES TROY, for respondent.

Earl, J.—At the time the plaintiff was injured he was about twelve years old. In July, 1882, he applied to the defendant for employment, and its foreman took him to O'Rorke, who had charge of one of its machines, and told the boy to do whatever O'Rorke directed him. The business of the defendant was to coat cloth with rubber, and for that purpose it had

evidence, that he knew the operations of the machine; that he had had sufficient experience at other factories to enable him to, and that he did fully understand its practical working, and he knew that he had to be careful in regard to his hands coming in contact with the saw, for if they did, he knew they would be badly cut. He had operated buzz saws before he did this one; not for any length of time, but obviously and from his own testimony, long enough to know the nature of the machine and the dangers attending its use. He was thus in the same position as to knowledge that he would have been in had the defendants imparted to him oral information of the dangerous character of a buzz saw. Within the cases decided in this court, the plaintiff should have been nonsuited. *Hickey v. Taaffe*, 105 N. Y. 26; *Buckley v. The Gutta Percha & Rubber Mfg. Co.*, 113 N. Y. 540, and cases cited."

In *CROWN (an infant, etc.) v. ORR ET AL.*, 140 N. Y. 450 (1893), appeal from judgment for \$5,000 for plaintiff, an infant, in action for damages for injuries sustained by him while in defendant's employ, judgment was *reversed*, on the ground of assumption of risk, and that the act complained of was that of a fellow-servant, for

which the master was not liable. O'BRIEN, J., delivered the opinion, and after stating the duty of master towards servant in furnishing safe appliances, stated the facts as follows: "On December 10, 1890, the plaintiff, who was then about nineteen years of age, and in the employment of defendants, lost his hand and part of his arm by coming in contact with the knives of a planing machine. No complaint is made that the machine was in any respect defective or unsuitable for the purpose for which it was used, or that the place where the plaintiff was directed to work was in any respect unsafe. The only omission of duty charged against the master in the complaint, or at least the only fault now urged, is that the plaintiff was ignorant of the use of machinery, and the defendants neglected to give proper instructions to him in this regard or cause them to be given. When the accident occurred the plaintiff had been at work in the shop about three weeks. His duty was to stand in front of the machine and about four or five feet from the end of it, and take off the dressed lumber." * * * He was not required to operate it or handle it, and was cautioned against meddling with the machine while it was in operation. On the occasion in

a number of machines, in a large room, operated by steam. The machines were simple, and whatever danger there was in their operation was obvious. It is difficult to describe them without a photograph or model, and we will not attempt to do it.

The plaintiff was put at work on Saturday about noon and worked that day and Monday and Tuesday until eleven o'clock, when he was injured. During that time he had seen the machine operated and had worked about it and became as familiar with it as a boy of that age could. It became necessary from time to time to remove from the front of the machine a woolen cylinder, through which a square iron rod ran, and carry it to the back of the machine, and take a similar cylinder from that place and put it in front of the machine in place of

question he was ordered by the defendant's foreman to hang some wood in front of the knives of the machine, and while doing so was injured. It was held that the act of the plaintiff in doing what he was not employed to do, although ordered by defendant's foreman, was an assumption of risk for which defendant was not liable.

In *CULLEN (an infant, etc.) v. NATIONAL SHEET METAL ROOFING CO.*, 114 N. Y. 45 (1889), plaintiff, a boy seventeen years of age, injured by machinery, the facts and points stated in the opinion by FOLLETT, Ch. J., are set out in the syllabus to the official report as follows: "Plaintiff was in the employ of the defendant, engaged in working a press used in stamping tin plates for roofing. The press had two dies, between which the plates were placed. While so engaged plaintiff's hand was caught and crushed between the dies. In an action to recover damages for the injury plaintiff claimed, and his evidence tended to show, that the press was out of repair, so that the clutch, which was designed to hold the upper die in place until the operative by the pressure of his foot on a treadle released it and let it down upon the tin plate on the lower die, would occasionally fly out of position, letting the die down without pressure

on the treadle, and that this happened at the time of the injury. It appeared by plaintiff's testimony that he had been operating this press for about a year; that three times before the accident the upper die had thus descended, the last time about an hour previous; also, that once before the plaintiff's hand was caught between the dies and the thumb injured. A stick was provided for moving the plates between the dies, and a notice was posted upon the press forbidding employees "under any circumstances" from placing their hands or fingers under the press. Defendant's superintendent and foreman had both, on different occasions, reproved plaintiff for putting his fingers between the dies and warned him of the danger, but he was accustomed to disregard the rule, his excuse being that he could work faster with his fingers than with the stick. On the occasion of the accident the plate stuck to the lower die and he was using his fingers instead of the stick to remove it. *Held*, that plaintiff's negligence directly contributed to the injury, and a refusal to nonsuit was error." Judgment on verdict for \$1,000, affirmed by Supreme Court, was reversed.

In *McCARRAGHER v. ROGERS*, 120 N. Y. 526 (1890), plaintiff, a boy thir-

the one removed. He had seen this cylinder in front of the machine removed several times and had himself assisted in removing it several times, so that he understood perfectly the process. When that cylinder was wound full of the rubber cloth, it was usually removed by O'Rorke and a young man by the name of Brevort, each taking one end and carrying it around to the rear, behind the machine, and then an empty cylinder was taken from the rear to the front and there it was put in position; and this had been done several times by the plaintiff and Brevort, each taking one end. On this occasion, after O'Rorke and Brevort had taken the cylinder from the front to the rear, O'Rorke rolled an empty cylinder under the machine to the front where the plaintiff was standing, and, as

teen years of age, injured by foot catching in machine which he was operating while in defendant's employ, and leg crushed, judgment for \$5,000 was *affirmed*.

In *DINGLEY v. STAR KNITTING CO.*, 134 N. Y. 552 (1892), plaintiff's son injured while cleaning waste from defendant's machine, the machine suddenly starting after he had stopped it, and crushing his hand, judgment of nonsuit was *affirmed*, the mere fact that the machine so started not being sufficient to infer that defect caused it.

In *BOHN (an infant, etc.) v. HAVE-MEYER ET AL.*, 114 N. Y. 296 (1889), minor employee injured, the facts as stated in the opinion by FOLLETT, Ch. J., are set out in the syllabus to the official report as follows: "In an action to recover damages for injuries alleged to have been caused by defendant's negligence these facts appeared: Plaintiff was employed as shoveler in defendant's sugar refinery, upon the second floor of which there are bins for the refined sugar. In the bottom of each bin is an orifice about two feet square, through which the sugar falls into a packer. It is the duty of the shovelers, among other things, when the discharging orifice of a bin becomes clogged, to open it by running a pole down through and loosening the sugar. Plaintiff had

been engaged in this work, and was acquainted with the construction of the bins and the method of discharging sugar. The orifice of a bin became clogged and plaintiff entered with a co-employee to open it. The pole not being long enough to effect the purpose, they dug down into the sugar far enough to reach the orifice with the pole. On opening it a sudden and unusual subsidence of the sugar occurred and plaintiff was drawn down and surrounded by sugar; his co-employees threw a rope around his body and pulled him out, whereby he received the injuries complained of. It was clearly proved that the bins had long been in use, and no witness was called to show that they were defectively constructed, out of repair, or that they might have been improved. The only evidence to show defendant's knowledge of the danger was that of a former employee, who testified that it was necessary in working to go on to the sugar, and that it was liable to run in upon a person thus employed; that it happened twice to him, once the foreman being present. The questions of defendants' negligence and plaintiff's contributory negligence were submitted to the jury, who found for defendants." Judgment for defendants *affirmed*. *Affirming* 46 Hun, 557.

the plaintiff testified, told him to put it in place. It weighed about one hundred pounds. He succeeded in putting it in place and drew a band over the end to hold it in the slot into which the end had been dropped, and was endeavoring to turn a screw into the band for the purpose of keeping it in position, and he turned the screw in the wrong direction and it came out and rolled upon the floor. He picked it up and came back with it and put the end of the screw in and started it, and then his foot slipped and he threw out his hand to save himself from falling and thrust it into the cogs of some wheels about nine inches from the end of the cylinder, and his hand was crushed.

O'Rorke testified that he did not instruct the plaintiff to pick up the cylinder and put it in. On previous occasions the plaintiff and Brevort, acting together, had put in the cylinder, he taking one end and Brevort the other. The plaintiff had not been instructed with reference to the machinery and had not been cautioned regarding any danger.

At the close of the evidence the court ruled that O'Rorke was a fellow-servant of the plaintiff, and also charged the jury that no act of negligence on the part of O'Rorke could be imputed to the defendant, because he was the plaintiff's fellow-workman. This case must, therefore, be treated on this appeal as if O'Rorke had not told the plaintiff to take up the cylinder and put it into its place, and as if the plaintiff had voluntarily, without any instruction, picked it up, put it in its place and attempted to fasten it so as to keep it there.

It is impossible to perceive, from the evidence, what the defendant could have done to avoid the accident. The machine was not imminently dangerous. The hands of the plaintiff, in anything which he had to do or was doing about the machine, would not come within nine inches of the cogs where he was injured. It was not needful to instruct him that the cogs were dangerous, because that was obvious. He could see as well as anybody that if his fingers got into the cogs they would be crushed into pieces. He was not injured because he did not know that the cogs were dangerous, but the injury happened because he slipped and fell and instinctively threw out his hand to recover himself. His falling was a mere accident, and no amount of instruction or caution from the agents of the defendant would have prevented the accident and saved him from the injury. His injury did not come from any ignorance of the machines or of the danger to which he was exposed, but it came solely from the accident.

The judge charged the jury that in order to find a verdict for the plaintiff, they "must find that the employer was guilty of breach of duty towards this young man; in other words, that he failed to do what a prudent man would have done under the circumstances in the management of this business. * * *

Of course, if a full-grown man had been employed at this work he would know that if he placed his fingers between the revolving cogs he would be very apt to be injured, and you are to say whether this boy would know as much as a man on that subject." It is idle to say that this plaintiff did not know as well as a grown man that if he placed his fingers between the revolving cogs he would be injured. The judge further charged: "If you shall say, under this proof, that it was not a dangerous machine to put such a boy at work upon, that ends the case, because that is the foundation of the plaintiff's case, that he was put to work at a dangerous machine without being properly instructed as to the liability or risk which he ran of injury." It is impossible to perceive how the absence of instructions had anything to do with this injury. He had been sufficiently instructed by what he saw during the time he had been employed there. He had seen the machine operated and had worked about it. He had seen this cylinder removed by others, and had himself assisted in removing it. What further knowledge could have been given him by instructions it is impossible to discern. The judge further said: "You observe that at one end of that machine the parts are stationary, and the danger, if any, is at the other end where the larger wheel and revolving cogs are situated, and, of course, that is the place of danger, if any; and if it is dangerous at that point, my opinion is that the danger is apparent, and that there is no hidden danger or defect in it. That is my view, but, of course, you are not to be governed by my view of the facts." The view the learned judge took of the facts should have induced him to nonsuit the plaintiff. The danger was apparent. The plaintiff had nothing to do with the cogwheels. He had no occasion to touch or handle them, and, but for the accident of his slipping, his hand would not have touched them.

The judge further charged: "Now, was there anything that this boy needed instruction about in connection with that machine? If you shall say, considering his age, capacity and experience, that it was necessary for his employer to warn him

not to put his fingers in between the cogs, and that if he did so he would be injured, and if the employer failed to do that, that it would be a specific act of negligence for which he would be liable." We think it is preposterous to say that it was the duty of the employer to warn him not to put his fingers in between the cogs. It might as well be required to warn a boy twelve years old, who was working about boiling water or a hot fire, not to put his hand into the water or the fire. The judge further charged the jury: "If you come to the conclusion, from this testimony, that this was an ordinary safe machine, and that a person putting a boy at work upon it omitted no precaution which a prudent man would have taken under the circumstances, then there would have been no breach of duty on the part of the defendant, and that ends the case for the plaintiff. If you find that this was a dangerous machine, and that a prudent man would have told this boy to keep his hands from these revolving wheels, then that would be an act of negligence for which the employer could be held responsible." Here again the case is made to turn upon the necessity of instructions to this boy to keep his hands from the revolving wheels, in the face of the fact that he did not thrust his hand voluntarily into the revolving wheels, but that his hand went into them in consequence of sheer accident.

He further charged the jury as follows: "The whole case in every view turns upon the question, whether or not a jury of twelve men shall determine, as a matter of fact, from this evidence, that this was a dangerous machine, and whether it was negligence to set such a boy to work on it. If you so find, the defendant is liable, otherwise the defendant is entitled to a general verdict." There is no rule of law that a minor may not be employed about a dangerous machine, and the simple fact that a machine is dangerous does not make an employer liable for an injury received by a minor employed upon such machine. All the law requires is that the minor should be properly instructed as to the danger to which he is exposed, and if he is injured because he has not received such instruction, then, as a general rule, the employer may be held responsible. But where the minor is familiar with the machine, and its character and operation are obvious, and he is aware of and fully appreciates the danger to be apprehended from working the machine, the fact that he is a minor does not alter the general rule that the employee takes upon himself the risks

which are patent and incident to the employment. *Hickey v. Taaffe*, 105 N. Y. 26. In that case Judge Peckham said: "She had not, it is true, received any instructions as to its dangers from the defendant or his agents, as she says, but she had acquired the information, in fact, from the best of all teachers, that of practical experience. She knew, therefore, all that the instructions of the defendant would have imparted to her. This was enough. Being of an age to appreciate, and having full knowledge of the danger, and at the same time being competent to perform the duty demanded from her, the fact that she was a minor does not alter the general rule of law upon the subject of employees taking upon themselves the risks which are patent and incident to the employment." In that case the plaintiff was a young girl about fourteen years old. Here the plaintiff knew all about this machine and its operation and danger that any instructions could have given him, and we repeat that no instructions, however minute, would have avoided the accident which occurred.

After the general charge of the judge to the jury, the counsel for the defendant said this to him: "I understand your honor to tell the jury, and you did tell the jury, and I ask to have it repeated, that if it happened from a slip and was an inevitable accident, that there can be no recovery any way, whether it was a dangerous employment or not." And the judge replied, "I think I have charged that substantially; I cannot repeat it." That charge required a verdict for the defendant. The evidence is undisputed, all coming from the plaintiff himself, that the accident did happen from a slip, and was, therefore, in that sense, inevitable.

We are, therefore, of opinion, as this case now appears in the record, the trial judge having held as the law of the case, that the defendant was not responsible for any carelessness on the part of O'Rorke, that the plaintiff should have been nonsuited.

The judgment should, therefore, be reversed and a new trial granted, costs to abide event.

FINCH, PECKHAM, and GRAY, JJ., concur; DANFORTH, J., concurs on the sole ground stated in the last exception to the judge's charge, viz., if this was the result of an accident, the plaintiff could not recover; to the rest of the opinion he dissents. ANDREWS, J., does not vote; RUGER, Ch. J., absent.

Judgment reversed.

TABLE OF CASES CLASSIFIED.

[This Table shows the Cases Reported, arranged according to States in the order in which they appear in this volume, and classified according to the cause of action and the personal injuries sustained, so far as the facts disclose the same. The varied list of employments in MASTER AND SERVANT Cases is shown under such titles as BRAKEMAN, CONDUCTOR, ENGINEER, FIREMAN, SWITCHMAN, ETC.; MINERS, MECHANICS (under MACHINERY), STEVEDORES (LOADING AND UNLOADING VESSELS), MINOR EMPLOYEES, ETC. Causes of injury appear under COUPLING CARS, COLLISION, DEFECTIVE APPLIANCE, EXPLOSION, MACHINERY, SCAFFOLD, ETC. The injuries are shown under ARM, HEAD, LEG, ETC.]

Animal — ENGINE COLLIDING WITH.

Fleming v. St. Paul & D. R. Co.
(Minn.) 286

Animal Killed — BLASTING.

Marshall v. Shricker (Mo.) 426

Ankle Injured — CAVE-IN.

Carlson v. N. W. Tel. Exch. Co.
(Minn.) 220

Ankle Injured — FALL OF IRON COLUMN.

Herdler v. Buck's Stove & Range
Co. (Mo.) 412

Ankle Injured — PILE DRIVER.

Fremont, etc., R. Co. v. Leslie
(Neb.) 577

Arm Injured — CARDING MACHINE.

Truntle v. North Star Woolen Mill
Co. (Minn.) 189

Arm Injured — CAUGHT BETWEEN CARS.

Fifield v. Northern R. R. (N. H.) . . 607

Arm Injured — CHAIN BREAKING.

Malone v. Morton (Mo.) 377

Arm Injured — COUPLING CARS.

Dewey v. Detroit, G. H. & M. R'y
Co. (Mich.) 101
Smith v. Potter, Rec'r (Mich.) . . . 115
Hathaway v. Mich. Cent. R. Co.
(Mich.) 129
Brewer v. Flint & P. M. R. Co.
(Mich.) 130
Ill. Cent. R. Co. v. Price (Miss.) . . 368
Burdick v. Pac. R'y Co. (Mo.) . . . 484
Rodney v. St. L. S. W. R'y Co.
(Mo.) 485

Arm Injured — CROSS-BEAM.

Lucey v. Hannibal Oil Co. (Mo.) . . 415

Arm Injured — ELECTRICITY.

Voyer v. Dispatch Printing Co.
(Minn.) 186

Arm Injured — FALLING FROM TRAIN.

Moran v. Eastern R'y Co. (Minn.) . 259

Arm Injured — GRINDSTONE.

Melzer v. Peninsular Car Co.
(Mich.) 10

Arm Injured — HOISTING MACHINE.

Fox v. Spring Lake Iron Co.
(Mich.) 31

Arm Injured — MACHINERY.

Snowberg v. Nelson Spencer Paper
Co. (Minn.) 182
Hess v. Adamant Mfg. Co. (Minn.) . 190

Arm Injured — PICKING MACHINE.

Anderson v. Morrison (Minn.) . . . 192

Arm Injured — PLANING MACHINE.

Anderson v. Akeley Lumber Co.
(Minn.) 182
Crown v. Orr (N. Y.) 844

Arm Injured — REVOLVING SHAFT.

King v. Ford River Lumber Co.
(Mich.) 27

Arm Injured — RUN OVER.

Schneider v. C. B. & N. R'y Co.
(Minn.) 260
Erb (Rec'r) v. Eggleston (Neb.) . . 568

Arm Injured — SAW MACHINE.

Lindstrand v. Delta Lumber Co.
(Mich.) 7

Arsenical Poisoning.

Fox v. Peninsular White Lead &
Color Works (Mich.) 66

Ashes and Cinders on Track.

Loranger v. L. S. & M. S. R'y Co.
(Mich.) 103
Hughes v. Winona & St. P. R. Co.
(Minn.) 243

Assault — BY PHYSICIAN.

Campbell v. Northern Pac. R. Co.
(Minn.) 346

Assault — BY SERVANT.

Richberger v. Am. Exp. Co.
(Miss.) 375

Assisting Employee — INJURED WHILE.

Evarts v. St. P., M. & M. R'y Co.
(Minn.) 322
Church v. C. M. & St. P. R'y Co.
(Minn.) 325

Automatic Hoist — INJURED BY.

Fox v. Spring Lake Iron Co.
(Mich.) 31

Awning — CONTACT WITH.

Clark v. St. P. & S. C. R. Co.
(Minn.) 280

Axe Breaking.

Moran v. Brown (Mo.) 517

Backing Engine — LABORER INJURED.

Schroeder v. Flint & P. M. R. Co.
(Mich.) 111

Backing Train — CRUSHED BETWEEN CARS.

McCosker v. Long Island R. Co.
(N. Y.) 798

Baggageman Killed — FALL OF BRIDGE.

Warner v. Erie R'y Co. (N. Y.) . . 734

Bags of Rice Falling on Stevedore.

Nord Deutscher Lloyd S. S. Co. v.
Ingebregsten (N. J.) 673

Baker Injured — EXPLOSION.

Garneau Cracker Co. v. Palmer
(Neb.) 602

Bank of Earth — CAVE-IN.

Olson v. McMullen (Minn.) 220
Pederson v. City of Rushford
(Minn.) 221
Bergquist v. City of Minneapolis
(Minn.) 221
Keegan v. Kavanaugh (Mo.) 431
Aldridge v. Midland Blast Furnace
Co. (Mo.) 431
Shortel v. City of St. Jos. (Mo.) . . 432
Stephenson v. Ravenscroft (Neb.) . . 596

Barrel of Paint Exploding.

Burke v. Parker, Webb & Co.
(Mich.) 44

Blacksmith Injured — DEFECTIVE CHAIN.

Rogers Locomotive, etc., Works v.
Hand (N. J.). 707

Blacksmith Injured — FALL OF IRON BAR.

Nicholds v. Crystal Plate Glass Co.
(Mo.) 415

Blacksmith Injured — FLYING STEEL.

Rawley v. Colliau (Mich.) 57

Beam and Tackle Falling.

McCarthy v. Lehigh Valley Transp.
Co. (Minn.) 230

Blast Furnace — INJURED BY.

Fox v. Spring Lake Iron Co.
(Mich.) 31

Blasting Explosion.

Kelly v. Cable Co. (Mont.) 519
Berg v. B. & M., etc., Mining Co.
(Mont.) 519
Henderson v. Williams (N. H.) . . . 625
Smith v. Oxford Iron Co. (N. J.) . . 683

Blasting — HORSE KILLED.

Marshall v. Shricker (Mo.) 426

Blasting — MINER INJURED.

Gilmore v. Oxford Iron & Nail Co.
(N. J.) 687

Blasting — QUARRY.

Comben v. Belleville Stone Co.
(N. J.) 719

Blasting Rock.

Cornelson v. Eastern R'y Co.
(Minn.) 344

Blinded by Molten Iron.

Jungnitsch v. Michigan Malleable
Iron Co. (Mich.) 29

Boarding Construction Train.

Dowell v. Vicksburg, etc., R. Co.
(Miss.) 363

Boarding Freight Car.

Gavigan v. L. S. & M. S. Ry Co.
(Mich.) 136
Lawson v. Truesdale, Rec'r (Minn.) . 283

Boarding Gravel Train.

Moran v. Eastern R'y Co. (Minn.) . 259

Boarding "Kicked" Car.

Erb (Rec'r) v. Eggleston (Neb.) . . 568

Boarding Moving Engine.

Miller v. Chicago & G. T. R'y Co.
(Mich.) 120

Boarding Moving Train.

Blair v. Grand Rapids & Ind. R. Co.
(Mich.) 146

Boiler Explosion.

Theisen v. Porter (Minn.) 234
Connolly v. Davidson (Minn.) 237
Johnson v. Boston & M., etc., Min-
ing Co. (Mont.) 525
Sioux City & Pac. R. Co. v. Finlay-
son (Neb.) 530
Keegan v. Western R. Co. (N. Y.) . . 730
Locomotive explosions; N. Y. cases
730-731

Boiler Front Falling.

Toomey v. Eureka Iron & Steel
Works (Mich.) 52

Brakeman Injured.

Railroad employees injured; notes
of Michigan cases 154-173
Railroad employees injured; notes
of Minnesota cases 347-358
Minor employees in service of rail-
road companies injured and killed
(Mo.) 455-458
Railroad employees injured; notes
of Missouri cases 491-513
Railroad employees injured; New
Hampshire cases 623-625
Railroad employees injured; notes
of N. Y. cases 801-820

Brakeman Injured — COLLISION.

Criswell v. Mont. Cent. R. Co. (Mont.)	527
Fenderson v. Atlantic City R. Co. (N. J.)	659
Wright v. N. Y. Cent. R. Co. (N. Y.)	752

Brakeman Injured — CONTACT WITH BRIDGE.

N. Y., Susq. & W. R. Co. v. Marion (N. J.)	652
Baylor v. D., L. & W. R. Co. (N. J.)	652
Railroad bridge accidents; N. Y. cases	734-736

Brakeman Injured — COUPLING CARS.

Dewey v. Detroit, G. H. & M. R'y Co. (Mich.)	101
McDonald v. Mich. Cent. R. Co. (Mich.)	112
Perry v. Mich. Cent. R. Co. (Mich.)	113
Smith v. Potter, Rec'r (Mich.)	115
Botsford v. Mich. Cent. R. Co. (Mich.)	127
Batterson v. Chicago & G. T. R'y Co. (Mich.)	128
Hathaway v. Mich. Cent. R. Co. (Mich.)	129
Brewer v. Flint & P. M. R. Co. (Mich.)	130
Jones v. L. S. & M. S. R'y Co. (Mich.)	139
Russell v. Minn. & St. L. R'y Co. (Minn.)	249
Hungerford v. Chicago, M. & St. P. R. Co. (Minn.)	250
Fay v. Minn. & St. L. R'y Co. (Minn.)	288
Herrick v. Minn. & St. L. R'y Co. (Minn.)	292
Hatter v. Ill. Cent. R. Co. (Miss.)	370
Gibson v. Pac. R. Co. (Mo.)	442
Smith v. R. R. Co. (Mo.)	474
Fifield v. Northern R. R. (N. H.)	607

Brakeman Injured — DEFECTIVE APPLIANCE.

C. B. & Q. R. Co. v. Howard (Neb.)	569
------------------------------------	-----

Brakeman Injured — DEFECTIVE CAR.

Current v. Mo. Pac. R'y Co. (Mo.)	469
-----------------------------------	-----

Brakeman Injured — DEFECTIVE HANDHOLD.

Mateer v. Mo. Pac. R. Co. (Mo.)	460
---------------------------------	-----

Brakeman Injured — DEFECTIVE STEP.

Miller v. Chicago & G. T. R'y Co. (Mich.)	120
---	-----

Brakeman Injured — DERAILMENT.

Drymala v. Thompson (Minn.)	243
-----------------------------	-----

Brakeman Injured — FALLING FROM BRIDGE.

McDermott v. Pac. R. Co. (Mo.)	444
--------------------------------	-----

Brakeman Injured — FALLING FROM CAR.

Moran v. Eastern R'y Co. (Minn.)	259
Condon v. Mo. Pac. R'y Co. (Mo.)	469
Bailey v. R., W. & O. R. Co. (N. Y.)	787

Brakeman Injured — "KICKED" CAR.

Erb (Rec'r) v. Eggleston (Neb.)	568
---------------------------------	-----

Brakeman Injured — PROJECTING OBJECT.

Smith v. Winona & St. P. R. Co. (Minn.)	281
Flanders v. C., St. P., M. & O. R'y Co. (Minn.)	282

Brakeman Injured — SLIPPING ON TRACK.

Piquegno v. Chicago & G. T. R'y Co. (Mich.)	104
Hughes v. Winona & St. P. R. Co. (Minn.)	243

Brakeman Injured — SUDDEN START OF TRAIN.

Evans v. Louis., etc., R. Co. (Miss.)	366
---------------------------------------	-----

Brakeman Injured — TRACK.

Loranger v. L. S. & M. S. R'y Co. (Mich.)	103
---	-----

Brakeman Injured —
SWITCHING CARS.

Warmington v. Atch., T. & S. F. R. Co. (Mo.)	517
Prosser v. Mont. Cent. R. Co. (Mont.)	528

Brakeman Injured —
LABORER ACTING AS.

Chicago & N. W. R'y Co. v. Bayfield (Mich.)	87
---	----

Brakemen Injured in Mills, Etc.

McLaren v. Williston (Minn.)	199
Anderson v. L. T. Sowle Elev. Co. (Minn.)	200

Brakeman Killed.

Railroad employees injured; notes of Michigan cases	154-173
Hutchins v. St. P., M. & M. R'y Co. (Minn.)	294
Railroad employees injured; notes of Minnesota cases	347-358
Railroad employees injured; notes of Missouri cases	491-513
Railroad employees injured; notes of N. Y. cases	801-820

Brakeman Killed — COL-
LAPSE OF BRIDGE.

Harrison v. Central R. R. (N. J.)	633
Haggerty v. Central R. R. (N. J.)	633

Brakeman Killed — COL-
LISION.

Flike v. B. & A. R. Co. (N. Y.)	765
Sprong v. B. & A. R. Co. (N. Y.)	765
Booth v. B. & A. R. Co. (N. Y.)	766
Rose v. B. & A. R. Co. (N. Y.)	779

Brakeman Killed — CON-
TACT WITH BRIDGE.

Illick v. Flint & P. M. R. Co. (Mich.)	126
Short v. New Orleans, etc., R. Co. (Miss.)	364
Devitt v. Pac. R. Co. (Mo.)	451
Rains v. St. L., I. M. & S. R'y Co. (Mo.)	452
Hardy v. B. & M. R. (N. H.)	617

Brakeman Killed — COUP-
LING CARS.

Ellison v. Truesdale, Rec'r (Minn.)	313
White v. Louis., etc., R. Co. (Miss.)	372
Mo. Pac. R'y Co. v. Baxter (Neb.)	555
Mo. Pac. R'y Co. v. Lewis (Neb.)	562
Anderson v. C., B. & Q. R. Co. (Neb.)	562

Brakeman Killed — DE-
RAILMENT.

Anderson v. Mich. Cent. R. Co. (Mich.)	98
Balhoff v. Mich. Cent. R. Co. (Mich.)	101

Brakeman Killed — FALL-
ING OR THROWN FROM TRAIN.

Morton v. Detroit, B. C. & A. R. Co. (Mich.)	121
Connor v. Chicago, R. I. & P. R. Co. (Mo.)	401
Settle v. St. L. & S. F. R. Co. (Mo.)	467
Gutridge v. Mo. Pac. R'y Co. (Mo.)	467
Soeder v. St. L., I. M. & S. R'y Co. (Mo.)	475

Brakeman Killed — FOUND
ON TRACK.

Chicago, B. & Q. R. Co. v. Quincy (Neb.)	563
--	-----

Brakeman Killed — PRO-
JECTING OBJECT.

Powers v. Thayer Lumber Co. (Mich.)	74
Clark v. St. P. & S. C. R. Co. (Minn.)	280
Robel v. C., M. & St. P. R. Co. (Minn.)	280

Breaking of Saw.

Lau v. Fletcher (Mich.)	17
-------------------------	----

Brewery — FALL OF TUB IN.

Malone v. Hathaway (N. Y.)	824
----------------------------	-----

Brickwork Collapsing.

Griffiths v. Wolfram (Minn.)	219
------------------------------	-----

Bridge Collapsing.

McDermott v. Pac. R. Co. (Mo.)...	444
Tabler v. Hann. & St. J. R. Co. (Mo.)	476
Muirhead v. Hann. & St. J. R. Co. (Mo.)	477
Harrison v. Central R. R. (N. J.)..	633
Haggerty v. Central R. R. (N. J.)..	633
Demarest v. Little (Receiver, etc.) (N. J.)	643
Woodruff v. Little (Receiver, etc.) (N. J.)	668
Warner v. Erie R'y Co., (N. Y.)..	734
Railroad bridge accidents; N. Y. cases	734-736

Bridge — CONTACT WITH.

Illick v. Flint & P. M. R. Co. (Mich.)	126
Devitt v. Pac. R. Co. (Mo.).....	451
Rains v. St. L., I. M. & S. R'y Co. (Mo.)	452
Hardy v. B. & M. R. (N. H.)....	617
N. Y., Susq. & W. R. Co. v. Marion (N. J.)	652
Baylor v. D., L. & W. R. Co. (N. J.)	652
Railroad bridge accidents; N. Y. cases	734-736

Bridge Worker Injured.

Tabler v. Hann. & St. J. R. Co. (Mo.)	476
Muirhead v. Hann. & St. J. R. Co. (Mo.)	477
Lee v. Detroit Bridge & Iron Works (Mo.)	426
Brothers v. Cartter (Mo.).....	428
Hardy v. D., L. & W. R. Co. (N. J.)	658

Bucket — STRUCK BY, IN MINE.

Patnode v. Harter (Nev.).....	604
-------------------------------	-----

Building Collapse.

Turner v. Haar (Mo.).....	416
---------------------------	-----

Burned — EXPLOSION IN OIL WORKS.

Bahr v. Lombard, Ayres & Co. (N. J.)	689
--	-----

Bursting of Emery Wheel.

Reier v. Detroit Steel & Spring Works (Mich.)	30
---	----

Buzz-saw — INJURED BY.

Ogley v. Miles (N. Y.).....	843
-----------------------------	-----

Cable Car — STRUCK BY.

Friel v. Citizen's R'y Co. (Mo.)...	513
-------------------------------------	-----

Cage in Mine — KILLED BY.

Quick v. Minn. Iron Co. (Minn)...	231
-----------------------------------	-----

Carding Machine — INJURED BY.

Truntle v. North Star Woolen Mill Co. (Minn.)	189
---	-----

Car Inspector Injured.

Railroad employees injured; notes of Michigan cases	154-173
Railroad employees injured; notes of N. Y. cases	801-820

Carpenter Injured — ELEVATOR.

Donovan v. Gay (Mo.).....	402
Hughes v. Fagin (Mo.).....	516

Carpenter Injured — FALL OF IRON COLUMN.

Herdler v. Buck's Stove & Range Co. (Mo.)	412
---	-----

Carpenter Killed — EXPLOSION.

Johnson v. Boston & M., etc., Mining Co. (Mont.)	525
--	-----

Carpenter Killed — FALLING FROM SCAFFOLD.

Fugler v. Bothe (Mo.).....	426
----------------------------	-----

Carpenter Killed — FALL OF WALL.

Lottman v. Barnett (Mo.).....	419
-------------------------------	-----

Car Repairer Injured.

Railroad employees injured; notes of Michigan cases	154-173
Railroad employees injured; notes of Minnesota cases	347-358
Railroad employees injured; notes of Missouri cases	491-513
Railroad employees injured; notes of N. Y. cases.....	801-820

Car Repairer Killed.

C. B. & Q. R. Co. v. Sullivan (Neb.)	570
---	-----

Car Shops — INJURED IN.

Findlay v. Russell Wheel & Foundry Co. (Mich.)	18
Breig v. Chicago & W. M. R'y Co. (Mich.)	131

Caught Between Cars.

Hathaway v. Mich. Cent. R. Co. (Mich.)	129
Railroad employees injured; Michigan cases	154-173
Russell v. Minn. & St. L. R'y Co. (Minn.)	249
Tierney v. Minn. & St. L. R'y Co. (Minn.)	288
Carroll v. Minn. Valley R. Co. (Minn.)	343
Burdick v. Pac. R'y Co. (Mo.)....	484
Railroad employees injured; notes of Missouri cases	491-513
Anderson v. C. B. & Q. R. Co. (Neb.)	567
C. B. & Q. R. Co. v. Bell (Neb.)....	581
Fifield v. Northern R. R. (N. H.)..	607
McCosker v. Long Island R. Co. (N. Y.)	798
Flynn v. Central R. Co. (N. Y.)....	800
Railroad employees injured; notes of N. Y. cases	801-820

Cave-in—SEWER, TRENCH, ETC.

Carlson v. N. W. Tel. Exch. Co. (Minn.)	220
Olson v. McMullen (Minn.)	220
Pederson v. City of Rushford (Minn.)	221
Bergquist v. City of Minneapolis (Minn.)	221
Leslie v. Rich Hill Mining Co. (Mo.)	399
Keegan v. Kavanaugh (Mo.)	431
Aldridge v. Midland Blast Furnace Co (Mo.)	431
Shortel v. City of St. Jos. (Mo.)..	432
Kelley v. Fourth of July Mining Co. (Mont.)	524
Soyer v. Great Falls Water Co. (Mont.)	524
Kearney Electric Co. v. Laughlin (Neb.)	596
Stephenson v. Ravenscroft (Neb.)..	596
Van Steenburgh v. Thornton (N. J.)	681
Kranz v. Long Island R. Co. (N. Y.)	795

Chain Breaking.

Malone v. Morton (Mo.)	377
------------------------------	-----

Circular Saw — INJURED BY.

Smith v. Dunham (Mich.)	8
Wheeler v. Berry (Mich.)	16
Carroll v. Williston (Minn.)	176
Anderson v. Nelson Lumber Co. (Minn.)	178
Eicheler v. Hanggi (Minn.)	182
Seckinger v. Philibert, etc., Co. (Mo.)	387
Smith v. Irwin (N. J.)	714

Cistern Wall Falling.

Snedda v. Libera (Minn.)	210
Kulas v. Libera (Minn.)	210

Cleaning Machinery.

Kean v. Detroit Copper & Brass Rolling Mills (Mich.)	10
Bergstrom v. Staples (Mich.)	11
Torongo v. Salliotte (Mich.)	11
Steiler v. Hart (Mich.)	26
Mackin v. Alaska Refrigerator Co. (Mich.)	28
Rothenberger v. N. W. Consol. Milling Co. (Minn.)	177
Carroll v. Williston (Minn.)	176
Anderson v. Morrison (Minn.)	192

Clearing Snow from Track — RUN OVER.

Omaha & R. V. R. Co. v. Krayenbuhl (Neb.)	571
---	-----

Clothing Caught in Gearing, Etc.

Swoboda v. Ward (Mich.)	1
Huizega v. Cutler & Savidge Lumber Co. (Mich.)	4
Schroeder v. Michigan Car Co. (Mich.)	7
Wuotilla v. Duluth Lumber Co. (Minn.)	173
Groff v. Duluth Imperial Mill Co. (Minn.)	181
Dowling v. Allen (Mo.)	383

Coal Car — INJURED BY.

Conroy v. Vulcan Iron Works (Mo.)	377
Hamilton v. Rich Hill Coal Co. (Mo.)	398

Coal Falling from Cage in Mine.

Durant v. Lexington Coal Mining Co. (Mo.) 397

Coal Hoist — INJURED BY.

Conroy v. Vulcan Iron Works (Mo.) 377

Coal Mine — FALL OF ROCK.

Leslie v. Rich Hill Mining Co. (Mo.) 399
Pantzar v. Tilly Foster Iron Mining Co. (N. Y.) 832

Coal Mine — STRUCK BY CAR.

Hamilton v. Rich Hill Coal Co. (Mo.) 398

Coal Thrown from Train.

Card v. Eddy, Receivers, etc. (Mo.) 479
Union Pac. R. Co. v. Erickson (Neb.) 574

Cogwheels — CAUGHT BY.

Swoboda v. Ward (Mich.) 1
Huizega v. Cutler & Savidge Lumber Co. (Mich.) 4
Schroeder v. Michigan Car Co. (Mich.) 7
Borck v. Michigan Bolt & Nut Works (Mich.) 28
Wuotilla v. Duluth Lumber Co. (Minn.) 173
Barbo v. Bassett (Minn.) 175
Rothenberger v. N. W. Consol. Milling Co. (Minn.) 177
Buckley v. Gutta Percha, etc., Mfg. Co. (N. Y.) 842
White v. Wittemann Lith. Co. (N. Y.) 843

Collapse of Brickwork.

Griffiths v. Wolfram (Minn.) 219

Collapse of Bridge Span.

Brothers v. Cartter (Mo.) 428

Collapse of Building.

Turner v. Haar (Mo.) 416

Collapse of Cistern Wall.

Snedda v. Libera (Minn.) 210
Kulas v. Libera (Minn.) 210

Collapse of Depot Floor.

Cook v. St. Paul, M. & M. R'y Co. (Minn.) 247

Collapse of Machine.

Richards v. Rough (Mich.) 29

Collapse of Platform.

Blomquist v. C. M. & St. P. R'y Co. (Minn.) 261

Collapse of Railroad Trestle.

Paulmier v. Erie R. Co. (N. J.) 643

Collapse of Scaffold.

Hoar v. Merritt (Mich.) 82
Boettger v. Scherpe & Koken, etc., Co. (Mo.) 421

Collision.

Railroad employees injured; notes of Michigan cases 154-173
Railroad employees injured; notes of Missouri cases 491-513
Railroad employees injured; New Hampshire cases 623-625
Railroad employees injured; notes of N. Y. cases 801-820

Collision — ENGINE AND CARS.

Schroeder v. Flint & P. M. R. Co. (Mich.) 111
Harrison v. Detroit, L. & N. R. Co. (Mich.) 119
Davis v. Detroit & Mil. R. Co. (Mich.) 130
Deremer v. D., L. & W. R. Co. (N. J.) 660

Collision — ENGINE AND DETACHED CARS.

Fenderson v. Atlantic City R. Co. (N. J.) 659

Collision — ENGINE AND FLAT CAR.

Hewitt v. Flint & P. M. R. Co. (Mich.) 122

Collision — FREIGHT CARS.

Gavigan v. L. S. & M. S. R'y Co.
(Mich.) 136

Collision — FREIGHT TRAIN AND RUNAWAY CARS.

Flike v. B. & A. R. Co. (N. Y.)... 765
Sprong v. B. & A. R. Co. (N. Y.).. 765
Booth v. B. & A. R. Co. (N. Y.).. 766
Rose v. B. & A. R. Co. (N. Y.).... 779

Collision — HAND CAR AND SNOW PLOUGH.

Olson v. St. P., M. & M. R'y Co.
(Minn.) 276
Larson v. St. P., M. & M. R'y Co.
(Minn.) 277

Collision — HAND CAR AND TRAIN.

Atch., T. & S. F. R. Co. v. Martin
(N. Mex.) 729

Collision — HAND CAR AND WORK TRAIN.

Coon v. Syr. & Utica R. Co. (N. Y.) 737

Collision — PASSENGER TRAIN AND FREIGHT CARS.

Hall v. C., B. & N. R'y Co.
(Minn.) 300

Collision — TRAIN AND CATTLE.

Fleming v. St. Paul & D. R. Co.
(Minn.) 286
Connor v. Chicago, R. I. & P. R.
Co. (Mo.) 461
C., B. & Q. R. Co. v. Clark and
others (Neb.) 578

Collision — TRAIN AND SWITCH ENGINE.

Criswell v. Mont. Cent. R. Co.
(Mont.) 527

Collision — TRAINS.

Hunn v. Mich. Cent. R. Co.
(Mich.) 119
Hunn v. Mich. Cent. R. Co.
(Mich.) 134
Ill. Cent. R. Co. v. Hunter (Miss.).. 366

Collisions — TRAINS — *cont'd.*

Millsaps v. Louis., etc., R. Co.
(Miss.) 366
Proctor v. Hann. & St. J. R. Co.
(Mo.) 464
Vawter v. Mo. Pac. R'y Co. (Mo.).. 486
C., B. & Q. R. Co. v. Wymore
(Neb.) 590
Lutz v. Atl. & Pac. R. Co. (N.
Mex.) 728
Wright v. N. Y. Cent. R. Co. (N.
Y.) 752
Slater v. Jewett, Receiver, (N. Y.).. 772
Hankins v. N. Y., L. E. & W. R. Co.
(N. Y.) 783
Sheehan v. N. Y. Cent. R. Co. (N.
Y.) 788
Dana v. N. Y. Cent. R. Co. (N.
Y.) 789
Sutherland v. Troy & B. R. Co. (N.
Y.) 789
Mann v. D. & H. Canal Co. (N.
Y.) 797

Collision — WOOD TRAIN AND ENGINE.

Schultz v. Pac. R. Co. (Mo.)..... 462

Conductor Injured.

Railroad employees injured; notes
of Michigan cases 154-173
Railroad employees injured; notes
of Minnesota cases ... 347-358
Railroad employees injured; notes
of Missouri cases..... 491-513
Street railroad employees injured;
notes of Minn. cases..... 326-329

Conductor Killed.

Railroad employees injured; notes
of Michigan cases..... 154-173
Railroad employees injured; notes
of Minnesota cases..... 347-358

Conductor Killed — COLLISION.

Lutz v. Atl. & Pac. R. Co. (N.
Mex.) 728

Conductor Killed — CONTACT WITH POLE.

Pierce v. Camden, G. & W. R. Co.
(N. J.) 672

Conductor Killed — DERAILMENT.

Howd v. Miss. Cent. R. Co.
(Miss.) 363

Conductor Killed — PROJECTING OBJECT.

Gibson v. Erie R'y Co. (N. Y.)..... 735

Construction Train — BOARDING.

Blair v. Grand Rapids & Ind. R. Co. (Mich.) 146

Contact with Bridge.

Illick v. Flint & P. M. R. Co. (Mich.) 126

Devitt v. Pac. R. Co. (Mo.)..... 451

Rains v. St. L., I. M. & S. R'y Co. (Mo.) 452

Hardy v. B. & M. R. (N. H.)..... 617

N. Y., Susq. & W. R. Co. v. Marion (N. J.) 652

Baylor v. D., L. & W. R. Co. (N. J.) 652

Contact with Pole.

Pierce v. Camden, G. & W. R. Co. (N. J.) 672

Cotton Loom — INJURED BY.

Jaques v. Great Falls Mfg. Co. (N. H.) 628

Cotton Mill — INJURED IN.

Anderson v. Morrison (Minn.)..... 192

Jaques v. Great Falls Mfg. Co. (N. H.) 628

Coupling Cars — INJURED OR KILLED WHILE.

Anderson v. Mich. Cent. R. Co. (Mich.) 98

Dewey v. Detroit, G. H. & M. R'y Co. (Mich.) 101

McDonald v. Mich. Cent. R. Co. (Mich.) 112

Perry v. Mich. Cent. R. Co. (Mich.) 113

Smith v. Potter, Rec'r (Mich.)..... 115

Ft Wayne, J. & S. R. Co. v. Gildersleeve (Mich.) 127

Botsford v. Mich. Cent. R. Co. (Mich.) 127

Batterson v. Chicago & G. T. R'y Co. (Mich.) 128

Mich. Cent. R. Co. v. Smithson (Mich.) 129

Hathaway v. Mich. Cent. R. Co. (Mich.) 129

Brewer v. Flint & P. M. R. Co. (Mich.) 130

Coupling Cars — INJURED OR KILLED WHILE — continued.

Gardner v. Mich. Cent. R. Co. (Mich.) 130

Jones v. L. S. & M. S. R'y Co. (Mich.) 139

Railroad employees injured; notes of Michigan cases..... 154-173

Hughes v. Winona & St. P. R. Co. (Minn.) 243

Russell v. Minn. & St. L. R'y Co. (Minn.) 249

Hungerford v. Chicago, M. & St. R. Co. (Minn.)..... 250

Fay v. Minn. & St. L. R'y Co. (Minn.) 288

Tierney v. Minn. & St. L. R'y Co. (Minn.) 288

Herrick v. Minn. & St. L. R'y Co. (Minn.) 292

Ellison v. Truesdale, Receiver (Minn.) 313

Doyle v. St. P., M. & M. R'y Co. (Minn.) 321

Evarts v. St. P., M. & M. R'y Co. (Minn.) 322

Rahman v. Minn. & A. W. R. Co. (Minn.) 336

Railroad employees injured; notes of Minnesota cases..... 347-358

Ill. Cent. R. Co. v. Price (Miss.)... 368

Hatter v. Ill. Cent. R. Co. (Miss.)... 370

Ill. Cent. R. Co. v. Cathey (Miss.)... 371

White v. Louis., etc., R. Co. (Miss.) 372

Rich. & D. R. Co. v. Rush (Miss.)... 373

Gibson v. Pac. R. Co. (Mo.)..... 442

Settle v. St. L. & S. F. R. Co. (Mo.) 467

Smith v. R. R. Co. (Mo.)..... 474

Rutledge v. Mo. Pac. R'y Co. (Mo.)... 483

Burdick v. Pac. R'y Co. (Mo.)..... 484

Rodney v. St. L. S. W. R'y Co. (Mo.) 485

Railroad employees injured; notes of Missouri cases..... 491-513

Thompson v. Mont. Cent. R. Co. (Mont.) 528

Mo. Pac. R'y Co. v. Baxter (Neb.)... 555

Mo. Pac. R'y Co. v. Lewis (Neb.)... 562

Anderson v. C., B. & Q. R. Co. (Neb.) 567

C., B. & Q. R. Co. v. Bell (Neb.)... 581

Union Stock Yards Co. v. Conoyer (Neb.) 595

Union Stock Yards Co. v. Larsen (Neb.) 595

Fifield v. Northern R. R. (N. H.)... 607

Railroad employees injured; New Hampshire cases 623-625

Railroad employees injured; notes of New York cases..... 801-820

Coupling Cars in Mills, Etc.

McLaren v. Williston (Minn.)	199
Anderson v. L. T. Sowle Elev. Co. (Minn.)	200
Capital City Oil Works v. Black (Miss.)	375

Crawling Under Cars.

Omaha & R. V. R. Co. v. Morgan (Neb.)	542
---------------------------------------	-----

Cross-beam Failing.

Lucey v. Hannibal Oil Co. (Mo.)	415
---------------------------------	-----

Crushed Between Cars.

Anderson v. Mich. Cent. R. Co. (Mich.)	98
Railroad employees injured; Michigan cases	154-173

Cutting Down Trolley Wire — KILLED WHILE.

Walker v. L. S. & M. S. R'y Co. (Mich.)	143
---	-----

Dangerous Work Place.

Sadowski v. Michigan Car Co. (Mich.)	23
Smith v. Peninsular Car Works (Mich.)	42
Van Dusen v. Letellier (Mich.)	50
Lamotte v. Boyce (Mich.)	56

Death — INJURIES RESULTING IN.

Parkhurst v. Johnson (Mich.)	5
Bergstrom v. Staples (Mich.)	11
Marshall v. Widdicomb Furniture Co. (Mich.)	27
Smith v. Peninsular Car Works (Mich.)	42
Barnowsky v. Helson (Mich.)	53
Balle v. Detroit Leather Co. (Mich.)	57
Ryan v. Bagaley, (Mich.)	62
Accidents in mines; falling roof, rock, etc.; notes of Michigan cases	64-66
Adams v. Iron Cliffs Co. (Mich.)	74
Powers v. Thayer Lumber Co. (Mich.)	74
Employees injured while working in vessels; notes of Michigan cases	76-77
Chicago & N. W. R'y Co. v. Bayfield (Mich.)	87

Death — INJURIES RESULTING IN — continued.

Anderson v. Mich. Cent. R. Co. (Mich.)	98
Balhoff v. Mich. Cent. R. Co. (Mich.)	101
Hunn v. Mich. Cent. R. Co. (Mich.)	119
Morton v. Detroit, B. C. & A. R. Co. (Mich.)	121
Illick v. Flint & P. M. R. Co. (Mich.)	126
Ft. Wayne, J. & S. R. Co. v. Gildersleeve (Mich.)	127
Hunn v. Mich. Cent. R. Co. (Mich.)	134
Walker v. L. S. & M. S. R'y Co. (Mich.)	143
Bresnahan v. Mich. Cent. R. Co. (Mich.)	146
Mich. Cent. R. Co. v. Campau (Mich.)	146
Coops v. L. S. & M. S. R'y Co. (Mich.)	147
Railroad employees injured; Michigan cases	154-173
Freeberg v. St. Paul Plow Works (Minn.)	176
Koslowski v. Thayer (Minn.)	184
Abel v. Butler-Ryan Co. (Minn.)	206
Sather v. Ness (Minn.)	208
Bennett v. Syndicate Ins. Co. (Minn.)	214
Quick v. Minn. Iron Co. (Minn.)	231
Olson v. St. P., M. & M. R'y Co. (Minn.)	276
Larson v. St. P., M. & M. R'y Co. (Minn.)	277
Clark v. St. P. & S. C. R. Co. (Minn.)	280
Johnson v. St. P. M. & M. R'y Co. (Minn.)	282
Fleming v. St. Paul & D. R. Co. (Minn.)	286
Sheedy v. C., M. & St. P. R'y Co. (Minn.)	290
Hutchins v. St. P., M. & M. R'y Co. (Minn.)	294
Gates v. So. Minn. R'y Co. (Minn.)	302
Morse v. Minn. & St. L. R'y Co. (Minn.)	306
Clapp v. Minn. & St. L. R'y Co. (Minn.)	307
Ellison v. Truesdale, Receiver (Minn.)	313
Evarts v. St. P., M. & M. R'y Co. (Minn.)	322
Funk v. St. Paul City R'y Co. (Minn.)	326

Death — INJURIES RESULTING IN
— *continued.*

Railroad employees injured; notes of Minnesota cases	347-358
Howd v. Miss. Cent. R. Co. (Miss.)	363
Short v. New Orleans, etc., R. Co. (Miss.)	364
Ill. Cent. R. Co. v. Hunter (Miss.)	366
Millsaps v. Louis., etc., R. Co., (Miss.)	366
Ill. Cent. R. Co. v. Cathey (Miss.)	371
White v. Louis., etc., R. Co. (Miss.)	372
Spiva v. Osage Coal, etc., Co. (Mo.)	397
McGowan v. St. L. Ore & Steel Co. (Mo.)	404
O'Brien v. Western Steel Co. (Mo.)	404
Lottman v. Barnett (Mo.)	419
Horner v. Nicholson (Mo.)	419
Norton v. Ittner (Mo.)	419
Gleeson v. Excelsior Mfg. Co. (Mo.)	421
Boettger v. Scherpe & Koken, etc., Co. (Mo.)	421
Ryan v. McCully (Mo.)	425
Fugler v. Bothe (Mo.)	426
Lee v. Detroit Bridge & Iron Works (Mo.)	426
Matthews v. St. L. Grain Elev. Co. (Mo.)	433
Devitt v. Pac. R. Co. (Mo.)	451
Rains v. St. L., I. M. & S. R'y Co. (Mo.)	452
Minor employees in service of railroad companies injured and killed (Mo.)	455-458
Connor v. Chicago, R. I. & P. R. Co. (Mo.)	461
Schultz v. Pac. R. Co. (Mo.)	462
Proctor v. Hann. & St. J. R. Co. (Mo.)	464
Settle v. St. L. & S. F. R. Co. (Mo.)	467
Gutridge v. Mo. Pac. R'y Co. (Mo.)	467
Huhn v. Mo. Pac. R'y Co. (Mo.)	473
Tabler v. Hann. & St. J. R. Co. (Mo.)	476
Muirhead v. Hann. & St. J. R. Co. (Mo.)	477
Parker v. Hann. & St. J. R. Co. (Mo.)	478
O'Mellia v. K. C., St. J. & C. B. R. Co. (Mo.)	481
Railroad employees injured; notes of Missouri cases	491-513
Vawter v. Mo. Pac. R'y Co. (Mo.)	486
Soyer v. Great Falls Water Co. (Mont.)	524
Johnson v. Boston & M., etc., Mining Co. (Mont.)	525

Death — INJURIES RESULTING IN
— *continued.*

Thompson v. Mont. Cent. R. Co. (Mont.)	528
Hastings v. Mont. Union R. Co. (Mont.)	529
Mo. Pac. R'y Co. v. Baxter (Neb.)	555
Mo. Pac. R'y Co. v. Lewis (Neb.)	562
Chicago, B. & Q. R. Co. v. Quincy (Neb.)	563
Anderson v. C., B. & Q. R. Co. (Neb.)	567
C., B. & Q. R. Co. v. Sullivan (Neb.)	570
Omaha & R. V. R. Co. v. Krayenbuhl (Neb.)	571
Kearney Electric Co. v. Laughlin (Neb.)	596
Dehning v. Detroit Bridge, etc., Works (Neb.)	600
Oberfelder v. Doran (Neb.)	602
Hardy v. B. & M. R. (N. H.)	617
Harrison v. Central R. R. (N. J.)	633
Haggerty v. Central R. R. (N. J.)	633
Paulmier v. Erie R. Co. (N. J.)	643
Demarest v. Little, Receiver, etc. (N. J.)	643
Woodruff v. Little, Receiver, etc. (N. J.)	668
Deremer v. D., L. & W. R. Co. (N. J.)	660
Little, Receiver v. Dusenbery (N. J.)	667
Cuff v. Newark & N. Y. R. Co. (N. J.)	668
Pierce v. Camden, G. & W. R. Co. (N. J.)	672
Nord Deutscher Lloyd S. S. Co. v. Ingebregsten (N. J.)	673
McAndrews v. Burns (N. J.)	680
Van Steenburgh v. Thornton (N. J.)	681
Comben v. Belleville Stone Co. (N. J.)	719
Atz v. Newark Lime, etc., Co. (N. J.)	720
Lutz v. Atl. & Pac. R. Co. (N. Mex.)	728
Warner v. Erie R'y Co. (N. Y.)	734
Gibson v. Erie R'y Co. (N. Y.)	735
Flike v. B. & A. R. Co. (N. Y.)	765
Sprong v. B. & A. R. Co. (N. Y.)	765
Booth v. B. & A. R. Co. (N. Y.)	766
Rose v. B. & A. R. Co. (N. Y.)	779
Slater v. Jewett, Receiver (N. Y.)	772
Sheehan v. N. Y. Cent. R. Co. (N. Y.)	788
Dana v. N. Y. Cent. R. Co. (N. Y.)	789
Sutherland v. Troy & B. R. Co. (N. Y.)	789

Death — INJURIES RESULTING IN
— *continued.*

McGovern v. Cent. Vt. R. Co. (N. Y.)	790
Kranz v. Long Island R. Co. (N. Y.)	795
Mann v. D. & H. Canal Co. (N. Y.)	797
Railroad employees injured; notes of N. Y. cases	801-820
Malone v. Hathaway (N. Y.)	824

Deck Hand Injured —
MACHINERY.

O'Brien v. American Dredging Co. (N. J.)	683
--	-----

Defective Appliance —
[See various heads in this Table specifying Appliances, Machinery, etc.]

Fox v. Spring Lake Iron Co. (Mich.)	31
Weiden v. Brush Electric Light Co. (Mich.)	34
Robinson v. Charles Wright & Co. (Mich.)	34
Tangney v. J. B. Wilson & Co. (Mich.)	52
Piette v. Bavarian Brewing Co. (Mich.)	53
Beesley v. F. W. Wheeler & Co. (Mich.)	75
Employees injured while working in vessels; notes of Mich. cases	76-77
McDonald v. Mich. Cent. R. Co. (Mich.)	112
Perry v. Mich. Cent. R. Co. (Mich.)	113
Morton v. Detroit, B., C. & A. R. Co. (Mich.)	121
Railroad employees injured; Michigan cases	154-173
Carroll v. Williston (Minn.)	176
Hefferen v. Northern Pac. R. Co. (Minn.)	254
Nord Deutscher Lloyd S. S. Co. v. Ingebregsten (N. J.)	673
Brown v. Winona & St. P. R. Co. (Minn.)	278
Street railroad employees injured; notes of Minn. cases	326-329
Railroad employees injured; notes of Minnesota cases	347-358
Conroy v. Vulcan Iron Works (Mo.)	377
Malone v. Morton (Mo.)	377
Ischer v. St. L. Bridge Co. (Mo.)	377

Defective Appliance —
continued.

Nicholds v. Crystal Plate Glass Co. (Mo.)	415
Railroad employees injured; notes of Missouri cases	491-513
Friel v. Citizen's R'y Co. (Mo.)	513
Moran v. Brown (Mo.)	517
Union Pac. R. Co. v. O'Hern (Neb.)	575
C., B. & Q. R. Co. v. Howard (Neb.)	569
Union Pac. R. Co. v. Broderick (Neb.)	576
Lincoln St. R'y Co. v. Cox (Neb.)	593
Patnode v. Harter (Nev.)	604
Atz v. Newark Lime, etc., Co. (N. J.)	720
Alexander v. Tenn., etc., Mining Co. (N. Mex.)	729
Railroad employees injured; notes of N. Y. cases	801-820
Malone v. Hathaway (N. Y.)	824

Defective Boiler.

Sioux City & Pac. R. Co. v. Finlayson (Neb.)	530
Johnson v. Boston & M., etc., Mining Co. (Mont.)	525

Defective Brake.

Morton v. Detroit, B., C. & A. R. Co. (Mich.)	121
Sheedy v. C., M. & St. P. R'y Co. (Minn.)	290
Railroad employees injured; notes of Missouri cases	491-513
Prosser v. Mont. Cent. R. Co.	528
Bailey v. R., W. & O. R. Co. (N. Y.)	787

Defective Bridge.

Warner v. Erie R'y Co. (N. Y.)	734
--------------------------------	-----

Defective Building.

Turner v. Haar (Mo.)	416
----------------------	-----

Defective Caboose.

Brewer v. Flint & P. M. R. Co. (Mich.)	130
--	-----

Defective Car.

Gardner v. Mich. Cent. R. Co. (Mich.)	130
Fay v. Minn. & St. L. R'y Co. (Minn.)	288
Macy v. St. P. & D. R. Co. (Minn.)	289

Defective Car—continued.

Settle v. St. L. & S. F. R. Co. (Mo.)	467
Gutridge v. Mo. Pac. R'y Co. (Mo.)	467
Current v. Mo. Pac. R'y Co. (Mo.) ..	469
Condon v. Mo. Pac. R'y Co. (Mo.) ..	469
Rodney v. St. L. S. W. R'y Co. (Mo.)	485
Railroad employees injured; notes of Missouri cases	491-513
McAndrews v. Mont. Union R'y Co. (Mont.)	525
Fifield v. Northern R. R. (N. H.) ..	607
Railroad employees injured; notes of N. Y. cases	801-820

Defective Chain in Machine Works.

Rogers Locomotive, etc., Works v. Hand (N. J.)	707
---	-----

Defective Coal Hoist.

Conroy v. Vulcan Iron Works (Mo.)	377
--	-----

Defective Crowbar.

Union Pac. R. Co. v. Broderick (Neb.)	576
--	-----

Defective Coupling.

Fay v. Minn. & St. L. R'y Co. (Minn.)	288
Gibson v. Pac. R. Co. (Mo.)	442
Fenderson v. Atlantic City R. Co. (N. J.)	659

Defective Derrick.

Blomquist v. C., M. & St. P. R'y Co. (Minn.)	261
---	-----

Defective "Dock" in Mill Yard.

Van Dusen v. Letellier (Mich.) ...	50
------------------------------------	----

Defective Engine.

Orth v. St. P., M. & M. R'y Co. (Minn.)	308
--	-----

Defective Footboard.

Welch v. Ala. & V. R. Co. (Miss.) ..	369
O'Mellia v. K. C., St. J. & C. B. R. Co. (Mo.)	481

Defective Hammer.

Johnson v. Mo. Pac. R'y Co. (Mo.)	468
--	-----

Defective Hand Car.

Buckner v. Rich. & D. R. Co. (Miss.)	369
---	-----

Defective Hand-hold on Car.

Mateer v. Mo. Pac. R'y Co. (Mo.) ..	460
Settle v. St. L. & S. F. R. Co. (Mo.)	467
Gutridge v. Mo. Pac. R'y Co. (Mo.)	467
Current v. Mo. Pac. R'y Co. (Mo.) ..	469
Condon v. Mo. Pac. R'y Co. (Mo.) ..	469

Defective Harness.

Hoffman v. Adams (Mich.)	30
--------------------------------	----

Defective Ladder.

Sawyer v. Minn. & St. L. R'y Co. (Minn.)	342
Mills v. Maine Ice Co. (N. J.)	674

Defective Loading of Cars.

Powers v. Thayer Lumber Co. (Mich.)	74
Jones v. L. S. & M. S. R'y Co. (Mich.)	139

Defective Machinery.

[See Machinery, and the various heads in this Table specifying the kind of machine.]

Defective Pole.

Essex County Electric Co. v. Kelly (N. J.)	700
N. Y. & N. J. Tel Co. v. Speicher (N. J.)	701

Defective Pushbar.

McDonald v. Mich. Cent. R. Co. (Mich.)	112
---	-----

Defective Roadbed.

Paulmier v. Erie R. Co. (N. J.) ...	643
-------------------------------------	-----

Defective Saw.

Lau v. Fletcher (Mich.)	17
-------------------------------	----

Defective Scaffold, etc.

See SCAFFOLDING ACCIDENTS.

Beesley v. F. W. Wheeler & Co. (Mich.)	75
Hoar v. Merritt (Mich.)	82
Dewey v. Parke Davis & Co. (Mich.)	821
Laning v. N. Y. Cent. R. Co. (N. Y.)	747
Brickner v. N. Y. Cent. R. Co. (N. Y.)	747

Defective Step — ENGINE.

Miller v. Chicago & G. T. R'y Co. (Mich.)	120
Dowell v. Vicksburg, etc., R. Co. (Miss.)	363

Defective Steps.

Fraser v. Red River Lumber Co. (Minn.)	205
Foley v. Jersey City Electric Light Co. (N. J.)	699

Defective Straw Cutter.

Snowberg v. Nelson Spencer Paper Co. (Minn.)	182
--	-----

Defective Street — FIRE-MAN INJURED.

Coots v. City of Detroit (Mich.)	83
----------------------------------	----

Defective Switch.

Mo. Pac. R'y Co. v. Lewis (Neb.)	562
Little, Receiver v. Dusenbery (N. J.)	667

Defective Track.

Anderson v. Mich. Cent. R. Co. (Mich.)	98
Balhoff v. Mich. Cent. R. Co. (Mich.)	101
Mich. Cent. R. Co. v. Austin (Mich.)	102
Henry v. L. S. & M. S. R'y Co. (Mich.)	117
Hewitt v. Flint & P. M. R. Co. (Mich.)	122
McGinnis v. Canada Southern Bridge Co. (Mich.)	127
Batterson v. Chicago & G. T. R'y Co. (Mich.)	128
Railroad employees injured; notes of Michigan cases	154-173
Hughes v. Winona & St. P. R. Co. (Minn.)	243
Drymala v. Thompson (Minn.)	243

Defective Track—continued.

Morse v. Minn. & St. L. R'y Co. (Minn.)	306
Clapp v. Minn. & St. L. R'y Co. (Minn.)	307
Ellison v. Truesdale, Rec'r (Minn.)	313
Doyle v. St. P., M. & M. R'y Co. (Minn.)	321
Railroad employees injured; notes of Minnesota cases	347-358
New Orleans, etc., R. Co. v. Hughes (Miss.)	358
Howd v. Miss. Cent. R. Co. (Miss.)	363
Soeder v. St. L., I. M. & S. R'y Co. (Mo.)	475
Railroad employees injured; notes of Missouri cases	491-513
Mo. Pac. R'y Co. v. Baxter (Neb.)	555
Union Stock Yards Co. v. Conoyer (Neb.)	595
Union Stock Yards Co. v. Larsen (Neb.)	595
Railroad employees injured; notes of N. Y. cases	801-820

Defective Wagon.

Schlitz v. Pabst Brewing Co. (Minn.)	239
---	-----

Defective Wall — MINE.

Pantzar v. Tilly Foster Iron Mining Co. (N. Y.)	832
---	-----

Derailment of Engines, Freight Cars, Trains, Etc.

Anderson v. Mich. Cent. R. Co. (Mich.)	98
Balhoff v. Mich. Cent. R. Co. (Mich.)	101
Mich. Cent. R. Co. v. Leahey (Mich.)	114
Henry v. L. S. & M. S. R'y Co. (Mich.)	117
Hewitt v. Flint & P. M. R. Co. (Mich.)	122
Drymala v. Thompson (Minn.)	243
Fleming v. St. Paul & D. R. Co. (Minn.)	286
Sweeney v. Minn. & St. L. R'y Co. (Minn.)	302
Morse v. Minn. & St. L. R'y Co. (Minn.)	306
Clapp v. Minn. & St. L. R'y Co. (Minn.)	307
Orth v. St. P., M. & M. R'y Co. (Minn.)	308

Derailment of Engines, Freight Cars, Trains, Etc. — continued.

New Orleans, etc., R. Co. v. Hughes (Miss.)	358
Howd v. Miss. Cent. R. Co. (Miss.)	363
Louis., etc., R. Co. v. Conroy (Miss.)	367
Connor v. Chicago, R. I. & P. R. Co. (Mo.)	461
Railroad employees injured; notes of Missouri cases	491-513
McAndrews v. Mont. Union R'y Co. (Mont.)	525
Deremer v. D., L. & W. R. Co. (N. J.)	660
Little, Receiver v. Dusenbery (N. J.)	667
Railroad employees injured; notes of N. Y. cases	801-820

Derrick Accidents.

Sather v. Ness (Minn.)	208
Blomquist v. C., M. & St. P. R'y Co. (Minn.)	261
Tabler v. Hann. & St. J. R. Co. (Mo.)	476
Muirhead v. Hann. & St. J. R. Co. (Mo.)	477

Ditch Caving in.

Carlson v. N. W. Tel. Exch. Co. (Minn.)	220
Soyer v. Great Falls Water Co. (Mont.)	524

"Dock" Collapsing — MILL YARD.

Van Dusen v. Letellier (Mich.)	50
--------------------------------	----

Domestic Servant Falling from Ladder.

Steinhauser v. Spraul (Mo.)	433
-----------------------------	-----

Door Falling.

Tangney v. J. B. Wilson & Co. (Mich.)	52
---------------------------------------	----

Driller — INJURED BY.

Freeberg v. St. Paul Plow Works (Minn.)	176
---	-----

Driving — INJURED WHILE.

Hoffman v. Adams (Mich.)	30
Schlitz v. Pabst Brewing Co. (Minn.)	239
Hammond Co. v. Johnson (Neb.)	594

Drowned — FALLING FROM BRIDGE.

Lee v. Detroit Bridge & Iron Works (Mo.)	426
--	-----

Drowned in Tannery Vat.

Balle v. Detroit Leather Co. (Mich.)	57
--------------------------------------	----

Dry Dock — PUMPING OUT WATER.

Crispin v. Babbitt (N. Y.)	820
----------------------------	-----

Elbow Injured — PLANER.

Anderson v. Akeley Lumber Co. (Minn.)	182
---------------------------------------	-----

Electricity — INJURED BY.

Voyer v. Dispatch Printing Co. (Minn.)	186
W. U. Tel. Co. v. McMullen (N. J.)	700

Electric Wire — INJURED BY.

Voyer v. Dispatch Printing Co. (Minn.)	186
Lincoln St. R'y Co. v. Cox (Neb.)	593

Elevator Cases.

Weiden v. Brush Electric Light Co. (Mich.)	34
Robinson v. Charles Wright & Co. (Mich.)	34
Sell v. Rietz & Bros. Lumber Co. (Mich.)	51
McDonough v. Lanpher (Minn.)	196
Ludwig v. Pillsbury (Minn.)	197
Donovan v. Gay (Mo.)	402
Troth v. Norcross (Mo.)	403
O'Brien v. Western Steel Co. (Mo.)	404
Hughes v. Fagin (Mo.)	515
Oberfelder v. Doran (Neb.)	602
Conway v. Furst (N. J.)	698
Smith v. Van Sciver (N. J.)	699
Corcoran v. Holbrook (N. Y.)	793

Elevator Awning — CONTACT WITH.

Clark v. St. P. & S. C. R. Co.
(Minn.) 280

Elevator Shaft, Etc.

Ehmcke v. Porter (Minn.) 197
McGowan v. St. L. Ore & Steel Co.
(Mo.) 404
Conway v. Furst (N. J.) 698
Smith v. Van Sciver (N. J.) 699

Emery Wheel Breaking.

Breig v. Chicago & W. M. R'y Co.
(Mich.) 131

Emery Wheel Bursting.

Reier v. Detroit Steel & Spring
Works (Mich.) 30

Employee of Another Company Injured.

Sawyer v. Minn. & St. L. R'y Co.
(Minn.) 342
Jordan v. C., St. P., M. & O. R'y
Co. (Minn.) 342
Carroll v. Minn. Valley R. Co.
(Minn.) 343
Erickson v. St. P. & D. R. Co.
(Minn.) 344
Cornelson v. Eastern R'y Co.
(Minn.) 344
Notes of Minn. cases arising out of
accidents to employees injured on
side tracks to mills, etc. 345-346
Smith v. Pac. R. Co. (Mo.) 466
Oates v. Union Pac. R. Co. (Mo.) 487
Dunkman v. Wabash, etc., R. Co.
(Mo.) 489
Omaha & R. V. R. Co. v. Morgan
(Neb.) 542
Flynn v. Central R. Co. (N. Y.) 800
Railroad employees injured; notes
of N. Y. cases 801-820

Employees Injured.

[THE particular branch of employment is indicated in this table under such heads as BRAKEMAN, CONDUCTOR, ENGINEER, FIREMAN, MINER, ETC. See also the various heads relating to CAUSES OF INJURY.]

Employees Killed. [See the title DEATH and heads relating to CAUSES OF INJURY.]

Engine — COLLISION WITH CARS.
See COLLISION.

Engine Falling Through Trestle.

Paulmier v. Erie R. Co. (N. J.) . . . 643

Engine Overturned.

Dale v. St. L., K. C. & N. R'y Co.
(Mo.) 455

Engine Running into Snow Bank.

Orth v. St. P., M. & M. R'y Co.
(Minn.) 308

Engine — STRUCK BY.

Rahman v. Minn. & A. W. R. Co.
(Minn.) 336
Jordan v. C., St. P., M. & O. R'y
Co. (Minn.) 342

Engineer Injured.

Railroad employees injured; notes
of Michigan cases 154-173
Railroad employees injured; notes
of Minnesota cases 347-358
Railroad employees injured; notes
of Missouri cases 491-513
Railroad employees injured; notes
of N. Y. cases 801-820

Engineer Injured — COLLISION.

Hewitt v. Flint & P. M. R. Co.
(Mich.) 122
Hall v. C., B. & N. R'y Co.
(Minn.) 300
Flike v. B. & A. R. Co. (N. Y.) 765
Sprong v. B. & A. R. Co. (N. Y.) 765
Booth v. B. & A. R. Co. (N. Y.) 766
Rose v. B. & A. R. Co. (N. Y.) 779

Engineer Injured — DERAILMENT.

New Orleans, etc., R. Co. v. Hughes
(Miss.) 358

Engineer Injured — EXPLOSION.

Sioux City & Pac. R. Co. v. Finlayson (Neb.) 530

Engineer Injured — STEAM ESCAPING FROM STATIONARY ENGINE.

Glover v. Meinrath (Mo.) 390

Engineer Injured — WASH-OUT.

Sweeney v. Minn. & St. L. R'y Co. (Minn.) 302

Engineer Killed.

Railroad employees injured; notes of Minnesota cases 347-358

Railroad employees injured; notes of Missouri cases 491-513

Railroad employees injured; notes of N. Y. cases 801-820

Engineer Killed — COLLISION.

Proctor v. Hann. & St. J. R. Co. (Mo.) 464

Sheehan v. N. Y. Cent. R. Co. (N. Y.) 788

Dana v. N. Y. Cent. R. Co. (N. Y.) 789

Sutherland v. Troy & B. R. Co. (N. Y.) 789

Mann v. D. & H. Canal Co (N. Y.) 797

Engineer Killed — DERAILMENT.

Morse v. Minn. & St. L. R'y Co. (Minn.) 306

Clapp v. Minn. & St. L. R'y Co. (Minn.) 307

Engine Wiper Injured.

Mikkelson v. Truesdale, Rec'r (Minn.) 336

Rahman v. Minn. & A. W. R. Co. (Minn.) 336

Nichols v. C., M. & St. P. R'y Co. (Minn.) 340

Escape of Steam.

Mahan v. Clee (Mich.) 73

McCallum v. McCallum (Minn.) 236

Glover v. Meinrath (Mo.) 390

Excavation — CAVE-IN.

Stephenson v. Ravenscroft (Neb.) 596

Excavation — FALLING INTO.

Quincy Mining Co. v. Kitts (Mich.) 58

Explosion — BARREL OF PAINT.

Burke v. Parker, Webb & Co. (Mich.) 44

Explosion — BLASTING.

Kelly v. Cable Co. (Mont.) 519

Berg v. B. & M., etc., Mining Co. (Mont.) 519

Henderson v. Williams (N. H.) 625

Smith v. Oxford Iron Co. (N. J.) 683

Explosion — BOILER.

Theisen v. Porter (Minn.) 234

Connolly v. Davidson (Minn.) 237

Johnson v. Boston & M., etc., Mining Co. (Mont.) 525

Sioux City & Pac. R. Co. v. Finlayson (Neb.) 530

Keegan v. Western R. Co. (N. Y.) 730

Explosion — EMERY WHEEL.

Reier v. Detroit Steel & Spring Works (Mich.) 30

Explosion — FIRE BOX.

Orth v. St. P., M. & M. R'y Co. (Minn.) 308

Explosion — FURNACE.

Gormly v. Vulcan Iron Works (Mo.) 388

Explosion — GRINDSTONE.

Helfenstein v. Medart (Mo.) 390

Explosion — MOLTEN METAL.

Smith v. Peninsular Car Works (Mich.) 42

Explosion — NITROGLYCERINE.

Cuff v. Newark & N. Y. R. Co. (N. J.) 668

Explosion — OIL WORKS.

Bahr v. Lombard, Ayres & Co. (N. J.) 689

Explosion — STEAM KETTLE

Garneau Cracker Co. v. Palmer
(Neb.) 602

**Extraordinary Storm —
FALL OF BUILDING.**

Turner v. Haar (Mo.) 416

**Eye Injured — COAL THROWN
FROM TRAIN.**

Card v. Eddy, Receivers, etc.
(Mo.) 479

Eye Injured — FLYING OBJECT.

Rawley v. Colliau (Mich.) 57

Smith v. Backus Lumber Co.
(Minn.) 183

Hefferen v. Northern Pac. R. Co.
(Minn.) 254

Johnson v. Mo. Pac. R'y Co.
(Mo.) 468

Eye Injured — MOLTEN IRON.

Jungnitsch v. Michigan Malleable
Iron Co. (Mich.) 29

**Eye Injured — POWDER EX-
PLOSION.**

Smith v. Oxford Iron Co. (N. J.) . . . 683

**Eye Injured — SHUTTLE OF
LOOM.**

Jaques v. Great Falls Mfg. Co. (N.
H.) 628

Face Injured — ELECTRICITY.

Voyer v. Dispatch Printing Co.
(Minn.) 186

**Face Injured — FLYING OB-
JECT.**

Breig v. Chicago & W. M. R'y Co.
(Mich.) 131

**Falling Against Ma-
chine.**

Lindstrand v. Delta Lumber Co.
(Mich.) 7

Smith v. Dunham (Mich.) 8

Borck v. Michigan Bolt & Nut
Works (Mich.) 28

Falling Between Cars.

Railroad employees injured; notes
of Michigan cases 154-173

Railroad employees injured; notes
of Minnesota cases 347-358

Short v. New Orleans, etc., R. Co.
(Miss.) 364

**Falling Down Elevator
Shaft.**

McGowan v. St. L. Ore & Steel Co.
(Mo.) 404

Conway v. Furst (N. J.) 698

Smith v. Van Sciver (N. J.) 690

**Falling Down Shaft in
Coal Mine.**

Spiva v. Osage Coal. etc., Co.
(Mo.) 397

Falling from Bridge.

Lee v. Detroit Bridge & Iron Works
(Mo.) 426

Brothers v. Cartter (Mo.) 428

Ryan v. McCully (Mo.) 425

**Falling from Building
Platform.**

Young v. Shickle, etc., Co. (Mo.) . . . 411

Falling from Car.

Lawson v. Truesdale, Rec'r
(Minn.) 283

Settle v. St. L. & S. F. R. Co.
(Mo.) 467

Mateer v. Mo. Pac. R'y Co. (Mo.) . . . 460

Condon v. Mo. Pac. R'y Co. (Mo.) . . . 469

Soeder v. St. L., I. M. & S. R'y Co.
(Mo.) 475

Railroad employees injured; notes
of Missouri cases 491-513

Prosser v. Mont. Cent. R. Co.
(Mont.) 528

Thompson v. Mont. Cent. R. Co.
(Mont.) 528

Erb, Rec'r v. Eggleston (Neb.) 568

Railroad employees injured; notes
of N. Y. cases 801-820

**Falling from Electric-
Light Pole.**

Foley v. Jersey City Electric Light
Co. (N. J.) 699

Falling from Engine.

- Schneider v. C., B. & N. R'y Co.
(Minn.) 260
Dowell v. Vicksburg, etc., R. Co.
(Miss.) 363

Falling from Floor of Building into Cellar.

- Holloran v. Union Iron & F. Co.
(Mo.) 405

Falling from Gravel Train.

- Moran v. Eastern R'y Co. (Minn.) . 259

Falling from Hand Car.

- Christianson v. C., St. P., M. & O.
R'y Co. (Minn.) 314
Section hands, etc., injured; notes
of Minnesota cases 337-340

Falling from Ladder.

- Lamotte v. Boyce (Mich.) 56
Steinhauser v. Spraul (Mo.) 433
Mills v. Maine Ice Co. (N. J.) 674

Falling from Platform in Dye Works.

- Alexander Dye Works v. Roufousse
(N. J.) 720

Falling from Scaffold.

See SCAFFOLDING ACCIDENTS.

- Boettger v. Scherpe & Koken, etc.,
Co. (Mo.) 421
Whalen v. Centenary Church
(Mo.) 424
Fugler v. Bothe (Mo.) ... 426
Wright v. Cooper (Mo.) 426

Falling from Switch Engine Foot Board.

- O'Mellia v. K. C., St. J. & C. B. R.
Co. (Mo.) 481

Falling from Viaduct.

- Dehning v. Detroit Bridge, etc.,
Works (Neb.) 600

Falling into Cellar from Floor of Building.

- Holloran v. Union Iron and F. Co.
(Mo.) 405

Falling into Ditch — LUMBER YARD.

- Sadowski v. Michigan Car Co.
(Mich.) 23

Falling into Excavation — MINE.

- Quincy Mining Co. v. Kitts (Mich.) . 58

Falling into Opening — GRAIN ELEVATOR.

- Ehmcke v. Porter (Minn.) 197

Falling into Tannery Vat.

- Balle v. Detroit Leather Co.
(Mich.) 57

Falling Object.

- Van Dusen v. Letellier (Mich.) ... 50
Slater v. Chapman (Mich.) 51
Alford v. Metcalf Bros. & Co.
(Mich.) 52
Tangney v. J. B. Wilson & Co.
(Mich.) 52
Toomey v. Eureka Iron & Steel
Works (Mich.) 52
Barnowsky v. Helson (Mich.) 53
Piette v. Bavarian Brewing Co.
(Mich.) 53
Broderick v. Detroit Union R. R.
Station, etc., Co. (Mich.) 54
Ryan v. Bagaley (Mich.) 62
Petaja v. Aurora Iron Mining Co.
(Mich.) 63
Accidents in mines; falling roof,
rock, etc.; notes of Mich. cases. 64-66
Welch v. Brainard (Mich.) 74
Railroad employees injured; notes
of Michigan cases 154-173
Abel v. Butler-Ryan Co. (Minn.) .. 206
Sather v. Ness (Minn.) 208
Kelly v. Erie Tel., etc., Co.
(Minn.) 208
Snedda v. Libera (Minn.) 210
Kulas v. Libera (Minn.) 210
Bennett v. Syndicate Ins. Co.
(Minn.) 214
Griffiths v. Wolfram (Minn.) 219
Smith v. Tromanhauser (Minn.) .. 223
Myhre v. Tromanhauser (Minn.) .. 224
Jennings v. Iron Bay Co. (Minn.) .. 227
Marsh v. Herman (Minn.) 227
McCarthy v. Lehigh Valley Transp.
Co. (Minn.) 230
Bergquist v. Chandler Iron Co.
(Minn.) 233

Falling Object — continued.

Blomquist v. C., M. & St. P. R'y Co. (Minn.)	261
Ischer v. St. L. Bridge Co. (Mo.)	377
Girard v. St. L. Car Wheel Co. (Mo.)	379
Durant v. Lexington Coal Mining Co. (Mo.)	397
Herdler v. Buck's Stove & Range Co. (Mo.)	412
Nicholds v. Crystal Plate Glass Co. (Mo.)	415
Lucey v. Hannibal Oil Co. (Mo.)	415
Steffen v. Mayer (Mo.)	420
Kelley v. Fourth of July Mining Co. (Mont.)	524
Crystal Ice Co. v. Sherlock (Neb.)	601
Patnode v. Harter (Nev.)	604
Hanley v. Grand Trunk R'y (N. H.)	615
Railroad employees injured; New Hampshire cases	623-625
Nash v. Nashua Iron & Steel Co. (N. H.)	626
Nourie v. Theobald (N. H.)	632
Gilmore v. Oxford Iron & Nail Co. (N. J.)	687
Sheridan v. Foley (N. J.)	689
Atz v. Newark Lime, etc., Co. (N. J.)	720
McGovern v. Cent. Vt. R. Co. (N. Y.)	790
Railroad employees injured; notes of N. Y. cases	801-820
Malone v. Hathaway (N. Y.)	824
Pantzar v. Tilly Foster Iron Mining Co. (N. Y.)	832

Falling Through Hatchway in Factory.

Gleeson v. Excelsior Mfg. Co. (Mo.)	421
-------------------------------------	-----

Fall of Bags of Rice.

Nord Deutscher Lloyd S. S. Co. v. Ingebregsten (N. J.)	673
--	-----

Fail of Bank of Earth.

Keegan v. Kavanaugh (Mo.)	431
Aldridge v. Midland Blast Furnace Co. (Mo.)	431
Shortel v. City of St. Jos. (Mo.)	432
Stephenson v. Ravenscroft, (Neb.)	596

Fall of Block of Ice.

Crystal Ice Co. v. Sherlock (Neb.)	601
------------------------------------	-----

Fall of Brick from Building.

Sheridan v. Foley (N. J.)	689
---------------------------	-----

Fall of Brickwork.

Griffiths v. Wolfram (Minn.)	219
------------------------------	-----

Fall of Bridge.

Tabler v. Hann. & St. J. R. Co. (Mo.)	476
Muirhead v. Hann. & St. J. R. Co. (Mo.)	477
Harrison v. Central R. R. (N. J.)	633
Haggerty v. Central R. R. (N. J.)	633
Demarest v. Little, Receiver, etc., (N. J.)	643
Woodruff v. Little, Receiver, etc., (N. J.)	668
Warner v. Erie R'y Co. (N. Y.)	734
Railroad bridge accidents; N. Y. cases	734-736
McDermott v. Pac. R. Co. (Mo.)	444

Fall of Bucket in Mine.

Patnode v. Harter (Nev.)	604
--------------------------	-----

Fall of Building.

Turner v. Haar (Mo.)	416
----------------------	-----

Fall of Building Wall.

Lottman v. Barnett (Mo.)	419
--------------------------	-----

Fall of Cistern Wall.

Snedda v. Libera (Minn.)	210
Kulas v. Libera (Minn.)	210

Fall of Coal from Cage.

Durant v. Lexington Coal Mining Co. (Mo.)	397
---	-----

Fall of Cross-beam.

Lucey v. Hannibal Oil Co. (Mo.)	415
---------------------------------	-----

Fall of Derrick.

Sather v. Ness (Minn.)	208
Blomquist v. C., M. & St. P. R'y Co. (Minn.)	261

Fall of "Dock" in Mill Yard.

Van Dusen v. Letellier (Mich.)	50
--------------------------------	----

Fall of Elevator.

- Weiden v. Brush Electric Light Co. (Mich.) 34
 Robinson v. Charles Wright & Co. (Mich.) 34
 Oberfelder v. Doran (Neb.) 602
 Corcoran v. Holbrook (N. Y.) 793

Fall of Grain — ELEVATOR BIN.

- McGovern v. Cent. Vt. R. Co. (N. Y.) 790

Fall of Heavy Stone.

- Atz v. Newark Lime, etc., Co. (N. J.) 720

Fall of Ice Bucket.

- Piette v. Bavarian Brewing Co. (Mich.) 53

Fall of Iron Bar.

- Herdler v. Buck's Stove & Range Co. (Mo.) 412
 Nicholds v. Crystal Plate Glass Co. (Mo.) 415

Fall of Iron Boiler Front.

- Toomey v. Eureka Iron & Steel Works (Mich.) 52

Fall of Iron Door.

- Tangney v. J. B. Wilson & Co. (Mich.) 52

Fall of Iron Pipe.

- Ischer v. St. L. Bridge Co. (Mo.) 377

Fall of Ore from Roof of Mine.

- Petaja v. Aurora Iron Mining Co. (Mich.) 63

Fall of Pile Driver.

- Fremont, etc., R. Co. v. Leslie (Neb.) 577

Fall of Pole.

- Kelly v. Erie Tel., etc., Co. (Minn.) 208

Fall of Rail from Car.

- Hanley v. Grand Trunk R'y (N. H.) 615

Fall of Rock in Mine.

- Accidents in mines; falling roof, rock, etc.; notes of Mich. cases. 64-66
 Kelly v. Fourth of July Mining Co. (Mont.) 524
 Pantzar v. Tilly Foster Iron Mining Co. (N. Y.) 832

Fall of Roof — BUILDING.

- Barnowsky v. Helson (Mich.) 53

Fall of Scaffold — See SCAFFOLDING ACCIDENTS.

- Smith v. Tromanhauser (Minn.) 223
 Myhre v. Tromanhauser (Minn.) 224
 Jennings v. Iron Bay Co. (Minn.) 227
 Marsh v. Herman (Minn.) 227
 Maher v. McGrath (N. J.) 717
 Laning v. N. Y. Cent. R. Co., (N. Y.) 747
 Brickner v. N. Y. Cent. R. Co. (N. Y.) 747

Fall of Sliding Door.

- Collyer v. Penn. R. Co. (N. J.) 665

Fall of Staging — VESSEL.

- Employees injured while working in vessels; notes of Mich. cases. 76-77

Fall of Staircase.

- Slater v. Chapman (Mich.) 51

Fall of Steel Ingot.

- Nash v. Nashua Iron & Steel Co. (N. H.) 626

Fall of Stone — LIME KILN.

- Parkhurst v. Johnson (Mich.) 5

Fall of Stone — MINE.

- Gilmore v. Oxford Iron & Nail Co. (N. J.) 687

Fall of Tank.

- Abel v. Butler-Ryan Co. (Minn.) 206

Fail of Telegraph Pole.

Matthews v. St. L. Grain Elev. Co.
(Mo.) 433

Fall of Timber.

Girard v. St. L. Car Wheel Co.
(Mo.) 379

Fall of Trestle.

Lindvall v. Woods (Minn.) 200
Paulmier v. Erie R. Co. (N. J.) . . . 643

Fall of Tub — BREWERY.

Malone v. Hathaway (N. Y.) 824

Fall of Ventilator.

Broderick v. Detroit Union R. R.
Station, etc., Co. (Mich.) 54

Fall of Wall — BUILDING.

Horner v. Nicholson (Mo.) 419
Mound City Paint & Color Co. v.
Conlon (Mo.) 435

Fall of Water Pipes.

Ryan v. Bagaley (Mich.) 62

Fan Machine — INJURED BY.

Kinney v. Folkerts (Mich.) 12

Farm Laborer Injured — FALLING OBJECT.

Welch v. Brainard (Mich.) 74

Female Employee Injured — FALL OF BUILDING.

Turner v. Haar (Mo.) 416

Female Employee Injured — MACHINERY.

Malm v. Thelin (Neb.) 599
McMahon v. O'Donnell (Neb.) 599
Jaques v. Great Falls Mfg. Co. (N.
H.) 628
Clark Thread Co. v. Bennett (N.
J.) 715
Clark Mile-End Cotton Co. v.
Shaffery (N. J.) 716
Hickey v. Taaffe (N. Y.) 842

Finger Injured — BUZZ SAW.

Ogley v. Miles (N. Y.) 843

Finger Injured — CIRCULAR SAW.

Eicheler v. Hanggi (Minn.) 182

Finger Injured — COGS.

White v. Wittemann Lith. Co. (N.
Y.) 843

Finger Injured — COUPLING CARS.

Hungerford v. Chicago, M. & St.
P. R. Co. (Minn.) 250
Gibson v. Pac. R. Co. (Mo.) 442

Finger Injured — GRIND-STONE.

Helzer v. Peninsular Car Co.
(Mich.) 10

Finger Injured — MACHINE.

Kean v. Detroit Copper & Brass
Rolling Mills (Mich.) 10
Berger v. St. P., M. & M. R'y Co.
(Minn.) 251
Malm v. Thelin (Neb.) 599
Foss v. Baker (N. H.) 632

Finger Injured — SAW.

Prentiss v. Kent Furniture Mfg.
Co. (Mich.) 26
Berg v. Bousfield (Minn.) 188
Olmscheid v. Nelson-Tenney Lum-
ber Co. (Minn.) 189

Finger Injured — STRAW CUTTER.

McMahon v. O'Donnell (Neb.) 599

Finger Injured — TRIP HAMMER.

Nelson v. St. Paul Plow Works
(Minn.) 183

Firebox of Engine Exploding.

Orth v. St. P., M. & M. R'y Co.
(Minn.) 308

Fire-engine Driver Injured — DEFECTIVE STREET.

Coots v. City of Detroit (Mich.) . . . 83

Fire — EXPLOSION IN OIL WORKS.

Bahr v. Lombard, Ayres & Co. (N. J.) 689

Fireman Injured.

Railroad employees injured; notes of Missouri cases 491-513
 Railroad employees injured; notes of Michigan cases 154-173
 Railroad employees injured; notes of N. Y. cases 801-820

Fireman Injured — COLLISION.

Hankins v. N. Y., L. E. & W. R. Co. (N. Y.) 783
 Sheehan v. N. Y. Cent. R. Co. (N. Y.) 788
 Dana v. N. Y. Cent. R. Co. (N. Y.) 789

Fireman Injured — DERAILMENT.

Henry v. L. S. & M. S. R'y Co. (Mich.) 117

Fireman Injured — ENGINE OVERTURNED.

Dale v. St. L., K. C. & N. R'y Co. (Mo.) 455

Fireman Injured — EXPLOSION.

Keegan v. Western R. Co. (N. Y.) 730

Fireman Injured — SNOW BANK.

Orth v. St. P., M. & M. R'y Co. (Minn.) 308

Fireman Injured — THROWN FROM ENGINE.

Schneider v. C., B. & N. R'y Co. (Minn.) 260

Fireman Killed.

Railroad employees injured; notes of Missouri cases 491-513
 Railroad employees injured; notes of N. Y. cases 801-820

Fireman Killed — COLLISION.

Hunn v. Mich. Cent. R. Co. (Mich.) 119
 Hunn v. Mich. Cent. R. Co. (Mich.) 134
 Ill. Cent. R. Co. v. Hunter (Miss.) 366
 Millsaps v. Louis, etc., R. Co. (Miss.) 366
 Deremer v. D., L. & W. R. Co. (N. J.) 660
 Flike v. B. & A. R. Co. (N. Y.) 765
 Sprong v. B. & A. R. Co. (N. Y.) 765
 Booth v. B. & A. R. Co. (N. Y.) 766
 Rose v. B. & A. R. Co. (N. Y.) 779
 Slater v. Jewett, Receiver (N. Y.) 772

Fireman Killed — DERAILMENT.

Fleming v. St. Paul & D. R. Co. (Minn.) 286

Fireman Killed — FALL OF TRESTLE.

Paulmier v. Erie R. Co. (N. J.) 643

Fixing Machinery — INJURED WHILE.

Mullin v. Northern Mill Co. (Minn.) 182
 Voyer v. Dispatch Printing Co. (Minn.) 186
 Demars v. Glen Mfg. Co. (N. H.) 629

Fiat Car — INJURED ON.

Hewitt v. Flint & P. M. R. Co. (Mich.) 122
 Anderson v. C., B. & Q. R. Co. (Neb.) 567

Flying Object — STRUCK BY VARIOUS SUBSTANCES.

Rawley v. Colliau (Mich.) 57
 Breig v. Chicago & W. M. R'y Co. (Mich.) 131
 Freeberg v. St. Paul Plow Works (Minn.) 176
 Smith v. Backus Lumber Co. (Minn.) 183
 Koslowski v. Thayer (Minn.) 184
 Foster v. Minn. Cent. R'y Co. (Minn.) 245
 Hefferen v. Northern Pac. R. Co. (Minn.) 254
 Seckinger v. Philibert, etc., Co. (Mo.) 387

Flying Objects — STRUCKBY VARIOUS SUBSTANCES—*cont'd.*

Johnson v. Mo. Pac. R'y Co. (Mo.)	468
Union Pac. R. Co. v. Erickson (Neb.)	574

Flying Switch.

Thompson v. Mont. Cent. R. Co. (Mont.)	528
---	-----

Floor Collapsing.

Cook v. St. Paul, M. & M. R'y Co. (Minn.)	247
--	-----

Foot Board of Engine —

FALLING FROM.

Mich. Cent. R. Co. v. Austin (Mich.)	102
Welsh v. Ala. & V. R. Co. (Miss.) ..	369
O'Mellia v. K. C., St. J. & C. B. R. Co. (Mo.)	481

**Foot Caught Between
Rails.**

Huhn v. Mo. Pac. R'y Co. (Mo.) ..	473
Smith v. R. R. Co. (Mo.)	474
Mo. Pac. R'y Co. v. Baxter (Neb.) ..	555
Mo. Pac. R'y Co. v. Lewis (Neb.) ..	562

**Foot Injured — CAUGHT IN
FROG.**

McGinnis v. Canada Southern Bridge Co. (Mich.)	127
---	-----

Foot Injured — CAVE-IN.

Carlson v. N. W. Tel. Exch. Co. (Minn.)	220
--	-----

**Foot Injured — COUPLING
CARS.**

Gardner v. Mich. Cent. R. Co. (Mich.)	130
--	-----

Foot Injured — ELEVATOR.

McDonough v. Lanpher (Minn.) ..	196
---------------------------------	-----

**Foot Injured — FALLING
OBJECT.**

Steffen v. Mayer (Mo.)	420
------------------------------	-----

Foot Injured — GEARING.

Sjogren v. Hall (Mich.)	25
-------------------------------	----

**Foot Injured — HOLE IN
TRACK.**

Batterson v. Chicago & G. T. R'y Co. (Mich.)	128
---	-----

Foot Injured — MACHINERY.

Scharenbroich v. St. Cloud Fibre- Ware Co. (Minn.)	178
O'Brien v. American Dredging Co. (N. J.)	683

Foot Injured — MOLTEN IRON.

Kehoe v. Allen (Mich.)	44
------------------------------	----

Foot Injured — RUN OVER.

Mateer v. Mo. Pac. R'y Co. (Mo.) ..	460
-------------------------------------	-----

Foreign Cars — COUPLING.

Dewey v. Detroit, G. H. & M. R'y Co. (Mich.)	101
Smith v. Potter, Rec'r (Mich.)	115
Hathaway v. Mich. Cent. R. Co. (Mich.)	129
Mich. Cent. R. Co. v. Smithson (Mich.)	129
Ill. Cent. R. Co. v. Price (Miss.) ..	368

Foreign Cars — DEFECTIVE.

Fay v. Minn. & St. L. R'y Co. (Minn.)	288
Sheedy v. C., M. & St. P. R'y Co. (Minn.)	290
Mateer v. Mo. Pac. R'y Co. (Mo.) ..	460
Gutridge v. Mo. Pac. R'y Co. (Mo.)	467
Condon v. Mo. Pac. R'y Co. (Mo.) ..	469
Railroad employees injured; notes of N. Y. cases	801-820

Found Dead on Track.

Chicago, B. & Q. R. Co. v. Quincy (Neb.)	563
---	-----

Freight Cars — COLLISION.

Railroad employees injured; notes of N. Y. cases	801-820
Gavigan v. L. S. & M. S. R'y Co. (Mich.)	136
Hall v. C., B. & N. R'y Co. (Minn.)	300

Freight Cars Derailed.

Anderson v. Mich. Cent. R. Co. (Mich.)	98
Balhoff v. Mich. Cent. R. Co. (Mich.)	101
Mich. Cent. R. Co. v. Leahey (Mich.)	114
Henry v. L. S. & M. S. R'y Co. (Mich.)	117

**Freight Cars — PROJECTING
OBJECTS ON.**

Flanders v. C., St. P., M. & O. R'y Co. (Minn.)	282
Johnson v. St. P., M. & M. R'y Co. (Minn.)	282

**Freight Elevator — FALL
OF.**

Robinson v. Charles Wright & Co. (Mich.)	34
Corcoran v. Holbrook (N. Y.)	793

**Freight Elevator — INJURED
IN.**

Sell v. Riets & Bros. Lumber Co. (Mich.)	51
McDonough v. Lanpher (Minn.)	196
Ludwig v. Pillsbury (Minn.)	197

Freight Train — RUN OVER.

Chicago & N. W. R'y Co. v. Bay- field (Mich.)	87
--	----

Furnace Explosion.

Gormly v. Vulcan Iron Works (Mo.)	388
--	-----

**Gearing — CAUGHT BY, OR
FALLING ON.**

Shumway v. Walworth & Neville Mfg. Co. (Mich.)	10
Roux v. Blodgett & Davis Lumber Co. (Mich.)	16
Sjogren v. Hall (Mich.)	25
Snowberg v. Nelson Spencer Paper Co. (Minn.)	182
Collins v. Laconia Car Co (N. H.)	630
Crispin v. Babbitt (N. Y.)	820

**Giant Powder Explo-
sion.**

Smith v. Oxford Iron Co. (N. J.)	683
--	-----

**Goods Damaged — FALL-
ING WALL.**

Mound City Paint & Color Co. v. Conlon (Mo.)	435
---	-----

**Grading Track — FALL OF
TRESTLE.**

Lindvall v. Woods (Minn.)	200
-------------------------------------	-----

Grain Elevator Cases.

Ehmcke v. Porter (Minn.)	197
Bennett v. Syndicate Ins. Co. (Minn.)	214
McGovern v. Cent. Vt. R. Co. (N. Y.)	790
Flynn v. Central R. Co. (N. Y.)	800

Grindstone — INJURED BY.

Melzer v. Peninsular Car Co. (Mich.)	10
Helfenstein v. Medart (Mo.)	390

**Gravel Train — FALLING
FROM.**

Moran v. Eastern R'y Co. (Minn.)	259
--	-----

**Gripman Injured — RUN
OVER.**

Friel v. Citizen's R'y Co. (Mo.)	513
--	-----

Hand Car Accidents.

Olson v. St. P., M. & M. R'y Co. (Minn.)	276
Larson v. St. P., M. & M. R'y Co. (Minn.)	277
Christianson v. C., St. P., M. & O. R'y Co. (Minn.)	314
Railroad employees injured; notes of Minnesota cases	347-358
Section hands etc., injured; notes of Minnesota cases	337-340
Buckner v. Rich. & D. R. Co. (Miss.)	369
Railroad employees injured; notes of Missouri cases	491-513
McAndrews v. Mont. Union R'y Co. (Mont.)	325
Schmidt v. Mont. Cent. R. Co. (Mont.)	529
Atch., T. & S. F. R. Co. v. Martin (N. Mex.)	729
Coon v. Syr. & Utica R. Co. (N. Y.)	737
Railroad employees injured; notes of N. Y. cases	801-820

Hand Injured — CIRCULAR SAW.

Smith v. Dunham (Mich.).....	8
Wheeler v. Berry (Mich.).....	16
Carroll v. Williston (Minn.).....	176
Anderson v. Nelson Lumber Co. (Minn.).....	178
Eicheler v. Hanggi (Minn.).....	182

Hand Injured — COGS.

Barbo v. Bassett (Minn.).....	175
Rothenberger v. N. W. Consol. Milling Co. (Minn.).....	177
White v. Wittemann Lith. Co. (N. Y.).....	843

Hand Injured — COUPLING CARS.

Batterson v. Chicago & G. T. R'y Co. (Mich.).....	128
Mich. Cent. R. Co. v. Smithson (Mich.).....	129
Fay v. Minn. & St. L. R'y Co. (Minn.).....	288
Gibson v. Pac. R. Co. (Mo.).....	442

Hand Injured — DERAILMENT.

Mich. Cent. R. Co. v. Leahey (Mich.).....	114
---	-----

Hand Injured — ELECTRICITY.

Voyer v. Dispatch Printing Co. (Minn.).....	186
---	-----

Hand Injured — FAN MACHINE.

Kinney v. Folkerts (Mich.).....	12
---------------------------------	----

Hand Injured — GEARING.

Collins v. Laconia Car Co. (N. H.).....	630
---	-----

Hand Injured — GRINDSTONE.

Melzer v. Peninsular Car Co. (Mich.).....	10
---	----

Hand Injured — MACHINE.

Kean v. Detroit Copper & Brass Rolling Mills (Mich.).....	10
Findlay v. Russel Wheel & Foundry Co. (Mich.).....	18
Steiler v. Hart (Mich.).....	26

Hand Injured — MACHINE — continued.

Snowberg v. Nelson Spencer Paper Co. (Minn.).....	182
Kaillen v. N. W. Bedding Co. (Minn.).....	191
Blanton v. Dold (Mo.).....	378
Nugent v. Kaufman Milling Co. (Mo.).....	384
Clark Thread Co. v. Bennett (N. J.).....	715
Clark Mile-End Cotton Co. v. Shaffery (N. J.).....	716
Buckley v. Gutta Percha, etc., Mfg. Co. (N. Y.).....	842
Hickey v. Taaffe (N. Y.).....	842
Cullen v. Nat. Sheet Metal Roofing Co. (N. Y.).....	845

Hand Injured — MANGLE.

Malm v. Thelin (Neb.).....	599
----------------------------	-----

Hand Injured — PEEP SAW.

Johnson v. Hovey (Mich.).....	17
-------------------------------	----

Hand Injured — "PICKER."

Anderson v. Morrison (Minn.)....	192
----------------------------------	-----

Hand Injured — PLANER.

Schroeder v. Michigan Car Co. (Mich.).....	7
Shumway v. Walworth & Neville Mfg. Co. (Mich.).....	10
Palmer v. Harrison (Mich.).....	26
Mackin v. Alaska Refrigerator Co. (Mich.).....	28
Crown v. Orr (N. Y.).....	844

Hand Injured — SAW.

Prentiss v. Kent Furniture Mfg. Co. (Mich.).....	26
Berg v. Bousfield (Minn.).....	188

Hand Injured — STEAM HAMMER.

Miller v. Madison Car Co. (Mo.).....	384
--------------------------------------	-----

Hand Injured — STRUCK BY CAR.

Capital City Oil Works v. Black (Miss.).....	375
--	-----

Hand Injured — TRAIN.

Hardy v D., L. & W. R. Co. (N. J.).....	658
---	-----

Hand Injured — WATER-WHEEL.

Ewan v. Lippincott (N. J.)..... 706

Head Injured — BRICK.

Sheridan v. Foley (N. J.)..... 689

Head Injured — CROSS-BEAM.

Lucey v. Hannibal Oil Co. (Mo.).. 415

Head Injured — ELEVATOR.

Sell v. Riets & Bros. Lumber Co. (Mich.) 51

Alford v. Metcalf Bros. & Co. (Mich.) 52

Ludwig v. Pillsbury (Minn.)..... 197

Donovan v. Gay (Mo.)..... 402

Troth v. Norcross (Mo.)..... 403

Head Injured — EXPLOSION.

Bahr v. Lombard, Ayres & Co. (N. J.) 689

Head Injured — MINE.

Quincy Mining Co. v. Kitts (Mich.).. 58

Holsting Appliances —

DEFECTIVE, ETC.

Findlay v. Russel Wheel & Foundry Co. (Mich.)..... 18

Fox v. Spring Lake Iron Co. (Mich.) 31

Piette v. Bavarian Brewing Co. (Mich.) 53

Quick v. Minn. Iron Co. (Minn.).. 231

Girard v. St. L. Car Wheel Co. (Mo.) 379

Durant v. Lexington Coal Mining Co. (Mo.) 397

Griffin v. Glen Mfg. Co. (N. H.).. 630

Alexander v. Tenn., etc., Mining Co. (N. Mex.)..... 729

Hodcarrier Injured.

Norton v. Ittner (Mo.)..... 419

Maher v. McGrath (N. J.)..... 717

Horse Frightened — EMPLOYEE INJURED.

Mahan v. Clee (Mich.)..... 73

Horse Killed — BLASTING.

Marshall v. Shricker (Mo.)..... 426

Ice House — INJURED IN.

Crystal Ice Co. v. Sherlock (Neb.).. 601

Imminent Danger — TRYING TO ESCAPE.

Mahan v. Clee (Mich.)..... 73

Drymala v. Thompson (Minn.)..... 243

Schmidt v. Mont. Cent. R. Co. (Mont.) 529

Lee v. Smart (Neb.)..... 600

Independent Contractor — LIABILITY OF.

Reier v. Detroit Steel & Spring Works (Mich.) 30

Piette v. Bavarian Brewing Co. (Mich.) 53

Hoar v. Merritt (Mich.)..... 82

Bresnahan v. Mich. Cent. R. Co. (Mich.) 146

Griffiths v. Wolfram (Minn.)..... 219

Theisen v. Porter (Minn.)..... 234

Erickson v. St. P. & D. R. Co. (Minn.) 344

Herdler v. Buck's Stove & Range Co. (Mo.) 412

Speed v. Atl. & Pac. R. Co. (Mo.).. 488

C., B. & Q. R. Co. v. Clark and others (Neb.) 578

Union Pac. R. Co. v. Billiter (Neb.) 580

Hardy v. D., L. & W. R. Co. (N. J.) 658

Cuff v. Newark & N. Y. R. Co. (N. J.) 668

Sheridan v. Foley (N. J.)..... 689

Infant Injured or Killed.

See MINOR EMPLOYEES.

Inhaling Poisonous Matter.

Fox v. Peninsular White Lead & Color Works (Mich.)..... 66

Iron Bar — FALL OF.

Herdler v. Buck's Stove & Range Co. (Mo.) 412

Nicholds v. Crystal Plate Glass Co. (Mo.) 415

Joint Use of Track.

Omaha & R. V. R. Co. v. Morgan (Neb.) 542

Jumping from Hand Car.

Schmidt v. Mont. Cent. R. Co.
(Mont.) 529

Jumping from Train.

Drymala v. Thompson (Minn.).... 243

Jumping from Wagon.

Mahan v. Clee (Mich.)..... 73
Lee v. Smart (Neb.)..... 600

"Kicked" Cars.

Schaible v. L. S. & M. S. R'y Co.
(Mich.) 104
Railroad employees injured; Michigan cases 154-173
Erb, Receiver, v. Eggleston (Neb.).. 568

Knives of Machine — CAUGHT BY.

Crown v. Orr (N. Y.)..... 844

Laborers Injured. [See the various headings of EMPLOYEES and CAUSES OF INJURY.]**Ladder of Car — FALLING FROM, OR INJURED ON.**

Illick v. Flint & P. M. R. Co.
(Mich.) 126
Gavigan v. L. S. & M. S. R'y Co.
(Mich.) 136
Robel v. C., N. & St. P. R. Co.
(Minn.) 280
Flanders v. C., St. P., M. & O. R'y
Co. (Minn.) 282
Johnson v. St. P., M. & M. R'y Co.
(Minn.) 282
Lawson v. Truesdale, Receiver
(Minn.) 283
Sawyer v. Minn. & St. L. R'y Co.
(Minn.) 342
Gutridge v. Mo. Pac. R'y Co.
(Mo.) 467
Gibson v. Erie R'y Co. (N. Y.).... 735

Lath Machine — INJURED BY.

Torongo v. Salliotte (Mich.)..... 11

Laundry Machine.

Malm v. Thelin (Neb.)..... 599
Hickey v. Taaffe (N. Y.)..... 842

Lead Poisoning.

Fox v. Peninsular White Lead &
Color Works (Mich.)..... 66

Leg Injured — COGS.

Swoboda v. Ward (Mich.)..... 1
Huizega v. Cutler & Savidge Lum-
ber Co. (Mich.)..... 4
Wuotilla v. Duluth Lumber Co.
(Minn.) 173

Leg Injured — COLLISION.

Hankins v. N. Y., L. E. & W. R.
Co. (N. Y.)..... 783

Leg Injured — COUPLING CARS.

Tierney v. Minn. & St. L. R'y Co.
(Minn.) 288

Leg Injured — FALLING FROM POLE.

Foley v. Jersey City Electric Light
Co. (N. J.)..... 699

Leg Injured — FALL OF POLE.

Kelly v. Erie Tel., etc., Co.
(Minn.) 208

Leg Injured — FALL OF RAIL.

Hanley v. Grand Trunk R'y (N.
H.) 615

Leg Injured — FALL OF STONE.

Bergquist v. Chandler Iron Co.
(Minn.) 233
Gilmore v. Oxford Iron & Nail Co.
(N. J.)..... 687

Leg Injured — GEARING.

Roux v. Blodgett & Davis Lumber
Co. (Mich.)..... 16

Leg Injured — GRAIN ELEVATOR.

Ehmcke v. Porter (Minn.)..... 197

Leg Injured — HORSE.

Mahan v. Clee (Mich.)..... 73

Leg Injured — JUMPING FROM TRAIN.

Dymala v. Thompson (Minn.)..... 243

Leg Injured — MACHINERY.

Mullin v. Northern Mill Co. (Minn.) 182

Dowling v. Allen (Mo.)..... 383

Leg Injured — MINE.

Quincy Mining Co. v. Kitts (Mich.) 58

Hamilton v. Rich Hill Coal Co. (Mo.) 398

Leg Injured — MOVING A BUILDING.

Jorgenson v. Smith (Minn.)..... 239

Leg Injured — RUN OVER.

Ill. Cent. R. Co. v. Cathey (Miss.) . 371

Rohback v. Pac. R. Co. (Mo.)..... 445

Waldhier v. Hann. & St. J. R. Co. (Mo.) 480

Friel v. Citizen's R'y Co. (Mo.).. 513

Leg Injured — WHEEL.

Cummins v. Collins (Mo.)..... 432

Leg Injured — WIRE CABLE.

Nichols v. C., M. & St. P. R'y Co. (Minn.) 340

Licensee Injured.

Omaha & R. V. R. Co. v. Morgan (Neb.) 542

Lime Kiln — KILLED IN.

Parkhurst v. Johnson (Mich.)..... 5

Lineman Injured.

Weiden v. Brush Electric Light Co. (Mich.) 34

Kelly v. Erie Tel. etc., Co. (Minn.) . 208

Neal v. Northern Pac. R. Co. (Minn.) 267

Matthews v. St. L. Grain Elev. Co. (Mo.) 433

Foley v. Jersey City Electric Light Co. (N. J.)..... 699

Essex County Electric Co. v. Kelly (N. J.)..... 700

W. U. Tel. Co. v. McMullen (N. J.) 700

N. Y. & N. J. Tel. Co. v. Speicher (N. J.)..... 701

Loading and Unloading Cars.

Chicago & N. W. R'y Co. v. Bayfield (Mich.) 87

Schroeder v. Flint & P. M. R. Co. (Mich.) 111

Railroad employees injured; notes of Michigan cases..... 154-173

Ischer v. St. L. Bridge Co. (Mo.).. 377

Hanley v. Grand Trunk R'y (N. H.) 615

Railroad employees injured; notes of New York cases..... 801-820

Loading and Unloading Vessels.

Employees injured while working in vessels; notes of Michigan cases 76-77

McCarthy v. Lehigh Valley Transp. Co. (Minn.) 230

Nord Deutscher Lloyd S. S. Co. v. Ingebregsten (N. J.)..... 673

Mills v. Maine Ice Co. (N. J.).... 674

Locomotive Explosion.

Keegan v. Western R. Co. (N. Y.) . 730

Locomotive explosions; New York cases 730-731

Locomotive Works — INJURED IN.

Rogers Locomotive, etc., Works v. Hand (N. J.) 707

Logging Train — PROJECTING OBJECT.

Powers v. Thayer Lumber Co. (Mich.) 74

Log on Saw-carriage — INJURED BY.

Redmond v. Delta Lumber Co. (Mich.) 17

Lumber Flying from Saw Machine.

Seckinger v. Philibert, etc. (Mo.).. 387

Lumber Mill — INJURED IN.

Roux v. Blodgett & Davis Lumber Co. (Mich.) 16

Redmond v. Delta Lumber Co. (Mich.) 17

Lumber Mill — INJURED IN
continued.

Van Dusen v. Letellier (Mich.).....	50
Fraser v. Red River Lumber Co. (Minn.)	205

Lumber Yard — FALLING
INTO DITCH IN.

Sadowski v. Michigan Car Co. (Mich.)	23
---	----

Machinery — INJURED OR
KILLED BY.

[See also Clothing Caught; Cogs;
Set Screws, etc.]

Swoboda v. Ward (Mich.).....	1
Huizega v. Cutler & Savidge Lum- ber Co. (Mich.).....	4
Schroeder v. Michigan Car Co. (Mich.)	7
Lindstrand v. Delta Lumber Co. (Mich.)	7
Smith v. Dunham (Mich.).....	8
Melzer v. Peninsular Car Co. (Mich.)	10
Kean v. Detroit Copper & Brass Rolling Mills (Mich.).....	10
Shumway v. Walworth & Neville Mfg. Co. (Mich.).....	10
Ribble v. Starratt (Mich.).....	11
Torongo v. Salliotte (Mich.).....	11
Bergstrom v. Staples (Mich.).....	11
Kinney v. Folkerts (Mich.).....	12
Roux v. Blodgett & Davis Lumber Co. (Mich.)	16
Wheeler v. Berry (Mich.).....	16
Redmond v. Delta Lumber Co. (Mich.)	17
Johnson v. Hovey (Mich.).....	17
Lau v. Fletcher (Mich.).....	17
Findlay v. Russel Wheel & Foun- dry Co. (Mich.).....	18
Lewis v. Emery (Mich.).....	18
Sjogren v. Hall (Mich.).....	25
Steiler v. Hart (Mich.).....	26
Prentiss v. Kent Furniture Mfg. Co. (Mich.)	26
Palmer v. Harrison (Mich.).....	26
King v. Ford River Lumber Co. (Mich.)	27
Marshall v. Widdicomb Furniture Co. (Mich.)	27
Borck v. Michigan Bolt & Nut Works (Mich.).....	28
Mackin v. Alaska Refrigerator Co. (Mich.)	28
Richards v. Rough (Mich.).....	29

Machinery — INJURED OR
KILLED BY — *continued.*

Fox v. Spring Lake Iron Co. (Mich.)	31
Craver v. Christian (Minn.).....	175
Groff v. Duluth Imperial Mill Co. (Minn.)	181
Snowberg v. Nelson Spencer Paper Co. (Minn.).....	182
Anderson v. Akeley Lumber Co. (Minn.)	182
Eicheler v. Hanggi (Minn.).....	182
Mullin v. Northern Mill Co. (Minn.)	182
Nelson v. St. Paul Plow Works (Minn.)	183
Smith v. Backus Lumber Co. (Minn.)	183
Koslowski v. Thayer (Minn.).....	184
Berg v. Bousfield (Minn.).....	188
Olmscheid v. Nelson-Tenney Lum- ber Co. (Minn.).....	189
Truntle v. North Star Woolen Mill Co. (Minn.).....	189
Hess v. Adamant Mfg. Co. (Minn.).....	190
Kaillen v. N. W. Bedding Co. (Minn.)	191
Anderson v. Morrison (Minn.)....	192
Berger v. St. P., M. & M. R'y Co. (Minn.)	251
Blanton v. Dold (Mo.).....	378
Dowling v. Allen (Mo.).....	383
Nugent v. Kauffman Milling Co. (Mo.)	384
McMahon v. O'Donnell (Neb.)....	599
Malm v. Thelin (Neb.).....	599
Jaques v. Great Falls Mfg. Co. (N. H.)	628
Demars v. Glen Mfg. Co. (N. H.)..	629
Collins v. Laconia Car Co. (N. H.)..	630
Foss v. Baker (N. H.).....	632
O'Brien v. American Dredging Co. (N. J.)	683
Ewan v. Lippincott (N. J.).....	705
Smith v. Irwin (N. J.).....	714
Clark Thread Co. v. Bennett (N. J.)	715
Clark Mile-End Cotton Co. v. Shaffery (N. J.).....	716
Crispin v. Babbitt (N. Y.).....	820
Hickey v. Taaffe (N. Y.).....	842
Buckley v. Gutta Percha, etc., Mfg. Co. (N. Y.).....	842
Ogley v. Miles (N. Y.).....	843
White v. Wittemann Lith. Co. (N. Y.)	843
Minor employees injured by ma- chinery; New York cases.....	842-846
Crown v. Orr (N. Y.).....	844
Cullen v. Nat. Sheet Metal Roofing Co. (N. Y.).....	845

Machinery — ESCAPE OF STEAM.

Clover v. Meinrath (Mo.)..... 390

Machinery — FLYING OBJECT.

Seckinger v. Philibert, etc. (Mo.)... 387

Machinery Uncovered or Unguarded.

Wuotilla v. Duluth Lumber Co. (Minn.) 173

Craver v. Christian (Minn.)..... 175

Barbo v. Bassett (Minn.)..... 175

Carroll v. Williston (Minn.)..... 176

Freeberg v. St. Paul Plow Works (Minn.) 176

Rothenberger v. N. W. Consol. Milling Co. (Minn.)..... 177

Scharenbroich v. St. Cloud Fiber-Ware Co. (Minn.) 178

Anderson v. Nelson Lumber Co. (Minn.) 178

Durant v. Lexington Coal Mining Co. (Mo.) 397

Mangle — INJURED BY.

Malm v. Thelin (Neb.)..... 599

"Miller Coupling."

Russell v. Minn. & St. L. R'y Co. (Minn.) 249

White v. Louis., etc., R. Co. (Miss.) 372

Fenderson v. Atlantic City R. Co. (N. J.) 659

Mine — INJURED IN — VARIOUS CAUSES.

Quincy Mining Co. v. Kitts (Mich.) 58

Petaja v. Aurora Iron Mining Co. (Mich.) 63

Accidents in mines; falling roof, rock, etc.; notes of Michigan cases 64-66

Bergquist v. Chandler Iron Co. (Minn.) 233

Blanton v. Dold (Mo.)..... 378

Nugent v. Kauffman Milling Co. (Mo.) 384

Durant v. Lexington Coal Mining Co. (Mo.) 397

Hamilton v. Rich Hill Coal Co. (Mo.) 398

Deweese v. Meramee Iron Mining Co. (Mo.)..... 399

Leslie v. Rich Hill Mining Co. (Mo.) 399

Mine — INJURED IN — VARIOUS CAUSES — continued.

Kelly v. Cable Co. (Mont.)..... 519

Berg v. B. & M., etc., Mining Co. (Mont.) 519

Kelley v. Fourth of July Mining Co. (Mont.)..... 524

Patnode v. Harter, (Nev.)..... 504

Smith v. Oxford Iron Co. (N. J.)... 683

Gilmore v. Oxford Iron & Nail Co. (N. J.) 687

Alexander v. Tenn., etc., Mining Co. (N. Mex.)..... 729

Pattzar v. Tilly Foster Iron Mining Co. (N. Y.)..... 832

Rima v. Rossie Iron Works (N. Y.) 839

Mine — KILLED IN.

Ryan v. Bagaley (Mich.)..... 62

Accidents in mines; falling roof, rock, etc.; notes of Michigan cases 64-66

Quick v. Minn. Iron Co. (Minn.)... 231

Spiva v. Osage Coal, etc., Co. (Mo.) 397

Miner Injured or Killed.

See title MINE.

Minor Employees Injured — VARIOUS CAUSES.

Huizega v. Cutler & Savidge Lumber Co. (Mich.)..... 4

Sjogren v. Hall (Mich.)..... 25

Palmer v. Harrison (Mich.)..... 26

Prentiss v. Kent Furniture Mfg. Co. (Mich.)..... 26

Steiler v. Hart (Mich.)..... 26

King v. Ford River Lumber Co. (Mich.) 27

Mackin v. Alaska Refrigerator Co. (Mich.) 28

Borck v. Michigan Bolt & Nut Works (Mich.)..... 28

Jungnitsch v. Michigan Malleable Iron Co. (Mich.)..... 29

Reier v. Detroit Steel & Spring Works (Mich.)..... 30

Hoffman v. Adams (Mich.)..... 30

Tangney v. J. B. Wilson & Co. (Mich.) 52

McGinnis v. Canada Southern Bridge Co. (Mich.)..... 127

Railroad employees injured; Michigan cases 154-173

Berg v. Bousfield (Minn.)..... 183

Truntle v. North Star Woolen Mill Co. (Minn.)..... 189

Minor Employees Injured — VARIOUS CAUSES — *continued.*

Olmscheid v. Nelson-Tenney Lumber Co. (Minn.)	189
Hess v. Adamant Mfg. Co. (Minn.)	190
Kaillen v. N. W. Bedding Co. (Minn.)	191
Anderson v. Morrison (Minn.)	192
McDonough v. Lanpher (Minn.)	196
Ludwig v. Pillsbury (Minn.)	197
Cook v. St. Paul. M. & M. R'y Co. (Minn.)	247
Berger v. St. P., M. & M. R'y Co. (Minn.)	251
Hefferen v. Northern Pac. R. Co. (Minn.)	254
Hatter v. Ill. Cent. R. Co. (Miss.)	370
Ill. Cent. R. Co. v. Cathey (Miss.)	371
Dowling v. Allen (Mo.)	383
Nugent v. Kauffman Milling Co. (Mo.)	384
Dale v. St. L., K. C. & N. R'y Co. (Mo.)	455
Minor employees in service of railroad companies injured and killed (Mo.)	455-458
Waldhier v. Hann. & St. J. R. Co. (Mo.)	480
Omaha & R. V. R. Co. v. Morgan (Neb.)	542
Lincoln St. R'y Co. v. Cox (Neb.)	593
McMahon v. O'Donnell (Neb.)	599
Smith v. Irwin (N. J.)	714
Clark Thread Co. v. Bennett (N. J.)	715
Clark Mile-End Cotton Co. v. Chaffery (N. J.)	716
Railroad employees injured; notes of New York cases	801-820
Rima v. Rossie Iron Works (N. Y.)	839
Buckley v. Gutta Percha, etc., Mfg. Co. (N. Y.)	842
Minor employees injured by machinery; New York cases	842-846
Hickey v. Taaffe (N. Y.)	842
White v. Wittemann Lith. Co. (N. Y.)	843
Ogley v. Miles (N. Y.)	843
Crown v. Orr (N. Y.)	844
Cullen v. Nat. Sheet Metal Roofing Co. (N. Y.)	845

Minor Employees Killed — VARIOUS CAUSES.

Marshall v. Widdicomb Furniture Co. (Mich.)	27
Chicago & N. W. R'y Co. v. Bayfield (Mich.)	87

Minor Employees Killed — VARIOUS CAUSES — *continued.*

Railroad employees injured; Michigan cases	154-173
Robel v. C., M. & St. P. R. Co. (Minn.)	280
Ellison v. Truesdale, Receiver (Minn.)	313
White v. Louis., etc., R. Co. (Miss.)	372
O'Brien v. Western Steel Co. (Mo.)	404
Devitt v. Pac. R. Co. (Mo.)	451
Rains v. St. L., I. M. & S. R'y Co. (Mo.)	452
Minor employees in service of railroad companies injured and killed (Mo.)	455-458
Kranz v. Long Island R. Co. (N. Y.)	795

Miscellaneous Cases.

Tort of servant; injury to third person; notes of Michigan cases	83-87
Railroad employees injured; notes of Michigan cases	154-173
Railroad employees injured; notes of Minnesota cases	347-358
Notes of master and servant cases in Missouri Court of Appeals	516-518
Notes of "Railroad cases" in Missouri Court of Appeals	517-518
Railroad employees injured; notes of Missouri cases	491-513
Railroad employees injured; New Hampshire cases	623-625
Railroad employees injured; notes of New York cases	801-820

Molder Injured — MOLTEN IRON.

Kehoe v. Allen (Mich.)	44
------------------------	----

Molder Killed — EXPLOSION.

Smith v. Peninsular Car Works (Mich.)	42
---------------------------------------	----

Molten Metal — INJURED BY.

Jungnitsch v. Michigan Malleable Iron Co. (Mich.)	29
Smith v. Peninsular Car Works (Mich.)	42
Kehoe v. Allen (Mich.)	44

Motorman Injured.

Street railroad employees injured; notes of Minnesota cases	326-329
---	---------

Moving Various Objects — INJURED WHILE.

Jorgenson v. Smith (Minn.)	239
Clark v. St. P. & S. C. R. Co. (Minn.)	280

Municipal Corporation. — ACTION AGAINST.

Coots v. City of Detroit (Mich.)	83
Pederson v. City of Rushford (Minn.)	221
Bergquist v. City of Minneapolis (Minn.)	221

Night Watchman Killed.

Gleeson v. Excelsior Mfg. Co. (Mo.)	421
-------------------------------------	-----

Nitroglycerine Explosion.

Cuff v. Newark & N. Y. R. Co (N. J.)	668
--------------------------------------	-----

Object Thrown from Passing Train.

Foster v. Minn. Cent. R'y Co. (Minn.)	245
Card v. Eddy, Receivers, etc. (Mo.)	479
Union Pac. R. Co. v. Erickson (Neb.)	574

Obstruction on Track.

Loranger v. L. S. & M. S. R'y Co. (Mich.)	103
Piguegno v. Chicago & G. T. R'y Co. (Mich.)	104
Mich. Cent. R. Co. v. Leahey (Mich.)	114
Hughes v. Winona & St. P. R. Co. (Minn.)	243

Oil Works — EXPLOSION.

Bahr v. Lombard, Ayres & Co. (N. J.)	689
--------------------------------------	-----

Oiling Machinery.

Shumway v. Walworth & Neville Mfg. Co. (Mich.)	10
Ribble v. Starratt (Mich.)	11
Wuotilla v. Duluth Lumber Co. (Minn.)	173
Groff v. Duluth Imperial Mill Co. (Minn.)	181

Overhead Bridge — CONTACT WITH. [See also BRIDGE.]

Hardy v. B. & M. R. (N. H.)	617
-----------------------------	-----

Paint Explosion.

Burke v. Parker, Webb & Co. (Mich.)	44
-------------------------------------	----

Paper Mill — INJURED IN.

Scharenbroich v. St. Cloud Fiber-Ware Co. (Minn.)	178
---	-----

Parting of Freight Train.

Flike v. B. & A. R. Co. (N. Y.)	765
Sprong v. B. & A. R. Co. (N. Y.)	765
Booth v. B. & A. R. Co. (N. Y.)	766
Rose v. B. & A. R. Co. (N. Y.)	779

Passenger Killed — DERAILMENT OF TRAIN.

Little, Receiver, v. Dusenbery (N. J.)	667
--	-----

Passing Train — OBJECT THROWN FROM.

Foster v. Minn. Cent. R'y Co. (Minn.)	245
Card v. Eddy, Receivers, etc. (Mo.)	479
Union Pac. R. Co. v. Erickson (Neb.)	574

Peep-saw — INJURED BY.

Johnson v. Hovey (Mich.)	17
--------------------------	----

Personal Injuries.

[Wherever the personal injury is stated in the cases reported in this volume, the same is shown under its specific title in this table, such as Arm, Hand, Head, Foot, Leg, etc.]

Person Not Employee Injured.

Blair v. Grand Rapids & Ind. R. Co. (Mich.)	146
Mich. Cent. R. Co. v. Campau (Mich.)	146
Coops v. L. S. & M. S. R'y Co. (Mich.)	147

Physician — ASSAULT BY.

Campbell v. Northern Pac. R. Co.
(Minn.) 346

Picker Machine — INJURED BY.

Anderson v. Morrison (Minn.).... 192

Pile Driver — INJURED BY.

Fremont, etc., R. Co. v. Leslie
(Neb.) 577

Piling Lumber — INJURED BY.

Fraser v. Red River Lumber Co.
(Minn.) 205

Pipe Bursting.

Theisen v. Porter (Minn.)..... 234

Planing Machine — INJURED BY.

Shumway v. Walworth & Neville
Mfg. Co. (Mich.)..... 10
Schroeder v. Michigan Car Co.
(Mich.) 7
Mackin v. Alaska Refrigerator Co.
(Mich.) 28
Palmer v. Harrison (Mich.)..... 26
Anderson v. Akeley Lumber Co.
(Minn.) 182
Crown v. Orr (N. Y.)..... 844

Planing Mill — INJURED IN.

Kinney v. Folkerts (Mich.)..... 12
Palmer v. Harrison (Mich.)..... 26

Platform Collapse.

Blomquist v. C. M. & St. P. R'y Co.
(Minn.) 261

Platform — FALLING FROM.

Young v. Shickle, etc., Co. (Mo.).. 411
Alexander Dye Works v. Roufosse
(N. J.)..... 720

Poisonous Matter.

Fox v. Peninsular White Lead &
Color Works (Mich.)..... 66

Pole Accidents.

Matthews v. St. L. Grain Elev. Co.
(Mo.) 433

Pole Accidents — continued.

Pierce v. Camden, G. & W. R. Co.
(N. J.)..... 672
Foley v. Jersey City Electric Light
Co. (N. J.)..... 699
Essex County Electric Co. v. Kelly
(N. J.) 700
N. Y. & N. J. Tel. Co. v. Speicher
(N. J.)..... 701

Projecting Object. See CLOTHING CAUGHT; SET SCREWS; BRIDGE, ETC.**Projecting Object — CONTACT WITH.**

Powers v. Thayer Lumber Co.
(Mich.) 74
Jones v. L. S. & M. S. R'y Co.
(Mich.) 139
Railroad employees injured; Michigan cases 154-173
McDonough v. Lanpher (Minn.).. 196
Ludwig v. Pillsbury (Minn.)..... 197
Robel v. C. M. & St. P. R. Co.
(Minn.) 280
Clark v. St. P. & S. C. R. Co.
(Minn.) 280
Smith v. Winona & St. R. R. Co.
(Minn.) 281
Flanders v. C., St. P., M. & O. R'y
Co. (Minn.)..... 282
Johnson v. St. P., M. & M. R'y Co.
(Minn.) 282
Lawson v. Truesdale, Receiver
(Minn.) 283
N. Y., Susq. & W. R. Co. v. Marion
(N. J.) 652
Gibson v. Erie R'y Co. (N. Y.).... 735

Punching Machine — COLLAPSE OF.

Richards v. Rough (Mich.)..... 29

Quarry — INJURED IN.

Sather v. Ness (Minn.)..... 208
Comben v. Belleville Stone Co. (N.
J.) 719

Railroad Bridge — SEE BRIDGE.

McDermott v. Pac. R. Co. (Mo.).. 444
Devitt v. Pac. R. Co. (Mo.)..... 451
Rains v. St. L., I. M. & S. R'y Co.
(Mo.) 452
Tabler v. Hann. & St. J. R. Co.
(Mo.) 476

Railroad Bridge — See BRIDGE — *continued.*

Muirhead v. Hann. & St. J. R. Co. (Mo.)	477
Hardy v. B. & M. R. (N. H.)	617
Harrison v. Central R. R. (N. J.)	633
Haggerty v. Central R. R. (N. J.)	633
Paulmier v. Erie R. Co. (N. J.)	643
Demarest v. Little, Receiver, etc. (N. J.)	643
Woodruff v. Little, Receiver, etc. (N. J.)	668
N. Y., Susq. & W. R. Co. v. Marion (N. J.)	652
Baylor v. D., L. & W. R. Co. (N. J.)	652
Warner v. Erie R'y Co. (N. Y.) ..	734
Railroad bridge accidents; New York cases	734-736

Railroad Companies.

[Actions against railroad companies are sufficiently indicated under the various subdivisions of employments, such as BRAKEMAN, CONDUCTOR, ENGINEER, FIREMAN, etc.]

Railroad Employees Injured — VARIOUS CAUSES.

[See also the various heads in this Table for branch of employment, such as BRAKEMAN, CONDUCTOR, ENGINEER, FIREMAN, SECTION HAND, etc.]

Notes of Michigan cases	154-173
Drymala v. Thompson (Minn.)	243
Cook v. St. Paul, M. & M. R'y Co. (Minn.)	247
Notes of Minnesota cases	347-358
Louis., etc., R. Co. v. Conroy (Miss.)	367
Minor employees in service of railroad companies injured and killed (Mo.)	455-458
Notes of Missouri cases	491-513
Notes of "Railroad cases" in Missouri Court of Appeals	517-518
Fremont, etc., R. Co. v. Leslie (Neb.)	577
New Hampshire cases	623-625
Collyer v. Penn. R. Co. (N. J.) ..	665
Laning v. N. Y. Cent. R. Co. (N. Y.)	747
Brickner v. N. Y. Cent. R. Co. (N. Y.)	747

Railroad Employees Injured — VARIOUS CAUSES — *continued.*

Actions against receivers of railroads; New York cases	772-774
McCosker v. Long Island R. Co. (N. Y.)	798
Railroad employees injured; notes of New York cases	801-820

Railroad Employees Killed — VARIOUS CAUSES.

Chicago & N. W. R'y Co. v. Bayfield (Mich.)	87
Notes of Michigan cases	154-173
Minor employees in service of railroad companies injured and killed (Mo.)	455-458
Schultz v. Pac. R. Co. (Mo.)	462
Vawter v. Mo. Pac. R'y Co. (Mo.) ..	486
Notes of Missouri cases	491-513
Notes of "Railroad cases" in Missouri Court of Appeals	517-518
Demarest v. Little, Receiver, etc. (N. J.)	643
Woodruff v. Little, Receiver, etc. (N. J.)	668
Notes of New York cases	801-820

Railroad Shop — INJURED IN.

Berger v. St. P., M. & M. R'y Co. (Minn.)	251
Hefferen v. Northern Pac. R. Co. (Minn.)	254
Section hands, etc., injured; notes of Minnesota cases	337-340
Railroad employees injured; notes of Minnesota cases	347-358
Kranz v. Long Island R. Co. (N. Y.)	795
Railroad employees injured; notes of New York cases	801-820

Railroad Yard — INJURED IN.

Jordan v. St. P., M. & O. R'y Co. (Minn.)	342
Ill. Cent. R. Co. v. Cathey (Miss.) ..	371
Waldhier v. Hann. & St. J. R. Co. (Mo.)	480
Rutledge v. Mo. Pac. R'y Co. (Mo.)	483
Burdick v. Pac. R'y Co. (Mo.)	484
Criswell v. Mont. Cent. R. Co. (Mont.)	527

Raising Wrecked Car.

Brown v. Winona & St. P. R. Co.
(Minn.) 278

Receiver — ACTION AGAINST.

Smith v. Potter, Receiver (Mich.) 115
Lawson v. Truesdale, Receiver
(Minn.) 283
Ellison v. Truesdale, Receiver
(Minn.) 313
Street railroad employees injured;
notes of Minnesota cases.....326-329
Mikkelson v. Truesdale, Receiver
(Minn.) 336
Card v. Eddy, Receivers, etc. (Mo.) 479
Erb, Receiver v. Eggleston (Neb.) 568
Demarest v. Little, Receiver, etc.
(N. J.) 643
Woodruff v. Little, Receiver, etc.
(N. J.) 668
Little, Receiver v. Dusenbery (N.
J.) 667
Slater v. Jewett, Receiver (N. Y.) 772
Notes of New York cases.....772-774

**Removing Slabs, etc.,
in Saw Mill — INJURED**

WHILE.

Swoboda v. Ward (Mich.)..... 1
Huizega v. Cutler & Savidge Lum-
ber Co. (Mich.)..... 4
Lindstrand v. Delta Lumber Co.
(Mich.) 7
Anderson v. Northern Mill Co.
(Minn.) 199

**Removing Various Ob-
jects — INJURED WHILE.**

Bennett v. Syndicate Ins. Co.
(Minn.) 214
Omaha & R. V. R. Co. v. Krayen-
buhl (Neb.) 571
Union Pac. R. Co. v. O'Hern
(Neb.) 575

**Revolving Machinery —
INJURED BY.**

King v. Ford River Lumber Co.
(Mich.) 27
Marshall v. Widdicomb Furniture
Co. (Mich.)..... 27
Berg v. Bousfield (Minn.)..... 188
Kaillen v. N. W. Bedding Co.
(Minn.) 191
Berger v. St. P., M. & M. R'y Co.
(Minn.) 251
Dowling v. Allen (Mo.)..... 883

**Rip-saw — LUMBER FLYING
FROM.**

Seckinger v. Philibert, etc. (Mo.).. 387

Roof of Mine — FALL OF.

Petaja v. Aurora Iron Mining Co.,
(Mich.) 63
Accidents in mines; falling roof,
rock, etc.; notes of Michigan
cases64-66
Bergquist v. Chandler Iron Co.
(Minn.) 233
Leslie v. Rich Hill Mining Co.
(Mo.) 399
Kelley v. Fourth of July Mining
Co. (Mont.) 524
Pantzar v. Tilly Foster Iron Min-
ing Co. (N. Y.)..... 832

Roundhouse — INJURED IN.

Gonsior v. Minn. & St. L. R'y Co.
(Minn.) 276
Mikkelson v. Truesdale, Receiver
(Minn.) 336
Rahman v. Minn. & A. W. R. Co.
(Minn.) 336
Nichols v. C., M. & St. P. R'y Co.
(Minn.) 340

Runaway Cars — COLLISION.

Flike v. B. & A. R. Co. (N. Y.).. 765
Sprong v. B. & A. R. Co. (N. Y.) 765
Booth v. B. & A. R. Co. (N. Y.).. 766
Rose v. B. & A. R. Co. (N. Y.).. 779

**Runaway Horse — BOY IN-
JURED.**

Hoffman v. Adams (Mich.)..... 30

**Running Board — INJURED
ON.**

Pierce v. Camden, G. & W. R. Co.
(N. J.) 672

Running Switch.

Settle v. St. L. & S. F. R. Co.
(Mo.) 467

Run Over — ENGINE.

McGinnis v. Canada Southern
Bridge Co. (Mich.)..... 127
Schneider v. C., B. & N. R'y Co.
(Minn.) 260
Hastings v. Mont. Union R. Co.
(Mont.) 529
Erb, Receiver v. Eggleston (Neb.) 568

Run Over — FREIGHT CAR.

Chicago & N. W. R'y Co. v. Bayfield (Mich.)	87
Coops v. L. S. & M. S. R'y Co. (Mich.)	147
Ellison v. Truesdale, Receiver (Minn.)	313
Evarts v. St. P., M. & M. R'y Co. (Minn.)	322
Ill. Cent. R. Co. v. Cathey (Miss.) ..	371
Mateer v. Mo. Pac. R'y Co. (Mo.) ..	460

Run Over — GRIP CAR.

Friel v. Citizen's R'y Co. (Mo.) ..	513
-------------------------------------	-----

Run Over — HAND CAR.

Christianson v. C., St. P., M. & O. R'y Co. (Minn.)	314
---	-----

Run Over — SWITCH ENGINE.

O'Mellia v. K. C., St. J. & C. B. R. Co. (Mo.)	481
--	-----

Run Over — TRAIN.

Rohback v. Pac. R. Co. (Mo.)	445
Settle v. St. L. & S. F. R. Co. (Mo.)	467
Gutridge v. Mo. Pac. R'y Co. (Mo.) ..	467
Waldhier v. Hann. & St. J. R. Co. (Mo.)	480
Prosser v. Mont. Cent. R. Co. (Mont.)	528
Mo. Pac. R'y Co. v. Baxter (Neb.) ..	555
Mo. Pac. R'y Co. v. Lewis (Neb.) ..	562
Omaha & R. V. R. Co. v. Krayenbuhl (Neb.)	571
Bailey v. R., W. & O. R. Co. (N. Y.)	787
Railroad employees injured; notes of New York cases	801-820

Safety Valve — ESCAPE OF STEAM.

McCallum v. McCallum (Minn.) ..	236
---------------------------------	-----

Saw Machine — INJURED BY.

Lindstrand v. Delta Lumber Co. (Mich.)	7
Ribble v. Starratt (Mich.)	11
Lau v. Fletcher (Mich.)	17
Lewis v. Emery (Mich.)	18
Prentiss v. Kent Furniture Mfg. Co. (Mich.)	26
Smith v. Backus Lumber Co. (Minn.)	183
Koslowski v. Thayer (Minn.)	184
Berg v. Bousfield (Minn.)	188

Saw Machine — INJURED BY — continued.

Olmscheid v. Nelson-Tenney Lumber Co. (Minn.)	189
Demars v. Glen Mfg. Co. (N. H.) ..	629
Ogley v. Miles (N. Y.)	843

Saw Mill — INJURED IN.

Swoboda v. Ward (Mich.)	1
Huizega v. Cutler & Savidge Lumber Co. (Mich.)	4
Lindstrand v. Delta Lumber Co. (Mich.)	7
Smith v. Dunham (Mich.)	8
Roux v. Blodgett & Davis Lumber Co. (Mich.)	16
Redmond v. Delta Lumber Co. (Mich.)	17
Johnson v. Hovey (Mich.)	17
Lewis v. Emery (Mich.)	18
Sjogren v. Hall (Mich.)	25
King v. Ford River Lumber Co. (Mich.)	27
Lamotte v. Boyce (Mich.)	56
Wuotilla v. Duluth Lumber Co. (Minn.)	173
Barbo v. Bassett (Minn.)	175
Carroll v. Williston (Minn.)	176
Anderson v. Nelson Lumber Co. (Minn.)	178
Anderson v. Northern Mill Co. (Minn.)	199
Ewan v. Lippincott (N. J.)	706

Scaffolding and Staging Accidents.

Beesley v. F. W. Wheeler & Co. (Mich.)	75
Dewey v. Parke, Davis & Co. (Mich.)	82
Hoar v. Merritt (Mich.)	82
Fraser v. Red River Lumber Co. (Minn.)	205
Smith v. Tromanhauser (Minn.) ..	223
Myhre v. Tromanhauser (Minn.) ..	224
Jennings v. Iron Bay Co. (Minn.) ..	227
Marsh v. Herman (Minn.)	227
Sims v. American Steel Barge Co. (Minn.)	230
Blomquist v. C., M. & St. P. R'y Co. (Minn.)	261
Young v. Shickle, etc., Co. (Mo.) ..	411
Norton v. Ittner (Mo.)	419
Boettger v. Scherpe & Koken, etc., Co. (Mo.)	421
Whalen v. Centenary Church (Mo.)	424
Ryan v. McCully (Mo.)	425
Wright v. Cooper (Mo.)	426

Scaffolding and Staging Accidents — *continued.*

Fugler v. Bothe (Mo.).....	426
Lee v. Detroit Bridge & Iron Works (Mo.)	426
Brothers v. Cartter (Mo.).....	428
Maher v. McGrath (N. J.).....	717
Laning v. N. Y. Cent. R. Co. (N. Y.)	747
Brickner v. N. Y. Cent. R. Co. (N. Y.)	747

Scalded — BOILER EXPLOSION.

Connolly v. Davidson (Minn.).....	237
-----------------------------------	-----

Scalded — ESCAPE OF STEAM.

McCallum v. McCallum (Minn.)...	236
Glover v. Meinrath (Mo.).....	390

Scalded — HOT WATER FROM ENGINE.

Hankins v. N. Y., L. E. & W. R. Co. (N. Y.).....	783
--	-----

Scalded — MOLTEN IRON.

Kehoe v. Allen (Mich.).....	44
-----------------------------	----

Scalded — PIPE BURSTING.

Theisen v. Porter (Minn.).....	234
--------------------------------	-----

Seaman Injured — EXPLOSION.

Connolly v. Davidson (Minn.).....	237
-----------------------------------	-----

Section Boss or Foreman Injured — VARIOUS CAUSES.

Buckner v. Rich. & D. R. Co. (Miss.)	369
Card v. Eddy, Receivers, etc., (Mo.)	479
Johnson v. Mo. Pac. R'y Co. (Mo.)	468
Walker v. L. S. & M. S. R'y Co. (Mich.)	143
Omaha & R. V. R. Co. v. Krayenbuhl (Neb.).....	571
C. B. & Q. R. Co. v. Wymore (Neb.)	590

Section Hand Injured — VARIOUS CAUSES.

Schaible v. L. S. & M. S. R'y Co. (Mich.)	104
Harrison v. Detroit, L. & N. R. Co. (Mich.)	119

Section Hand Injured — VARIOUS CAUSES — *continued.*

Gavigan v. L. S. & M. S. R'y Co. (Mich.)	136
Railroad employees injured; notes of Michigan cases.....	154-173
Foster v. Minn. Cent. R'y Co. (Minn.)	245
Brown v. Winona & St. P. R. Co. (Minn.)	278
Christianson v. C., St. P., M. & O. R'y Co. (Minn.).....	314
Section hands, etc., injured; notes of Minnesota cases.....	337-340
Railroad employees injured; notes of Minnesota cases.....	347-358
Dowell v. Vicksburg, etc., R. Co. (Miss.)	363
Railroad employees injured; notes of Missouri cases.....	491-513
Union Pac. R. Co. v. Erickson (Neb.)	574
Hanley v. Grand Trunk R'y (N. H.)	615
Atch., T. & S. F. R. Co. v. Martin (N. Mex.).....	729
Railroad employees injured; notes of New York cases.....	801-820

Section Hand Killed — VARIOUS CAUSES.

Railroad employees injured; Michigan cases	154-173
Olson v. St. P. M. & M. R'y Co. (Minn.)	276
Larson v. St. P. M. & M. R'y Co. (Minn.)	277
Railroad employees injured; notes of Minnesota cases.....	347-358
Parker v. Hann. & St. J. R. Co. (Mo.)	478
Railroad employees injured; notes of New York cases.....	801-820

"Set Screw" Cases.

See also CLOTHING CAUGHT; REVOLVING MACHINERY.

Groff v. Duluth Imperial Mill Co. (Minn.)	181
Dowling v. Allen (Mo.).....	383

Shoulder Injured — ELEVATOR.

Troth v. Norcross (Mo.).....	403
------------------------------	-----

Shoulder Injured — PILE DRIVER.

Fremont, etc., R. Co. v. Leslie (Neb.)	577
--	-----

Shuttle of Loom — INJURED BY.

Jaques v. Great Falls Mfg Co. (N. H.) 628

Side Injured — MINE.

Quincy Mining Co. v. Kitts (Mich.) 58

Side Track — INJURED ON.

Clark v. St. P. & S. C. R. Co. (Minn.) 280

Notes of Minnesota cases arising out of accidents to employees injured on side track to mills, etc.

Capital City Oil Works v. Black (Miss.) 345-346

Miss. Cotton Oil Co. v. Ellis (Miss.) 375

Signal Post — CONTACT WITH.

Johnson v. St. P. M. & M. R'y Co. (Minn.) 282

Signaling Train — VOLUNTEER INJURED.

Blair v. Grand Rapids & Ind. R. Co. (Mich.) 146

Sliding Door Falling.

Collyer v. Penn. R. Co. (N. J.).. 665

Slippery Floor.

Swoboda v. Ward (Mich.) I
Scharenbroich v. St. Cloud Fiber-Ware Co. (Minn.) 178

Slipping on Ice and Water.

Smith v. Peninsular Car Works (Mich.) 42

Slipping on Track.

Piguegno v. Chicago & G. T. R'y Co. (Mich.) 104

Hughes v. Winona & St. P. R. Co. (Mich.) 243

Lawson v. Truesdale, Receiver (Minn.) 283

Snow and Ice on Track.

Piguegno v. Chicago & G. T. R'y Co. (Mich.) 104

Lawson v. Truesdale, Receiver (Minn.) 283

Fifield v. Northern R. R. (N. H.) 607

Snowbank — ENGINE RUNNING INTO.

Orth v. St. P. M. & M. R'y Co. (Minn.) 308

Snow Plough — COLLISION WITH HAND CAR.

Olson v. St. P. M. & M. R'y Co. (Minn.) 276

Larson v. St. P. M. & M. R'y Co. (Minn.) 277

Sparks from Molten Iron.

Jungnitsch v. Michigan Malleable Iron Co. (Mich.) 29

Spinal Cord Concussion — EXPLOSION.

Sioux City & Pac. R. Co. v. Finlayson (Neb.) 530

Staircase Falling.

Slater v. Chapman (Mich.) 51

Stationary Engine — ESCAPE OF STEAM.

McCallum v. McCallum (Minn.)... 236

Glover v. Meinrath (Mo.) 390

Steamboat — EXPLOSION ON.

Connolly v. Davidson (Minn.) 237

Steam Boiler — EXPLOSION.

Johnson v. Boston & M., etc., Mining Co. (Mont.) 525

Steam Dredge — INJURED ON.

O'Brien v. American Dredging Co. (N. J.) 683

Steam Escaping — BOILER.

McCallum v. McCallum (Minn.)... 236

Steam Hammer — INJURED BY.

Millar v. Madison Car Co. (Mo.)... 384

Steam Kettle — EXPLOSION.

Garneau Cracker Co. v. Palmer
(Neb.) 602

Steam Laundry — INJURED IN.

Hickey v. Taaffe (N. Y.)..... 842

Steam Turned on and Starting Machinery.

Crispin v. Babbitt (N. Y.)..... 820

Steamship — KILLED WHILE UNLOADING.

Nord Deutscher Lloyd S. S. Co. v.
Ingebregsten (N. J.)..... 673

Steel Ingot — STRUCK BY.

Nash v. Nashua Iron & Steel Co.
(N. H.)..... 626

Stevedore Killed — UNLOADING VESSEL.

Nord Deutscher Lloyd S. S. Co. v.
Ingebregtsen (N. J.)..... 673

Stock Yards — INJURED IN.

Union Stock Yards Co. v. Connoyer
(Neb.) 595

Union Stock Yards Co. v. Larsen
(Neb.) 595

Stone Falling.

Bergquist v. Chandler Iron Co.
(Minn.) 233

Deweese v. Meramee Iron Co.
(Mo.) 399

Stone Mason Falling from Scaffold.

Whalen v. Centenary Church (Mo.) 424

Stone Quarry — FALL OF DERRICK.

Sather v. Ness (Minn.)..... 208

Straw Cutter — INJURED BY.

Snowberg v. Nelson Spencer Paper
Co. (Minn.)..... 182

McMahon v. O'Donnell (Neb.).... 599

Street Railroad Employee Injured.

Funk v. St. Paul City R'y Co.
(Minn.) 326

Notes of Minnesota cases..... 326-329

Friel v. Citizens' R'y Co. (Mo.).... 513

Leigh v. Omaha St. R. Co. (Neb.).. 592

Lincoln St. R'y Co. v. Cox (Neb.).. 593

Pierce v. Camden, G. & W. R. Co.
(N. J.)..... 672

Sudden Starting of Machinery.

Crispin v. Babbitt (N. Y.)..... 820

Sudden Starting of Train.

Mich. Cent. R. Co. v. Austin
(Mich.) 102

Evans v. Louis, etc., R. Co. (Miss.) 366

Omaha & R. V. R. Co. v. Morgan
(Neb.) 542

Suffocation — CAVE-IN.

Kranz v. Long Island R. Co. (N.
Y.) 795

Switch Engine — FALLING FROM.

O'Mellia v. K. C., St. J. & C. B. R.
Co. (Mo.)..... 481

Switching Cars.

Railroad employees injured; Michi-
gan cases..... 154-173

Church v. C. M. & St. P. R'y Co.
(Minn.) 325

Huhn v. Mo. Pac. R'y Co. (Mo.).. 473

Soeder v. St. L., I. M. & S. R'y Co.
(Mo.) 475

Waldhier v. Hann. & St. J. R. Co.
(Mo.) 480

Warmington v. Atch., T. & S. F. R.
Co. (Mo.)..... 517

Prosser v. Mont. Cent. R. Co.
(Mont.) 528

Switchman Injured — VARIOUS CAUSES.

Mich. Cent. R. Co. v. Austin (Mich.)	102
McGinnis v. Canada Southern Bridge Co. (Mich.)	127
Mich. Cent. R. Co. v. Smithson (Mich.)	129
Gardner v. Mich. Cent. R. Co. (Mich.)	130
Railroad employees injured; Michigan cases	154-173
Lawson v. Truesdale, Receiver (Minn.)	283
Tierney v. Minn. & St. L. R'y Co. (Minn.)	288
Doyle v. St. P. M. & M. R'y Co. (Minn.)	321
Jordan v. C., St. P. M. & O. R'y Co. (Minn.)	342
Ill. Cent. R. Co. v. Price (Miss.) ..	368
Welsh v. Ala. & V. R. Co. (Miss.) ..	369
Ill. Cent. R. Co. v. Cathey (Miss.) ..	371
Waldhier v. Hann. & St. J. R. Co. (Mo.)	480
Rutledge v. Mo. Pac. R'y Co. (Mo.) ..	483
Burdick v. Pac. R'y Co. (Mo.)	484
Rodney v. St. L. S. W. R'y Co. (Mo.)	485
Railroad employees injured; notes of Missouri cases	491-513
C., B. & Q. R. Co. v. Bell (Neb.) ...	581
Union Stock Yards Co. v. Connoyer (Neb.)	595
Union Stock Yards Co. v. Larsen (Neb.)	595
Railroad employees injured; New Hampshire cases	623-625
Railroad employees injured; notes of New York cases	801-820

Switchman Killed — VARIOUS CAUSES.

Railroad employees injured; Michigan cases	154-173
Clark v. St. P. & S. C. R. Co. (Minn.)	280
Johnson v. St. P. M. & M. R'y Co. (Minn.)	282
O'Mellia v. K. C., St. J. & C. B. R. Co. (Mo.)	481
Railroad employees injured; notes of Missouri cases	491-513
Thompson v. Mont. Cent. R. Co. (Mont.)	528
Railroad employees injured; notes of New York cases	801-820

Switch Target — CONTACT WITH.

Lawson v. Truesdale, Receiver (Minn.)	283
---	-----

Tackle — INJURED BY. [See also SCAFFOLDING ACCIDENTS.]

Abel v. Butler-Ryan (Minn.)	206
McCarthy v. Lehigh Valley Transp. Co. (Minn.)	230

Teamster Injured.

Lincoln St. R'y Co. v. Cox (Neb.) ..	593
Lee v. Smart (Neb.)	600

Tearing Down Building.

Nourie v. Theobald (N. H.)	632
----------------------------------	-----

Telegraph Pole — FALL OF

Kelly v. Erie Tel., etc., Co. (Minn.) ..	208
Matthews v. St. L. Grain Elev. Co. (Mo.)	433

Thigh Injured — MINE.

Quincy Mining Co. v. Kitts (Mich.) ..	58
---------------------------------------	----

Third Person Injured — TORT OF SERVANT.

Notes of Michigan cases	83-87
Notes of Minnesota cases	241-243
New Orleans, etc., R. Co. v. Harrison (Miss.)	373
Richberger v. Am. Exp. Co. (Miss.) ..	375
Cases involving the question of scope of servant's authority (Mo.) ..	436-438
Notes of Nebraska cases	603-604
Hill v. Caverly (N. H.)	633

Thrown from Car. See FALLING FROM CAR, ETC.

Thrown under Coal Car.

Conroy v. Vulcan Iron Works (Mo.)	377
---	-----

Timber — STRUCK BY.

Anderson v. Northern Mill Co. (Minn.)	199
---	-----

Toe Injured — OBSTRUCTION ON TRACK.

Loranger v. L. S. & M. S. R'y Co.
(Mich.) 103

Top of Car — CONTACT WITH BRIDGE, ETC.

Devitt v. Pac. R. Co. (Mo.) 451
Rains v. St. L., I. M. & S. R'y Co.
(Mo.) 452
Hardy v. B. & M. R. (N. H.) 617
N. Y., Susq. & W. R. Co. v. Marion
(N. J.) 652
Baylor v. D. L. & W. R. Co. (N. J.) 652
Railroad bridge accidents; New
York cases 734-736
Gibson v. Erie R'y Co. (N. Y.) 735

Tort of Servant — THIRD PERSON INJURED.

Notes of Michigan cases 83-87
Notes of Minnesota cases 241-243
Morier v. St. P., M. & M. R'y Co.
(Minn.) 346
New Orleans, etc., R. Co. v. Harri-
son (Miss.) 373
Mound City Paint & Color Co. v.
Conlon (Mo.) 435
Cases involving the question of scope
of servant's authority (Mo.) 436-438
Richberger v. Am. Exp. Co. (Miss.) 375
Notes of Nebraska cases 603-604
Hill v. Caverly (N. H.) 633

Track Blocked — SNOW AND ICE.

Fifield v. Northern R. R. (N. H.) 607

Track Hand Injured.
See SECTION HAND.**Track Repairer Injured.**

Foster v. Minn. Cent. R'y Co.
(Minn.) 245
Section hands, etc., injured; notes of
Minnesota cases 337-340
Goodwell v. Mont. Cent. R. Co.
(Mont.) 529
Railroad employees injured; notes
of New York cases 801-820

Train Falling into River.

McDermott v. Pac. R. Co. (Mo.) 444

Train Falling Through Bridge.

Harrison v. Central R. R. (N. J.) 633
Haggerty v. Central R. R. (N. J.) 633

Train Running into Washout.

Gates v. So. Minn. R'y Co. (Minn.) 302
Sweeney v. Minn. & St. L. R'y Co.
(Minn.) 302

Train — STRUCK BY. [See RUN OVER.]**Trains — COLLISION BETWEEN.**

Hunn v. Mich. Cent. R. Co. (Mich.) 119
Hunn v. Mich. Cent. R. Co. (Mich.) 134
Ill. Cent. R. Co. v. Hunter (Miss.) 366
Millsaps v. Louis, etc., R. Co.
(Miss.) 366
Coon v. Syr. & Utica R. Co. (N.
Y.) 737
Wright v. N. Y. Cent. R. Co. (N.
Y.) 752
Slater v. Jewett, Receiver (N. Y.) 772
Hankins v. N. Y., L. E. & W. R.
Co. (N. Y.) 783
Mann v. D. & H. Canal Co. (N. Y.) 797
Railroad employees injured; notes
of New York cases 801-820

Trench — CAVE-IN.

Van Steenburgh v. Thornton (N.
J.) 681
Kranz v. Long Island R. Co. (N.
Y.) 795

Trestle Falling.

Lindvall v. Woods (Minn.) 200
Paulmier v. Erie R. Co. (N. J.) 643

Trip-hammer — INJURED BY.

Nelson v. St. Paul Plow Works
(Minn.) 183

Trolley Wire — KILLED BY.

Walker v. L. S. & M. S. R'y Co.
(Mich.) 143

Tunnel — CAVE-IN.

Kelley v. Fourth of July Mining Co.
(Mont.) 524
Kearney Electric Co. v. Laughlin
(Neb.) 596

Tunnel — KILLED IN.

McAndrews v. Burns (N. J.)..... 680

Unblocked Guard Rail.Mo. Pac. R'y Co. v. Baxter (Neb.).. 555
Railroad employees injured; New
Hampshire cases..... 623-625**Uncoupling Cars. See**
COUPLING CARS.**Uncovered Machinery.**Swoboda v. Ward (Mich.)..... 1
Huizega v. Cutler & Savidge Lum-
ber Co. (Mich.)..... 4
Schroeder v. Michigan Car Co.
(Mich.)..... 7
Roux v. Blodgett & Davis Lumber
Co. (Mich.)..... 16
Sjogren v. Hall (Mich.)..... 25
Borck v. Michigan Bolt & Nut
Works (Mich.)..... 28
Wuotilla v. Duluth Lumber Co.
(Minn.)..... 173
Barbo v. Bassett (Minn.)..... 173
Craver v. Christian (Minn.)..... 175
Freeberg v. St. Paul Plow Works
(Minn.)..... 176
Rothenberger v. N. W. Consol.
Milling Co. (Minn.)..... 177
Scharenbroich v. St. Cloud Fiber-
Ware Co. (Minn.)..... 178
Anderson v. Nelson Lumber Co.
(Minn.)..... 178**Unexploded Blasts.**Kelly v. Cable Co. (Mont.)..... 519
Berg v. B. & M., etc., Mining Co.
(Mont.)..... 519
Henderson v. Williams (N. H.)... 625**Unloading Cars. See**
LOADING AND UNLOADING.Chicago & N. W. R'y Co. v. Bay-
field (Mich.)..... 87**Vat — DROWNED IN.**

Balle v. Detroit Leather Co. (Mich.) 57

Ventilator Falling.Broderick v. Detroit Union R. R.
Station, etc., Co. (Mich.)..... 54**Vessel — DEFECTIVE SCAFFOLD.**Beesley v. F. W. Wheeler & Co.
(Mich.)..... 75**Vessel — EXPLOSION ON.**

Connolly v. Davidson (Minn.)..... 237

Vessel — INJURED ON.Employees injured while working in
vessels; notes of Michigan cases. 76-77
McCarthy v. Lehigh Valley Transp.
Co. (Minn.)..... 230
Sims v. American Steel Barge Co.
(Minn.)..... 230
Mills v. Maine Ice Co. (N. J.)..... 674
O'Brien v. American Dredging Co.
(N. J.)..... 683**Vessel — KILLED ON.**Nord Deutscher Lloyd S. S. Co. v.
Ingebregsten (N. J.)..... 673**Viaduct — FALLING FROM.**Dehning v. Detroit Bridge, etc.,
Works (Neb.)..... 600**Volunteer Injured.**Blair v. Grand Rapids & Ind. R.
Co. (Mich.)..... 146
Church v. C., M. & St. P. R'y Co.
(Minn.)..... 325
Evarts v. St. P. M. & M. R'y Co.
(Minn.)..... 322**Walking on Track — RUN**
OVER.Mich. Cent. R. Co. v. Campau
(Mich.)..... 146
Bresnahan v. Mich. Cent. R. Co.
(Mich.)..... 146**Wall of Building — FALL OF.**Horner v. Nicholson (Mo.)..... 419
Lottman v. Barnett (Mo.)..... 419**Wall of Cistern — FALL OF.**Snedda v. Libera (Minn.)..... 210
Kulas v. Libera (Minn.)..... 210**Wall of Elevator — FALL OF.**Bennett v. Syndicate Ins. Co.
(Minn.)..... 214**Washout — TRAIN RUNNING**
INTO.Gates v. So. Minn. R'y Co. (Minn.) 302
Sweeney v. Minn. & St. L. R'y Co.
(Minn.)..... 302

Watchman Killed — FALL-
ING THROUGH HATCHWAY.Gleeson v. Excelsior Mfg Co.
(Mo.) 421**Water Wheel** — CAUGHT BY.

Ewan v. Lippincott (N. J.) 706

Wheel — STRUCK BY.Cummins v. Collins (Mo.) 432
Foss v. Baker (N. H.) 632**"Wild" Train** — COLLISION.Sheehan v. N. Y. Cent. R. Co. (N.
Y.) 788
Dana v. N. Y. Cent. R. Co. (N. Y.) 789**Wire** — KILLED WHILE CUTTING.Walker v. L. S. & M. S. R'y Co.
(Mich.) 143**Wool Machine** — INJURED
BY.Kaillen v. N. W. Bedding Co.
(Minn.) 191**Yardman Injured.**Davis v. Detroit & Mil. R. Co.
(Mich.) 130
Huhn v. Mo. Pac. R'y Co. (Mo.).. 473
Railroad employees injured; notes
of Missouri cases..... 491-513**Yardmaster Injured.**Macy v. St. P. & D. R. Co. (Minn.) 289
Railroad employees injured; notes
of New York cases..... 801-820

INDEX.

[For the numerous divisions and subdivisions of the topic of MASTER AND SERVANT relating to the causes of action and the injuries sustained by employees, see the TABLE OF CASES CLASSIFIED which precedes this INDEX.]

ACCIDENT.

employee eighteen years of age injured by foot catching in gearing-wheel in saw mill, he having apparently slipped; master not liable, it being held that the injury was the result of a pure accident. Mich. 25
brakeman found dead on track, no evidence of defendant's negligence; assumption of risk..Neb. 563
proof of occurrence of accident does not raise presumption of negligenceN. J. 689

ACCORD AND SATISFACTION.

receipt of \$25 from railroad company and signing of formal release by injured party who was quite ignorant and of weak intellect; invalidity of release...Minn 314
voluntary payment of money to injured employee by defendant merely as "wages" during disability, does not constitute a satisfaction of cause of action..Minn. 319

ACTION.

action will lie by employee against master for injuries sustained by concurring negligence of master and fellow-servant.....Mich. 112
railway company owes duty to public to keep its tracks, etc., in suitable and safe condition, but an employee has no right of action against the company on this obligationMich. 117
brakeman injured coupling cars; action under the Iowa statute; right to sue in another State.....Minn. 292
the Iowa statute giving right of action to employee injured by employee of another employer is not

ACTION — *continued.*

against public policy of laws of Minnesota, and action may be maintained in latter State..Minn. 292
jurisdiction of probate court to direct administration solely to prosecute statutory action for causing death of intestate...Minn. 294
distinction in amount of damages recoverable in actions for death and actions for wilful torts or personal injuries, the former being limited to pecuniary loss, and the latter allowing punitive damages and also damages for mental and physical pain, and injury to the feelingsMinn. 294
fireman killed in collision; action brought by widow and children of deceased not in conformity with statute giving right of action to the "legal or personal representatives."Miss. 366
but this ruling is subsequently distinguishedMiss. 372
under Constitution 1890, section 193, action for injury resulting in death of railroad employee must be brought by executor or administrator of decedent, "the legal or personal representative," and not by parent or child, or husband and wifeMiss. 366
but this ruling is subsequently distinguishedMiss. 372
construction of the statutes as to right of action for injuries resulting in death of railway employees and in cases of instantaneous death.....Miss. 367
it is only where railroad employee is killed through negligence of fellow-servant that the action must be brought by the personal representative under Constitution 1890,

ACTION — continued.

section 193; but where the negligence is that of the company itself, the action for death of a child is to be brought by the parent, under Code 1892, section 663 (distinguishing a former ruling, see Miss. 366) Miss. 372

right of parent, under Code 1892, section 663, to recover for death of child, depends on whether child, had it survived, could have maintained action for the jury.. Miss. 372

servant who negligently discharges his duties and injures a third person is not personally liable to the latter; in such case the maxim *respondeat superior* obtains, the principal is liable for the injury and the agent is then liable to the principal for the damages which latter may have sustained.... Mo. 433

action by administrator in Missouri, under the Kansas statutes, for death of railroad employee in defendant's employ killed in a collision in Kansas..... Mo. 486

action by administrator for death of railroad employee in another State may be maintained under the statute of that State..... Neb. 562

validity of railroad relief fund association, the question of acceptance of benefit by an injured employee operating as a release, and the powers of a railroad corporation under its charter to organize such relief fund, discussed... Neb. 581

actions under the Death Statute and the damages recoverable. N. J. 633, 643

minor employee injured in mine; defendant liable; question at issue related to practice in regard to bringing of suit by infant, and appointment of guardian... N. Y. 839

ADJOINING TRACK.

switchman of one railroad struck by engine of another running on adjoining track; defendant liable... Minn. 342

ADMINISTRATOR.

jurisdiction of probate court to direct administration solely to prosecute statutory action for causing death of intestate..... Minn. 294

under Constitution 1890, section 193, action for injury resulting in death of railroad employee must be brought by executor or administrator of decedent, "the legal or

ADMINISTRATOR — continued.

personal representative," and not by parent or child, or husband and wife Miss. 366

but this ruling is subsequently distinguished Miss. 372

action by administrator in Missouri, under the Kansas statute, for death of railroad employee in defendant's employ killed in a collision in Kansas..... Mo. 486

action by administrator for death of railroad employee in another State may be maintained under the statute of that State in Nebraska... Neb. 562

actions under the Death Statute and the damages recoverable. N. J. 633, 643

ADMISSION.

by defendant's vice-principal of knowledge, before the accident, of the particular defect causing it, made next day and away from place of accident, inadmissible... Mich. 51

AGENT.

error in admitting evidence of statements of agent as binding upon principal is cured if principal impeaches such evidence by that of the agent in denial that such statements were made..... Mich. 16

master liable for negligence in respect to such acts and duties as are required of him without regard to rank or title of agent intrusted with their performance, the latter occupying the place of the master who is liable for manner of performance..... Mich. 31

corporations must act through agents, and it is immaterial whether duly authorized agent is or is not a stockholder..... Mich. 31

master cannot relieve himself from liability for employing incompetent servants by delegating that duty to another; if the latter is negligent in that respect the master is liable Mich. 58

master liable for negligence of agent intrusted by him with management of business..... Mich. 134

where one performs work for another representing the will of that other, not only as to the result, but also as to the means by which that result is accomplished, he is not an independent contractor, but the agent of that other, who is

AGENT — *continued.*

- responsible for his acts and omissions within scope of his authority. Minn. 188
- whenever a master delegates to another the performance of a duty to a servant which rests upon himself absolutely, he is liable for the manner in which it is performed, and to that extent the agent stands in the place of the master; as to all other matters he is a mere co-servant with other employeesMinn. 200
- delegation by master to agent of duty required of him in furnishing safe place to work and machinery, etc., cannot relieve master from liability for neglect of such duty by agent.....Minn. 243
- declarations of injured employee to railroad agent cannot bind the company, as proof of such declarations would be mere hearsay evidenceMinn. 321
- liability of railroad company for acts of incompetent agent where it has had notice of the same.....Miss. 365
- superintendent of corporation with full authority to carry on business thereof, not a fellow-servant of the laborers, but a vice-principal, being an agent of the corporation. Mo. 388
- master cannot delegate personal duty owing to servant to another person to escape liability for negligence in regard thereto.....Mo. 414
- servant who negligently discharges his duties and injures a third person is not personally liable to the latter; in such case the maxim *respondeat superior* obtains, the principal is liable for the injury and the agent is then liable to the principal for the damages which latter may have sustained....Mo. 433
- personally liable to third persons for misfeasances and positive wrongs done in course of employment... Mo. 433
- wife giving directions to domestic servant in her husband's employment is agent of her husband and is not liable for injury to servant obeying the order.....Mo. 433
- section foreman injured by piece of coal thrown from passing train by fireman on railroad operated by receivers; the custom was to send orders of roadmaster to section foreman by an employee on train

AGENT — *continued.*

- who threw same to section foreman; held that the fireman was not a vice-principal or agent of the roadmaster, but a fellow-servant of the injured employee... Mo. 479
- important ruling on the fellow-servant question which seems to undermine the proposition that the duty to direct the work is a personal duty of the master (see preceding paragraph).....Mo. 479
- person clothed by corporation with control and management of a distinct department, with duty of superintendent, is a vice-principal. Neb. 570
- where master selects agent to perform personal duty of servant, he is liable for the negligence of such agentN. J. 673
- liability of corporation for negligence of officers and agents.....N. J. 683
- master cannot escape responsibility by entrusting personal duty to an agentN. J. 719
- railroad employee injured by fall of scaffold which was defectively constructed by incompetent employees under direction of foreman who was drunk at the time of the accident, the intemperate habits of the foreman being known by the agent who employed him; railroad company chargeable with notice of the habits of the foreman and liable for act of agent in retaining him in employ after knowledge of said habitN. Y. 747
- where general agent is clothed with duty of master in respect to machinery, etc., and he fails to properly discharge same, the master is liable for such neglect..N. Y. 747. 765
- liability of corporation for act of agentN. Y. 765
- fireman on freight train killed by a number of cars of another freight train which had become detached colliding with his train; the forward train was insufficiently equipped with brakemen and was sent out by defendant's agent, a head conductor, whose duty it was to make up trains, etc.; railroad company liable for the negligent act of its agent.....N. Y. 765
- liability of master for neglect of duty towards servant is not shifted by adoption of rules and regulations providing for performance

AGENT — continued.

- of that duty by agent of the master N. Y. 783
- superintendent of grain elevator, owned by railroad company, is agent of corporation and his negligence in performance of duty to servants is negligence of corporation N. Y. 790
- employee injured in defendant's iron works by the gearing-wheels of a pumping engine, the superintendent letting on the steam causing the wheel to start; judgment for plaintiff reversed for erroneous instruction and refusal to instruct on question of whether superintendent was representative of defendant or a fellow-servant..... N. Y. 820
- master cannot delegate duty to another so as to escape liability for injury to servant by its non-performance N. Y. 832

ANIMAL.

- several workmen constructing track injured in collision of construction train with cattle on track; erroneous instruction as to running train at full speed on question of negligence Neb. 578
- street-car driver kicked by horse and fatally injured; sufficient evidence to go to jury; nonsuit reversed Neb. 592
- employee injured by vicious horse which he was driving; master liable Neb. 594

ARCHITECT.

- qualified as expert on construction and strength of buildings.... Mo. 416
- carpenter killed by fall of wall of building owing to negligence of architect; latter liable..... Mo. 419

ARSENIC.

- employee inhaling poisonous matter in lead works; erroneous admission of certain medical evidence.. Mich. 66
- where plaintiff claimed injury from arsenical poisoning but defendant claimed it was caused by lead poisoning, it was error to admit testimony of physician in plaintiff's favor which was based on a certain paper not in evidence, as the witness did not base his opinion upon a history of the case

ARSENIC — continued.

- but upon conclusions of another physician Mich. 66
- one who has had fifteen years actual experience with 100 employees, engaged in manufacture of paris green, has had opportunity to observe and has made observations of the effect upon such workmen, is competent to testify as to disease affecting those engaged in such manufacture and it was error to exclude such testimony in action for damages for injury sustained by employee inhaling poisonous matter in lead works..... Mich. 66

ASSAULT.

- railroad company not liable for assault by physician in its employ upon an assistant..... Minn. 346

ASSISTING EMPLOYEE.

- where person not employee was injured in attempt to board a moving train in order to carry out request of watchman to signal the train to avoid danger, and it did not appear that watchman had authority to make the request nor did he ask the person to board the moving train, the injured person assumed the risk and was guilty of gross negligence..... Mich. 146
- person not employee injured while attempting to board moving train in order to signal train at request of railroad employee; voluntary assumption of risk; railroad company not liable..... Mich. 146
- employee under direction of foreman assisting in setting up printing press injured by electric shock due to alleged defective insulation of wires; questions of defendant's negligence and whether plaintiff was acting within scope of employment should have been submitted to jury Minn. 186
- person injured while assisting in moving a building; insufficient complaint Minn. 239
- railroad employees fatally injured while assisting in coupling cars by conductor's orders; railroad company liable; question of scope of authority Minn. 322
- person volunteering to assist servant of another assumes the ordinary risks of the situation, but where he places himself in position of

ASSISTING EMPLOYEE — *cont'd.*

danger and the servant fails to exercise reasonable care to avert the danger, the master is liable..

Minn. 322

bystander, at request of defendant's head brakeman, assisting in switching cars injured while so doing, assumed the risk; brakeman had no authority to employ men

Minn. 325

ASSUMPTION OF RISK. See also RISK OF EMPLOYMENT.

servant assumes the ordinary risks of service and such dangers as can be readily seen by common observation; also negligence of fellow-servants... Mich. 1, 42, 58, 87, 122, 126

servant voluntarily remaining in employment after knowledge of defect, and without promise of master to remedy same, cannot recover for injury sustained thereby.

Mich. 1

employee only bound to know risks connected with his own work, and is not required to know condition of all machinery he may come in contact with..... Mich. 1

in absence of evidence showing notice given by defendant's agent of latent danger, or servant's knowledge thereof, it cannot be said that servant assumed all the risks and perils ordinary and extraordinary, of employment, or was guilty of contributory negligence.... Mich. 42

employee falling from ladder in saw-mill; master not liable, the danger being obvious and one of the risks of employment..... Mich. 56

employee falling into tannery vat and drowned; knowledge of danger; assumption of risk.... Mich. 57

employee while crossing a "bridge" over an excavation in defendant's copper mine, precipitated into the excavation a distance of about 100 feet, by the breaking of a plank of the bridge; master not liable, the accident being due to negligence of fellow-servant..... Mich. 58

servant does not assume risk of master's negligence or that of any one intrusted by master with superintendence

Mich. 58

servant assumes risk of fellow-servant's negligence even though latter may hold more responsible position or be in a different line

ASSUMPTION OF RISK — *cont'd.*

of employment, so long as both are in same general business, and the negligence of one contributes to danger of other..... Mich. 58

servant does not assume extra hazards to which he may be exposed by master of which he has no knowledge..... Mich. 87

where servant in obeying orders incurs risk of machinery which may be safely used by extraordinary caution and skill, he is not guilty of concurring negligence... Mich. 87

brakeman on ladder of car coming in contact with railroad bridge, thrown to track, run over and killed; contributory negligence and assumption of risk..... Mich. 126

railroad employees injured; cases involving the question of assumption of risk.... Mich. 127-130, 154-173

employee operating emery wheel in railroad car shops injured by breaking of wheel and some of the pieces flying into his face, assumed the risks where it appeared that he had worked for four years as a machinist and had knowledge of defect

Mich. 131

the fact that section-hand was directed by section boss to perform service outside scope of employment did not give him right of action against railroad company where danger was apparent and work was performed without objection

Mich. 136

discussion of question of assumption of risk where servant is put to work outside of employment....

Mich. 136-142

where servant having authority directs another servant to do work outside of his employment the latter assumes only the risks of danger as are apparent..... Mich. 143

person not employee injured while attempting to board moving train in order to signal train at request of railroad employee; voluntary assumption of risk; railroad company not liable..... Mich. 146

where person not employee was injured in attempt to board a moving train in order to carry out request of watchman to signal the train to avoid danger, and it did not appear that watchman had authority to make the request nor did he ask the person to board

ASSUMPTION OF RISK. — *cont'd.*

- the moving train, the injured person assumed the risk and was guilty of gross negligence..Mich. 146
- the fact that a servant knows of the defective condition of machinery, etc., with which he works does not necessarily charge him with contributory negligence or assumption of risk; he must also understand the risks to which such defects expose him.....Minn. 173
- accidents from uncovered or unguarded machinery; notes of casesMinn. 175-179
- where employee complained to master of defect in machine which the latter promised to remedy, the questions of contributory negligence and assumption of risk were proper for jury to determine.... Minn. 182
- employees injured by machinery and appliances; notes of cases..... Minn. 182-184
- employee stepping into opening in grain elevator in defendant's flouring mill; assumption of risk.... Minn. 197
- employee acting as brakeman in mills, etc., injured in collision and while coupling cars; assumption of risk; fellow-servant..Minn. 199-200
- a servant assumes the ordinary risks of his employment, including negligence of fellow-servants..... Minn. 210, 247, 280
- one employee killed and another injured in collapse of a large cistern wall which was being erected by defendants, as contractors and builders, in a convent building; defendants liable; questions of assumption of risk and contributory negligence passed upon.... Minn. 210
- cave-in accidents; notes of cases... Minn. 220-221
- carpenter injured by fall of scaffold used in work of constructing grain elevator; rule of assumption of risk, where danger is obvious, appliedMinn. 223
- but see action for injury to another employee from same accident where defendant was held liable.. Minn. 224
- miner killed by descending cage in mine; obvious danger.....Minn. 231
- distinction between knowledge by servant of defect and knowledge of danger.....Minn. 247-249

ASSUMPTION OF RISK. — *cont'd.*

- a servant, though a minor, assumes the risk of negligence of fellow-servants as a hazard incident to the service.....Minn. 254
- brakeman on freight car fatally injured by contact with roof or awning projecting from side of elevator over side track upon which cars were being moved; rule of assumption of risk appliedMinn. 280
- railroad employees injured by projecting objects or objects near track; notes of cases...Minn. 280-286
- servant knowing, or by ordinary observation ought to have known, of danger to which he may be exposed, takes the risk of such dangerMinn. 321
- person volunteering to assist servant of another assumes the ordinary risk of the situation, but where he places himself in position of danger and the servant fails to exercise reasonable care to avert the danger, the master is liable.. Minn. 322
- bystander, at request of defendant's head brakeman assisting in switching cars, injured while so doing, assumed the risk; brakeman had no authority to employ menMinn. 325
- railroad employees injured; notes of cases.....Minn. 347-358
- servant assumes usual and ordinary risks incident to service, including negligence of fellow-servants.... Miss. 364
- servant assumes all the ordinary risks incident to his employment, including negligence of fellow-servants and obvious dangers..Mo. 377, 390, 414, 424, 442, 444, 445, 482
- while a servant assumes risk of danger from machinery which is obvious, he does not necessarily assume it where it is reasonable to suppose that with care it can be used with safety; in such case the question is for jury.....Mo. 377
- employee injured by steam hammer, master not liable; assumption of riskMo. 384
- stationary engineer scalded by escape of steam from machinery in defendant's mill; erroneous instructions on assumption of risk; judgment for plaintiff reversed.. Mo. 390

ASSUMPTION OF RISK. — *cont'd.*

- minor employee killed while riding in freight elevator; nonsuit; assumption of risk.....Mo. 404
- employee moving derrick on first floor of building falling into cellar, not entitled to recover, the danger being obvious and he assumed the risk.....Mo. 405
- discussion and application of the ruleMo. 405, 451, 467, 474, 475, 476, 477
- servant assumes all ordinary risks incident to employment but not those resulting from latent defects unknown to him but known to the master.....Mo. 414
- servant assumes all ordinary risks of service but does not assume risk of employment by master of incompetent servants or defective machineryMo. 424
- carpenter falling from staging; danger being obvious and continuous, employee assumed the risk...Mo. 426
- wife of employer directing domestic servant to perform work which caused injury to servant who fell from a ladder while attempting to enter loft; servant not entitled to recover, having assumed the risks of her employment.....Mo. 433
- fellow-servant rule and doctrine of assumption of risk discussed....Mo. 442
- minor employee, a brakeman, while at his brake on top of freight car killed by head coming in contact with bridge; refusal to give defendant's requests to charge as to contributory negligence and assumption of risk.....Mo. 451, 452
- railroad employee has right to rely on company's proper discharge of duty to inspect track, and his continuance in service was not an assumption of risk of defective trackMo. 455
- erroneous instruction on.....Mo. 476
- section hand struck and fatally injured by train; assumption of risk. Mo. 478
- employee of mining company injured by explosion of two blasts which had not exploded at time of firing by other employees; defendant not liable, the fellow-servant and assumption of risk rules being applied and instructions thereon held properMont. 519
- servant assumes ordinary risk of

ASSUMPTION OF RISK. — *cont'd.*

- employment including negligence of fellow-servants.....Mont. 519
- where master furnishes defective machinery and servant uses same carefully believing there is no immediate danger, and it is reasonably probable that same can be operated safely with such care, the servant does not assume the risk, and if injured master is liable....Neb. 530
- brakeman killed while coupling cars his foot catching in unblocked guard rail, he knowing the tracks to be unblocked and dangerous; petition failing to negative presumption, the deceased assumed the risksNeb. 555
- servant assumes the ordinary risks of employmentNeb. 555
- where machinery, etc., is obviously defective and servant continues in service, he assumes the risk of injury, unless induced to continue by master's promise to remedy defectNeb. 555
- brakeman found dead on track; no evidence of defendant's negligence; assumption of risk...Neb. 563
- the rule stated...Neb. 596, 599, 600, 601
- female employee injured while operating laundry mangle; knowledge of defect; assumption of risk....Neb. 599
- employee working on viaduct being constructed by defendant engaged in heating rivets for the work, killed by falling from viaduct; assumption of risk.....Neb. 600
- miner injured by fall of bucket in mine; knowledge of danger; assumption of risk; contributory negligence; nonsuit affirmed.Nev. 604
- servant assumes all the ordinary risks of employment.....Nev. 604
- servant continuing in service after knowledge of defect or danger, assumes the risks.....Nev. 604
- servant assumes ordinary risks incident to employment including negligence of fellow-servants..N. H. 607, 615, 617, 625
- employee injured by explosion while removing an unexploded charge of powder placed in a hole previously drilled by him and others, assumed the risk.....N. H. 625
- servant assumes ordinary risks of employment including negligence of fellow-servants, and obvious dangers.....N. J. 633, 699, 719, 720

ASSUMPTION OF RISK. — *cont'd.*

where railroad bridge properly constructed presents an obvious danger to an employee, the danger is one incident to the employment; but where danger is not obvious, a duty is required of railroad company to give notice to employee..
N. J. 652

brakeman on top of car struck by bridge under which train was passing assumed the risks, having knowledge of the danger...N. J. 652

if injured party was lawfully on premises where he was injured in course of employment he was fellow-servant with those whose negligence caused the injury; if he was a trespasser he assumed the risksN. J. 665

where employee was injured by falling from electric-light pole owing to broken step, the defect being obvious, he assumed the risk and could not recover and verdict for him not sustained.....N. J. 699

the doctrine discussed....N. J. 699-706

servant assumes ordinary risks of employment, but where he is an infant it is master's duty to warn and instruct him as to dangers..
N. J. 714

cases in which the question is involvedN. J. 720

notes of master and servant cases..
N. Mex. 728-729

servant assumes the ordinary risks of employment including negligence of fellow-servants and obvious dangers.....N. Y. 734, 752, 772, 790, 798, 820, 832

railroad employees injured in railroad bridge accidents; notes of casesN. Y. 734-736

brakeman injured in collision between two trains on single track the engineer running plaintiff's train taking the place of a sick employee by direction of defendant's manager or superintendent and running it at full speed which was held to be cause of collision and the act of the engineer was a risk assumed by the brakeman..
N. Y. 752

a railway may vary its time-table set for servants for running trains and is only required to use due care and diligence in giving notice of the change by selecting competent servants to perform

ASSUMPTION OF RISK. — *cont'd.*

that duty, and a servant assumes the risk of negligence of such fellow-servantsN. Y. 772

railroad employees injured; notes of casesN. Y. 801-820

where minor is familiar with use of machinery and is aware of danger in operating it, the fact that he is a minor does not alter general rule that servant assumes all ordinary risks of employment, including those from obvious dangers....
N. Y. 842

minor employees injured by machinery, etc.; notes and abstracts of cases.....N. Y. 842-846

AWNING.

brakeman on freight car fatally injured by contact with roof or awning projecting from side of elevator over side track upon which cars were being moved; rule of assumption of risk appliedMinn. 280

BACKING ENGINE.

boy, 12 years of age, engaged with his father as car cleaner, directed to go to tool house by his father, while crawling under cars of defendant on track used in joint occupancy with plaintiff's company, injured by sudden backing of engine without signal or warning; defendant liable, the boy being rightfully on track, and question of his negligence was for jury..
Neb. 544

employee moving damaged cars to shops crushed between cars by backing train which yardmaster negligently signaled; act of fellow-servantN. Y. 798

BAGGAGEMAN.

killed by collapse of bridge over which train was passing, the fall being occasioned by decay in its timbers; railroad company not liable where it appeared that bridge was properly constructed and the defect was not apparent from inspection and it was not shown that it had notice of defectN. Y. 734

railroad employees injured; notes of cases.....N. Y. 801-820

BENEFIT FUND. See RELIEF FUND.

acceptance of money from benefit fund of mining company; question of validity of release signed by wife of injured employee; ignorance as to contents of signed paperMich. 80

BLASTING.

lineman repairing telegraph line, after blasting, injured by rock falling upon him by negligence of quarrymen engaged in blasting, all the parties being in the employ of same railroad company; fellow-servant rule applied.....Minn. 267

servant of third party engaged, under direction of servant of defendant, in blasting rock, injured while withdrawing unexploded powder charge; defendant not liableMinn. 344

employee of mining company injured by explosion of two blasts which had not exploded at time of firing by other employees; defendant not liable, the fellow-servant and assumption of risk rules being applied and instructions thereon held proper.....Mont. 519

employee injured by explosion while removing an unexploded charge of powder placed in a hole previously drilled by him and others, assumed the risk.....N. H. 625

discussion of the fellow-servant rule and cases distinguishing the doctrineN. J. 683-687

laborer in quarry thrown from rock by blasting operations, owing to defective machinery, and killed; nonsuit reversed as conflicting evidence as to negligence was for juryN. J. 719

BOARDING CAR.

person not employee injured while attempting to board moving train in order to signal train at request of railroad employee; voluntary assumption of risk; railroad company not liable.....Mich. 146

it is negligence for stranger or passenger to attempt to board a moving train.....Mich. 146

railroad laborer attempting to board moving gravel train, by direction of foreman, injured by falling as train was started without signal; railroad company liable....Minn. 259

brakeman injured trying to board

BOARDING CAR — continued.

"kicked" car; railroad company not liable, the negligence, if any, being that of a fellow-servant.. Neb. 568

BOILER.

employee of brewery scalded and fatally injured by bursting of ten-inch piping to boiler which was being put in a brewery by defendants who had the contract for the same; judgment for defendants reversed, as the questions of independent contractor, fellow-servant and scope of employment were for jury to determine.....Minn. 234

escape of steam from safety valve of boiler and employee scalded and falling from place where his duties did not call him; contributory negligence.....Minn. 236

deck hand injured by explosion of boiler on steamboat; owners of boat liable.....Minn. 237

explosion on steamboat; notes of casesMinn. 237-238

carpenter working in boiler room fatally injured by explosion of steam boiler; master liable..... Mont. 525

fireman injured by explosion of locomotive boiler; railroad company liableN. Y. 730

BOOKS.

books of science or art, when shown to be reputable or standard works, are competent evidence.....Neb. 530

BRAKEMAN.

crushed between two cars while setting a brake on the way car of a freight train, another car having left the track owing to alleged defective track; reversible error in charge as to defendant's duty in respect to inspection and repairMich. 98

taking a position exposing himself to greater danger he was not, as matter of law, guilty of contributory negligence, where it appeared that the position taken enabled him to render more effective service in the case of a car having left the track.....Mich. 98

brakeman and a car inspector fellow servants.....Mich. 101

railroad employees injured from various causes; notes of cases..... Mich. 101-104, 111-115

BRAKEMAN — continued.

injured while attempting to climb moving engine, due to defective step on engine; railroad not liable where the defect was caused by neglect of engineer, he being a fellow-servant of brakeman... Mich. 120

killed by being thrown from logging train by reason of breaking of brake-chain; railroad liable for negligence of its car inspector in failing to inspect cars before starting on trip..... Mich. 121

on ladder of car coming in contact with railroad bridge, thrown to track, run over and killed; contributory negligence and assumption of risk..... Mich. 126

railroad employees injured; cases involving the question of assumption of risk..... Mich. 127-130

passenger brakeman engaged in yard duties outside scope of his employment struck by projecting lumber from defectively-loaded car he was attempting to couple to box car; railroad company liable Mich. 139

railroad employees injured; notes of cases Mich. 154-173

employees acting as brakeman in mills, etc., injured in collision and while coupling cars; assumption of risk; fellow-servant. Minn. 199-200

on freight car fatally injured by contact with roof or awning projecting from side of elevator over side track upon which cars were being moved; rule of assumption of risk applied..... Minn. 280

defective car received by one railroad from another and brakeman injured while coupling cars; railroad company liable..... Minn. 288

brakeman injured coupling cars; action under the Iowa statute; right to sue in another State... Minn. 292

bystander, at request of defendant's head brakeman, assisting in switching cars injured while so doing, assumed the risk; brakeman had no authority to employ men Minn. 325

railroad employees injured; notes of cases Minn. 347-358

brakeman killed while coupling cars; question of contributory negligence should have been submitted to jury Miss. 372

caught between cars while coupling cars owing to alleged defective

BRAKEMAN — continued.

coupling apparatus; railroad company liable Mo. 442

car precipitated into river while running over bridge or trestle, and brakeman on car injured; fellow-servant rule applied..... Mo. 444

minor employee, a brakeman, while at his brake on top of freight car killed by head coming in contact with bridge; refusal to give defendant's requests to charge as to contributory negligence and assumption of risk..... Mo. 451, 452

injured by defective hand-hold on foreign car; erroneous instruction on question of release.. Mo. 460

on car of gravel train thrown from car and killed by train colliding with cow on track causing several cars to be derailed; the Damage Act construed Mo. 461

making running switch falling from car owing to defective hand hold and run over; railroad liable for sending out defective car.... Mo. 467

railroad employees injured; notes of cases..... Mo. 491-513

in switch gang fellow-servant with engineer of switch engine.... Mo. 517

head brakeman on freight train injured by switch engine running at high speed crashing into train, train running without a headlight and no flagman being sent ahead to see if track was clear; question of constitutional law..... Mont. 527

railroad employees injured; notes of cases Mont. 528-530

killed while coupling cars his foot catching in unblocked guard rail, he knowing the tracks to be unblocked and dangerous; petition failing to negative presumption that deceased assumed risks.. Neb. 555

killed while coupling cars owing to failure of railroad company to block its switches and frogs; defendant not liable..... Neb. 562

found dead on track; no evidence of defendant's negligence; assumption of risk..... Neb. 563

coupling cars caught between projecting timber and box car and killed; nominal damages, one dollar only Neb. 567

injured trying to board "kicked" car; railroad company not liable, the negligence, if any, being that of a fellow-servant..... Neb. 568

injured by alleged defective coupler; allegation not sustained where it

BRAKEMAN — continued.

- is clearly shown that injury was caused by reckless manner in which the coupler was pushed against another car by another employeeNeb. 569
- is fellow-servant of another brakeman employed upon same train.. Neb. 569
- action maintainable against railroad corporation by one of its brakemen injured by reason of company permitting track to be blocked with snow and ice and a car to be out of repair, the plaintiff being in no fault.....N. H. 607
- fatally injured by contact with overhead bridge; railroad company liableN. H. 617
- railroad employees injured; notes of casesN. H. 623
- on heavily-loaded train killed by collapse of railroad bridge over which train was passing; railroad company liable.....N. J. 633
- on top of car coming in contact with iron bar of railroad bridge; questions of notice of danger by master or knowledge thereof by servant properly for jury; railroad company liableN. J. 652
- on top of cars struck by bridge under which train was passing assumed the risks, having knowledge of the danger.....N. J. 652
- on engine injured by engine running into rear car of part of train ahead which became detached; non-suit affirmed; contributory negligence; fellow-servant...N. J. 659
- railroad employees injured in railroad bridge accidents; notes of casesN. Y. 734-736
- injured in collision between two trains on single track the engineer running plaintiff's train taking the place of a sick employee by direction of defendant's manager or superintendent and running it at full speed which was held to be cause of collision and the act of the engineer was a risk assumed by the brakeman.....N. Y. 752
- thrown from freight car owing to defective brake rod; duty of railroad company to properly inspect carsN. Y. 787
- engineer killed in collision caused by improper signals by incompetent brakeman under direction of conductor; railroad company liable

BRAKEMAN — continued.

- for act of incompetent employee... N. Y. 797
- railroad employees injured; notes of casesN. Y. 801-820
- BRIDGE.** See OVERHEAD BRIDGE; RAILROAD BRIDGE; BRIDGE LABORERS.
- brakeman on ladder of car coming in contact with railroad bridge, thrown to track, run over and killed; contributory negligence and assumption of risk.....Mich. 126
- bridge laborer falling into river from bridge and drowned; fellow-servant rule applied and non-suit sustainedMo. 426
- bridge laborer falling great distance owing to collapse of span of railroad bridge which was being constructed; master liableMo. 428
- car precipitated into river while running over bridge or trestle, and brakeman on car injured; fellow-servant rule applied.....Mo. 444
- minor employee, a brakeman, while at his brake on top of freight car killed by head coming in contact with bridge; refusal to give defendant's requests to charge as to contributory negligence and assumption of risk.....Mo. 451, 452
- fall of bridge caused by derrick on caboose car of wrecking train catching in bridge timbers and employee killed; erroneous instructionsMo. 476
- brakeman fatally injured by contact with overhead bridge; railroad company liableN. H. 617
- brakeman on heavily-loaded train killed by collapse of railroad bridge over which train was passing; railroad company liable.....N. J. 633
- brakeman on top of car coming in contact with iron bar of railroad bridge; questions of notice of danger and knowledge by servant properly for jury; railroad company liableN. J. 652
- duty of railroad company in construction of bridges falls within duty of master to furnish reasonably safe place to work and materials for servant to work with.. N. J. 652
- where railroad bridge properly constructed presents an obvious dan-

BRIDGE — continued.

- ger to an employee, the danger is one incident to the employment; but where the danger is not obvious a duty is required of railroad company to give notice to employee N. J. 652
- brakeman on top of car struck by bridge under which train was passing assumed the risks, having knowledge of the danger.... N. J. 652
- workman in employ of rolling mill engaged in erecting a railroad bridge, injured by train negligently run by defendant's engineer over the bridge; nonsuit reversed as the question of who the plaintiff's employer was should have been left to jury..... N. J. 658
- subsequent decision affirmed judgment for plaintiff (see preceding paragraph) N. J. 659
- baggage man on defendant's train killed by collapse of bridge over which train was passing, the fall being occasioned by decay in its timbers; railroad company not liable where it appeared that bridge was properly constructed and the defect was not apparent from inspection, and it was not shown that it had notice of defect.. N. Y. 734
- railroad company not liable for injury caused by fall of railroad bridge, due to a latent defect not discoverable by inspection, unless it had notice, which must be shown by the injured party.. N. Y. 734
- railroad employees injured in railroad bridge accidents; notes of cases N. Y. 734-736

BRIDGE IN MINE.

- employee while crossing a "bridge" over an excavation in defendant's copper mine, precipitated into the excavation a distance of about 100 feet, by the breaking of a plank of the bridge; master not liable, the accident being due to negligence of fellow-servant..... Mich. 58

BRIDGE LABORER.

- laborer employed in building a bridge, an engineer operating hoisting machinery for its construction, working under same foreman, fellow-servants Mo. 425

BUILDER.

- builder qualified as expert on construction and strength of buildings Mo. 416

BURLINGTON RELIEF DEPARTMENT.

- validity of railroad relief fund association, the question of acceptance of benefits by an injured employee operating as a release, and the powers of a railroad corporation under its charter to organize such relief fund, discussed..... Neb. 581

BURDEN OF PROOF. See PLEADING AND PRACTICE.

- where servant is injured by unusual risk due to master's negligence, the burden is upon latter to show servant's knowledge of the extra hazards Mich. 1
- servant must show some fault on part of master in order to recover for injury received in the service. Mich. 58
- burden upon servant to show lawful reason for refusal to obey master's orders Mich. 87
- negligence cannot be presumed, it must be proved; it may be inferred from facts proved, but never from conjecture..... Mich. 122
- fireman injured by engine running into snow bank, owing to alleged defect in locomotive; failure of evidence to support plaintiff's contention Minn. 308
- negligence cannot be presumed, it must be proved... Minn. 308; Mo. 483
- not necessary to establish with absolute certainty connection of cause and effect between negligent act and injury; it is sufficient if evidence furnishes reasonable basis for satisfying jury that negligent act was proximate cause of injury, but this conclusion must not rest on mere conjecture.... Minn. 308

CABLE CAR.

- gripman of cable car struck by grip car; street railway company not liable Mo. 513

CAR INSPECTOR.

- question of fellow-servant in relation to inspection of cars, track, etc., discussed..... Mich. 98; 101-104
- brakeman on freight train and a car inspector fellow-servants... Mich. 101

CAR INSPECTOR — *continued*.

brakeman killed by being thrown from logging train by reason of breaking of brake-chain; railroad liable for negligence of its car inspector in failing to inspect cars before starting on trip.....Mich. 121
 railroad employees injured; notes of casesMich. 154-173
 railroad employees injured; notes of casesN. Y. 801-820

CARPENTER.

employee in defendant's ship building works injured by the breaking of a part of scaffold built by carpenters using the same; fellow-servant of carpenters.....Mich. 75
 injured by fall of scaffold used in work of constructing grain elevator; rule of assumption of risk, where danger is obvious, applied. Minn. 223
 but see action for injury to another employee from same accident where defendant was held liable.. Minn. 224
 master mechanic and wreck master not fellow-servant with a bridge carpenterMo. 476
 carpenter working in elevator shaft struck by elevator operated by boy; nonsuit reversed, the question of contributory negligence being for the jury.....Mo. 516
 carpenter working in elevator shaft and boy operating elevator, fellow-servantsMo. 516
 working in defendant's boiler-room, fatally injured by explosion of steam boiler; master liable..Mont. 525
 falling from floor of building and injured owing to alleged incompetency of fellow-servant; unskilful treatment by surgeon also alleged; evidence failed to sustain complaintMont. 526

CAR REPAIRER.

railroad employees injured; notes of casesMich. 154-173
 railroad employees injured; notes of casesMinn. 347-358
 railroad employees injured; notes of casesMo. 491-513
 car repairer killed; erroneous instruction failing to distinguish between acts of vice-principal and fellow-servantNeb. 570
 railroad employees injured; notes of casesN. Y. 801-820

CARRIER OF PASSENGER.

railway company owes duty to public to keep its tracks, etc., in suitable and safe condition, but an employee has no right of action against the company on this obligationMich. 117
 liability of receiver of railroad for death of passenger killed by derailment of train caused by imperfect switchN. J. 667

CAR SHOPS.

employee operating emery wheel in railroad car shops, injured by breaking of wheel and some of the pieces flying into his face, assumed the risks, where it appeared that he had worked for four years as a machinist and had knowledge of defect.....Mich. 131
 minor employee, nineteen years old, working in railroad shop, injured by fingers being caught in rollers of machine; knowledge of danger; master not liable.....Minn. 251
 minor employee, seventeen years of age, struck in the eye by flying fragment from tool struck by hammer by another employee; master not liable, the fellow-servant rule being applied.....Minn. 254
 railroad employees injured; notes of casesMinn. 347-358
 railroad employees injured; notes of casesN. Y. 801-820

CATTLE GUARD.

statute relating to cattle guards and fencesMinn. 286

CAUGHT BETWEEN CARS.

brakeman crushed between two cars while setting a brake on the way car of a freight train, another car having left the track owing to alleged defective track; reversible error in charge as to defendant's duty in respect to inspection and repairMich. 98
 railroad employees injured; notes of casesMich. 154-173
 railroad employees injured; notes of casesMinn. 347-358
 brakeman caught between cars while coupling cars, owing to alleged defective coupling apparatus; railroad company liable.....Mo. 442
 railroad employees injured; notes of casesMo. 491-513

CAUGHT BETWEEN CARS — *cont'd.*

action maintainable against railroad corporation by one of its brakemen, injured by reason of company permitting track to be blocked with snow and ice, and a car to be out of repair, the plaintiff being in no fault.....N. H. 607

employee moving damaged cars to shops crushed between cars by backing train which yardmaster negligently signaled; act of fellow-servantN. Y. 798

employee of another company injured in grain elevator at defendant's pier by being caught between cars which were being loaded; erroneous instruction on rule of law applicable to licensees..N. Y. 800

railroad employees injured; notes of casesN. Y. 801-820

CAVE-IN.

Mining accidents; notes of cases.. Mich. 64-66

laborer engaged in digging a ditch under direction of foreman, injured by cave-in; defendant liable. Minn. 220

notes of cases.....Minn. 220, 221

cases under the Coal Mines Act of 1881Mo. 397-399

employees injured by cave-in accidentsMo. 431, 432

cave-in of tunnel and fall of roof in mine and employee injured; master liableMont. 524

employee killed by cave-in of tunnel; erroneous instruction on defendant's negligence in exposing employee to extra hazards...Neb. 596

railroad employee, eighteen years of age, suffocated by cave-in of earth while he was cleaning out water pipes on defendant's premises; non-suit reversed, as question of defendant's negligence in furnishing reasonably safe place to work was for jury.....N. Y. 795

CHARTER.

validity of railroad relief fund association, the question of acceptance of benefits by an injured employee operating as a release, and the powers of a railroad corporation under its charter to organize such fund, discussedNeb. 581

CLEANING MACHINERY.

where defendant's superintendent turned on machinery while plaintiff was attempting to oil planer machine which he was running in factory and plaintiff was injured by gearing, question of contributory negligence properly submitted to jury.....Mich. 10

notes of cases.....Mich. 10-12

clothing of employee caught by set-screw while attempting to oil machinery; contributory negligence.. Minn. 181

CLOTHING CAUGHT.

workman carrying slabs from gang-plank in sawmill slipping on wet bark and falling against cog-wheels that caught his trousers and injured him; contributory negligence for jury where plaintiff had not been warned nor knew that wheels were uncovered. Mich. 1

minor employee, sixteen years old, removing a slab from gearing in sawmill, injured by trousers catching in uncovered cogs, his leg being crushed; master liable..... Mich. 4

notes of cases.....Mich. 7-8

employee in sawmill injured by clothing catching in gearing of machinery, the same not being loxed or covered; defendant liableMinn. 173

clothing of employee caught by set-screw while attempting to oil machinery; contributory negligence.. Minn. 181

clothing of minor employee, a boy seventeen years of age, caught by set-screw of revolving shaft and employee injured; master liable for failure to instruct employee as to danger.....Mo. 383

COAL MINE.

miner injured by fall of rock in coal mine, the superintendent having notice of defect but not taking precautions to protect the workmen from danger; defendant liable for negligence of superintendentN. Y. 832

COAL MINES ACT.

the Coal Mines Act of 1881..... Mo. 397, 399, 400

cases under the Coal Mines Act of 1881Mo. 397-399

CODE. See STATUTE.

COGS. See MACHINERY.

COLLISION.

brakeman crushed between two cars while setting a brake on the way-car of a freight train, another car having left the track owing to alleged defective track; reversible error in charge as to defendant's duty in respect to inspection and repair Mich. 98

fireman fatally injured in collision; erroneous admission of evidence as to pecuniary means of deceased at time of death..... Mich. 119

engine colliding with flat car and thrown from track and engineer injured; judgment for plaintiff reversed for erroneous instruction as to duty of railroad company in respect to side track..... Mich. 122

brakeman on ladder of car coming in contact with railroad bridge, thrown to track, run over and killed, contributory negligence and assumption of risk..... Mich. 126

fireman killed in collision; erroneous admission of evidence as to pecuniary means of deceased at time of death..... Mich. 134

section hand injured by freight car pushed against another car while he was attempting to climb upon car by order of section boss; fellow-servant rule applied.... Mich. 136

railroad employees injured; notes of cases Mich. 154-173

employees acting as brakemen in mills, etc., injured in collision and while coupling cars; assumption of risk; fellow-servant. Minn. 199, 200

brakeman on freight car fatally injured by contact with roof or awning projecting from side of elevator over side track upon which cars were being moved; rule of assumption of risk applied. Minn. 280

railroad employees injured by projecting objects or objects near track; notes of cases.. Minn. 280-286

collision of passenger train with freight cars on main track, and engineer seriously injured, the freight cars being run on the track by switching crew contrary to rules; railroad company liable.... Minn. 300

railroad employees injured; notes of cases Minn. 347-358

COLLISION — *continued.*

fireman killed in collision; action brought by widow and children of deceased not in conformity with statute giving right of action to the "legal or personal representative." Miss. 366

but this ruling is subsequently distinguished Miss. 372

brakeman on car of gravel train thrown from car and killed by train colliding with cow on track causing several cars to be derailed; the Damage Act construed Mo. 461

engineer killed in collision between trains; the Damage Act construed Mo. 464

railroad employees injured; notes of cases Mo. 491-513

head brakeman on freight train injured by switch engine running at high speed crashing into train, train running without a headlight and no flagman being sent ahead to see if track was clear; question of constitutional law..... Mont. 527

railroad employees injured; notes of cases Mont. 528-530

brakeman injured by alleged defective coupler; allegation not sustained where it is clearly shown that injury was caused by reckless manner in which the coupler was pushed against another car by another employee Neb. 569

section foreman clearing snow from railroad cut killed by rapidly moving train while trying to remove hand car from track to avoid collision; erroneous instructions as to signals Neb. 571

several workmen constructing track injured in collision of construction train with cattle on track; erroneous instruction as to negligence in running train at full speed... Neb. 578

railroad employees injured; notes of cases N. H. 623

brakeman on engine injured by engine running into rear car of part of train ahead which became detached; nonsuit affirmed; contributory negligence; fellow-servant N. J. 659

brakeman injured in collision between two trains on single track, the engineer running plaintiff's train taking the place of a sick employee by direction of defendant's manager or superintendent and running it at full speed,

COLLISION — *continued.*

- which was held to be cause of collision, and the act of the engineer was a risk assumed by the brakeman N. Y. 752
- fireman on freight train killed by a number of cars of another freight train which had become detached colliding with his train; the forward train was insufficiently equipped with brakemen and was sent out by defendant's agent, a head conductor, whose duty it was to make up trains, etc.; railroad company liable for the negligent act of its agent..... N. Y. 765
- negligence of conductor and telegraph operator in transmission of orders from train dispatcher to engineer, resulting in collision of trains and killing of fireman; receiver of railroad not liable, the negligence causing the injury being that of fellow-servants.. N. Y. 772
- fireman on freight train injured in collision with another train, due to alleged negligence of train dispatcher in giving orders; railroad company liable..... N. Y. 783
- fireman running "wild" train by order of defendant's superintendent injured in collision; inadequacy of rules for prevention of accidents; railroad company liable. N. Y. 788
- engineer killed in collision caused by improper signals by incompetent brakeman under direction of conductor; railroad company liable for act of incompetent employee.. N. Y. 797
- railroad employees injured; notes of cases N. Y. 801-820

COMMON LABORER.

- not error for court to refuse to define term "common laborer," the meaning being obvious to jury.. Mo. 421

COMMON LAW.

- engineer injured by derailment of train; common-law rule of fellow-servant applied Miss. 358
- railroad employees injured; limitation of statute; common-law rule; notes of cases..... Miss. 363, 364
- the common-law rule of fellow-servant defined Miss. 365
- the statute, article 43, Code 1857, construed in regard to railroad employees Miss. 365

COMMON LAW — *continued.*

- brakeman on car of gravel train thrown from car and killed by train colliding with cow on track, causing several cars to be derailed; the Damage Act construed. Mo. 461
- action by administrator in Missouri, under the Kansas statute, for death of railroad employee in defendant's employ, killed in a collision in Kansas..... Mo. 486
- statutory modification of the common-law rule as to negligence of fellow-servant and superior servant Mont. 527
- notes of master and servant cases.. N. Mex. 728, 729
- COMPETENCY AND INCOMPETENCY OF SERVANT.**
- minor employee injured by sparks from molten iron, caused by alleged incompetency of assistant; master not liable..... Mich. 29
- duty of master to provide competent servants, and liability for retaining same after notice of unfitness Mich. 58
- master cannot relieve himself from liability for employing incompetent servants by delegating that duty to another; if the latter is negligent in that respect the master is liable..... Mich. 58
- liability of railroad company for acts of incompetent agent, where it has had notice of the same..... Miss. 365
- servant assumes all ordinary risks of service, but does not assume risk of employment by master of incompetent servants or defective machinery Mo. 424
- duty of master to provide reasonably safe place and machinery for servant, and competent co-servant Mo. 424
- master not liable for injuries to servant caused by negligence of fellow-servant, unless latter was incompetent, and the fact was known by master at time of employment Mo. 428
- servant injured by negligence of co-servant cannot recover unless latter incompetent and master knew, or, by ordinary care, ought to have known, of such incompetency at time of employment.... Mo. 442

COMPETENCY AND INCOMPETENCY OF SERVANT—*cont'd.*

- where complaint only charged negligence and carelessness of employees, proper to charge there was no claim of their incompetencyMont. 519
- carpenter falling from floor of building and injured, owing to alleged incompetency of fellow-servant; unskilful treatment by surgeon also alleged; evidence failed to sustain complaint.....Mont. 526
- duty of master to furnish reasonably safe machinery, etc.; also to exercise care in selection of competent servants.....N. J. 665
- master not liable to servant for negligence of fellow-servant, unless negligent in selection of negligent servant or retaining him after notice of incompetency.....N. J. 680
- duty of railroad company to provide reasonably safe roadbed and equipments for use of employees and to select competent subordinates to supervise, inspect and repair, but the company is not bound to insure absolute safety of employeesN. Y. 734
- railroad employee injured by fall of scaffold which was defectively constructed by incompetent employees, under direction of foreman who was drunk at the time of the accident, the intemperate habits of the foreman being known by the agent who employed him; railroad company chargeable with notice of the habits of the foreman, and liable for act of agent in retaining him in employ after knowledge of said habit....N. Y. 747
- whether plaintiff was negligent remaining in employment after knowledge of a foreman's intemperate habits, was a question for the jury.....N. Y. 747
- duty of master to provide reasonably safe machinery, etc., for use of servant, and to select competent fellow-servants....N. Y. 747, 765, 772, 790, 797, 820, 832
- where general agent is clothed with duty of master in respect to machinery, etc., and he fails to properly discharge same, the master is liable for such neglect..N. Y. 747, 765
- where servant knows of defective machinery, etc., or of incompetency of fellow-servant, and he continues in service without prom-

COMPETENCY AND INCOMPETENCY OF SERVANT—*cont'd.*

- ise of master to remedy defect, such continuance in service may be contributory negligence, but where inducement to remain is made by master's promise to remedy defect the question of negligence is for jury.....N. Y. 747
- duty of railroad company to supply safe machinery, sufficient help, etc., for equipment of train..N. Y. 765
- a railway may vary its time table set for servants for running trains and is only required to use due care and diligence in giving notice of the change by selecting competent servants to perform that duty, and a servant assumes the risk of negligence of such fellow-servants. N. Y. 772
- engineer killed in collision caused by improper signals by incompetent brakeman under direction of conductor; railroad company liable for act of incompetent employeeN. Y. 797

COMPLAINT. See PLEADING AND PRACTICE.

- person injured while assisting in moving a building; insufficient complaintMinn. 239
- petition failing to aver defendants had any authority or control over elevator which injured plaintiff, insufficient, and demurrer sustainedMo. 403
- employee falling from platform, defective construction and absence of guard-rail being alleged, nonsuit reversed, the complaint being sufficient to show cause of action. Mo. 411
- contributory negligence is matter of defense, and plaintiff need not allege he was without fault....Mo. 411
- employee falling from scaffold; insufficiency of complaint.....Mo. 426
- where complaint only charged negligence and carelessness of employees, proper to charge there was no claim of incompetency of employeesMont. 519
- carpenter falling from floor of building and injured owing to alleged incompetency of fellow-servant; unskilful treatment by surgeon also alleged; evidence failed to sustain complaintMont. 526

COMPROMISE VERDICT.

where instructions given for defendant force the jury to a compromise verdict for plaintiff (one dollar damages) which is practically a verdict for defendant, it should be set aside.....Mo. 402

CONCURRING NEGLIGENCE.

where servant in obeying orders incurs risk of machinery which may be safely used by extraordinary caution and skill, he is not guilty of concurring negligence...Mich. 87

CONDUCTOR.

railroad employees injured; notes of casesMich. 154-173

railroad employee fatally injured while assisting in coupling cars by conductor's orders; railroad company liable; question of scope of authorityMinn. 322

street-railway employees injured by various causes; notes of cases.... Minn. 326-329

railroad employees injured; notes of casesMinn. 347-358

railroad employees injured; notes of casesMo. 491-513

where conductor on running board of street car was killed by coming in contact with pole, the question of contributory negligence was for jury, and non-suit reversedN. J. 672

fireman on freight train killed by a number of cars of another freight train which had become detached colliding with his train; the forward train was insufficiently equipped with brakemen and was sent out by defendant's agent, a head conductor, whose duty it was to make up trains, etc., railroad company liable for the negligent act of its agent.....N. Y. 765

negligence of conductor and telegraph operator in transmission of orders from train dispatcher to engineer, resulting in collision of trains and killing of fireman; receiver of railroad not liable, the negligence causing the injury being that of fellow-servants..N. Y. 772

fireman on locomotive, conductor of the train and a telegraph operator, communicating orders as to trains, are fellow-servants in same common employment and for an in-

CONTRACTOR — continued.

jury to one by negligence of another, railroad company is not liableN. Y. 772

CONJECTURE. See PRESUMPTION.

not necessary to establish with absolute certainty, connection of cause and effect between negligent act and injury; it is sufficient if evidence furnishes reasonable basis for satisfying jury that negligent act was proximate cause of injury, but this conclusion must not rest on mere conjecture.....Minn. 308

CONSIDERATION.

contract releasing railroad company from damages for its negligence void for want of consideration... N. Y. 801

CONSTITUTIONAL LAW.

the Iowa statute relating to right of action for injuries sustained by railroad employees only is not in conflict with the Fourteenth Amendment to the Constitution of the United States.....Minn. 292

question of constitutional law under the Railroad Corporation Act.... Mont. 527

CONTRACT.

railroad company cannot contract with its employees to release itself from liability for its own negligenceMich. 98

receipt of \$25 from railroad company and signing of formal release by injured party who was quite ignorant and of weak intellect; invalidity of release...Minn. 314

voluntary payment of money to injured employee by defendant merely as "wages" during disability, does not constitute a satisfaction of cause of action..Minn. 319

contract exempting master from liability for negligence in performance of his duties towards his servants is illegal, being contrary to public policyMo. 379

question of written instrument purporting to be a release and allegation of fraud in obtaining same.. Mo. 379, 380

railroad employee who, having opportunity and ability, neglects to read all of receipt releasing company from all claims for injury,

CONTRACT — continued.

and signs same, will not afterwards be heard to say that he did not read it.....Mo. 460
 validity of railroad relief fund association, the question of acceptance of benefits by an injured employee operating as a release, and the powers of a railroad corporation under its charter to organize such relief fund, discussed.....Neb. 581
 contract releasing railroad company from damages for its negligence, void for want of consideration... N. Y. 801

CONTRACTOR. See **INDEPENDENT CONTRACTOR.**

CONTRIBUTORY NEGLIGENCE.

servant voluntarily remaining in employment after knowledge of defect, and without promise of master to remedy same, cannot recover for injury sustained thereby. Mich. 1
 when question for jury....Mich. 1, 31
 presumes a careless act or omission. Mich. 1
 age, intelligence and experience of injured person help determine... Mich. 1-4
 workman carrying slabs from gang-plank in sawmill, slipping on wet bark and falling against cog-wheels that caught his trousers and injured him; contributory negligence for jury, where plaintiff had not been warned nor knew that wheels were uncovered. Mich. 1
 where defendant's superintendent turned on machinery while plaintiff was attempting to oil planer machine which he was running in factory, and plaintiff was injured by gearing, question of contributory negligence properly submitted to jury.....Mich. 10
 where testimony is conflicting same is for jury.....Mich. 31
 in absence of evidence showing notice given by defendant's agent of latent danger, or servant's knowledge thereof, it cannot be said that servant assumed all the risks and perils ordinary and extraordinary, of employment, or was guilty of contributory negligenceMich. 42
 where brakeman took a position exposing himself to greater danger

CONTRIBUTORY NEGLIGENCE — continued.

he was not, as matter of law, guilty of contributory negligence, where it appeared that the position taken enabled him to render more effective service in the case of a car having left the track....Mich. 98
 brakeman on ladder of car coming in contact with railroad bridge, thrown to track, run over and killed; contributory negligence and assumption of risk....Mich. 126
 to defeat right of action must be that of party injured.....Mich. 134
 where person not employee was injured in attempt to board a moving train in order to carry out request of watchman to signal the train to avoid danger, and it did not appear that watchman had authority to make the request, nor did he ask the person to board the moving train, the injured person assumed the risk and was guilty of gross negligence.....Mich. 146
 it is negligence for stranger or passenger to attempt to board a moving trainMich. 146
 railroad employees injured; notes of casesMich. 154-173
 although it may be negligence for master to leave machinery uncovered, yet the servant is not necessarily negligent in working near it, knowing of its condition; the measure of the duty of each not being the same.....Minn. 173
 the fact that a servant knows of the defective condition of machinery, etc., with which he works, does not necessarily charge him with contributory negligence or assumption of risk; he must also understand the risks to which such defects expose him.....Minn. 173
 clothing of employee caught by set-screw while attempting to oil machineryMinn. 181
 accidents from uncovered or unguarded machinery; notes of casesMinn. 175-179
 where employee complained to master of defect in machine which the latter promised to remedy, the questions of contributory negligence and assumption of risk were proper for jury to determineMinn. 182
 employees injured by machinery and appliances; notes of cases... Minn. 182-184

CONTRIBUTORY NEGLIGENCE —
continued.

a youth between fifteen and sixteen years of age is required to exercise that amount of discretion which persons of his age and experience should exercise, and no more, and whether he is negligent is question for jury...Minn. 188

one employee killed and another injured in collapse of a large cistern wall which was being erected by defendants, as contractors and builders, in a convent building; defendants liable; questions of assumption of risk and contributory negligence passed upon....Minn. 210

employee struck by falling beam and tackle on vessel, after being warned of danger.....Minn. 230

escape of steam from safety valve of boiler and employee scalded and falling from place where his duties did not call him....Minn. 236

engineer injured by train running around a curve at excessive speed and into a washout, after a very heavy storm, the danger of which he knew, guilty of contributory negligenceMinn. 302

brakeman killed while coupling cars; question should have been submitted to jury.....Miss. 372

is matter of defense and plaintiff need not allege he was without faultMo. 411

employee injured by fall of cross-beam, the danger of which was known to him.....Mo. 415

night watchman in defendant's employ killed by falling through hatchway in factory.....Mo. 421

lineman killed by fall of telegraph pole on premises of elevator company; obvious danger.....Mo. 433

minor employee, a brakeman, while at his brake on top of freight car killed by head coming in contact with bridge; refusal to give defendant's requests to charge as to contributory negligence and assumption of risk.....Mo. 451, 452

servant cannot wholly ignore a known defect in appliance, but must exercise due care in its use, and question whether he is negligent in its use is for jury....Mo. 467

where there is conflicting evidence the question of negligence should be left to the jury.....Mo. 476

carpenter working in elevator shaft struck by elevator operated by

CONTRIBUTORY NEGLIGENCE —
continued.

boy; nonsuit reversed, the question of contributory negligence being for the jury.....Mo. 516

boy, twelve years of age, engaged with his father as car cleaner, directed to go to tool house by his father, while crawling under cars of defendant on track used in joint occupancy with plaintiff's company, injured by sudden backing of engine, without signal or warning; defendant liable, the boy being rightfully on track, and question of his negligence was for juryNeb. 544

miner injured by fall of bucket in mine; knowledge of danger; assumption of risk; contributory negligence; nonsuit affirmed.....Nev. 604

to defeat right of action, must be that of the party injured....N. J. 643

brakeman on engine injured by engine running into rear car of part of train ahead which became detached; nonsuit affirmed; contributory negligence; fellow-servantN. J. 659

where conductor on running board of street car was killed by coming in contact with pole, the question of contributory negligence was for jury, and nonsuit reversed...N. J. 672

employee injured while unloading cargo of ice from vessel; defective ladder; contributory negligence for jury; nonsuit reversed..N. J. 674

laborer in quarry thrown from rock by blasting operations, owing to defective machinery, and killed; nonsuit reversed as conflicting evidence as to negligence was for juryN. J. 719

railroad employees injured in railroad bridge accidents; notes of casesN. Y. 734-736

whether plaintiff was negligent in remaining in employment after knowledge of a foreman's intemperate habits was a question for the juryN. Y. 747

where servant knows of defective machinery, etc., or of incompetency of fellow-servant, and he continues in service without promise of master to remedy defect, such continuance in service may be contributory negligence, but where inducement to remain is

CONTRIBUTORY NEGLIGENCE —
continued.

- made by master's promise to remedy defect the question of negligence is for jury.....N. Y. 747
laborer in grain elevator while working in bin, under direction of defendant's superintendent, killed by fall of grain; nonsuit reversed; questions of negligence for jury.. N. Y. 790
railroad employees injured; notes of casesN. Y. 801-820

CORPORATION.

- must act through agents, and it is immaterial whether duly authorized agent is or is not a stockholderMich. 31
superintendent of corporation with full authority to carry on business thereof, not a fellow-servant of the laborers, but a vice-principal being an agent of the corporation. Mo. 388
foreman for mining company with full control of materials, etc., and employees, is a vice-principal of the corporation, and for injuries resulting from his negligence, the corporation is liable.....Mont. 524
person clothed by corporation with control and management of a distinct department, with duty of superintendence, is a vice-principalNeb. 570
validity of railroad relief fund association, the question of acceptance of benefits by an injured employee operating as a release, and the powers of a railroad corporation under its charter to organize such fund, discussed.....Neb. 581
liability for negligence of officers and agents.....N. J. 683
railroad employee injured by fall of scaffold which was defectively constructed by incompetent employees under direction of foreman who was drunk at the time of the accident, the intemperate habits of the foreman being known by the agent who employed him; railroad company chargeable with notice of the habits of the foreman and liable for act of agent in retaining him in employ after knowledge of said habits...N. Y. 747
where general agent is clothed with duty of master in respect to machinery, etc., and he fails to prop-

CORPORATION — *continued.*

- erly discharge same, the master is liable for such neglect..N. Y. 747, 765
liability for act of agent.....N. Y. 765
superintendent of grain elevator owned by railroad company is agent of corporation and his negligence in performance of duty to servants is negligence of corporationN. Y. 790
miner injured by fall of rock in coal mine, the superintendent having notice of defect but not taking precautions to protect the workmen from danger; defendant liable for negligence of superintendentN. Y. 832

COUPLING CARS.

- brakeman crushed between two cars while setting a brake on the way car of a freight train, another car having left the track owing to alleged defective track; reversible error in charge as to defendant's duty in respect to inspection and repairMich. 98
railroad employees injured; cases involving the question of assumption of risk.....Mich. 127-130
passenger brakeman engaged in yard duties outside scope of his employment, struck by projecting lumber from defectively-loaded car which he was attempting to couple to box car; railroad company liableMich. 139
railroad employees injured; notes of casesMich. 154-173
employees acting as brakemen in mills, etc., injured in collision and while coupling cars; assumption of risk; fellow-servant..Minn. 199-200
defective car received by one railroad from another and brakeman injured while coupling cars; railroad company liable.....Minn. 288
railroad employees injured while coupling cars; question of inspection; notes of cases.....Minn. 288-290
brakeman injured coupling cars; action under the Iowa statute; right to sue in another State.....Minn. 292
switchman injured while coupling cars; claim that foot was caught in splinter of rail and also of negligent loading of car whereby iron projected over end of car; recovery could not be had for latter cause where injury was caused therebyMinn. 321

COUPLING CARS — *continued.*

- railroad employee fatally injured while assisting in coupling cars by conductor's orders; railroad company liable; question of scope of authorityMinn. 322
- railroad employees injured; notes of casesMinn. 347-358
- switchman injured while coupling foreign cars; failure to instruct employee as to extra hazards; railroad company liable.....Miss. 368
- minor employees injured while coupling carsMiss. 370-371
- brakeman killed while coupling cars; question of contributory negligence should have been submitted to juryMiss. 372
- brakeman caught between cars while coupling cars owing to alleged defective coupling apparatus; railroad company liable.....Mo. 442
- switchman injured while uncoupling cars; sudden starting of engine by engineer on signal from an employee on train; held that these employees were fellow-servants.. Mo. 483
- switchman coupling cars in railroad yard stepping into ditch and arm caught between bumpers of car; railroad company liable.....Mo. 484
- railroad employees injured; notes of casesMo. 491-513
- brakeman killed while coupling cars, his foot catching in unblocked guard rail he knowing the tracks to be unblocked and dangerous; petition failing to negative presumption that deceased assumed risksNeb. 555
- brakeman killed while coupling cars owing to failure of railroad company to block its switches and frogs; defendant not liable..Neb. 562
- brakeman coupling cars caught between projecting timber and box car and killed; nominal damages, one dollar only.....Neb. 567
- switchman injured in stockyards; company liableNeb. 594
- action maintainable against railroad corporation by one of its brakemen injured by reason of company permitting track to be blocked with snow and ice and a car to be out of repair, the plaintiff being in no fault.....N. H. 607
- railroad employees injured; notes of casesN. H. 623
- railroad employees injured; notes of casesN. Y. 801-820

COURT.

- the Supreme Court will not notice evidence where verdict below shows jury must have found against it.....Mich. 87
- error for court to express an opinion, in presence of jury, as to weight of testimony introduced as bearing upon credibility of witnessMich. 98
- preliminary question whether a witness offered as an expert has the necessary qualifications is for the court, and is largely within its discretionMinn. 210
- jurisdiction of Probate Court to direct administration solely to prosecute statutory action for causing death of intestate.....Minn. 294
- while court has no power to substitute its own estimate of damages for that found by jury, it has the right to determine amount beyond which there is no evidence to support verdict, and may order new trial unless plaintiff consents to reduce verdict.....Minn. 294
- in statutory action for death of railroad employee the measure of damages is the probable pecuniary loss of the widow or next of kin, and if verdict is greatly in excess of amount arrived at, the court should set it aside or reduce it.. Minn. 294
- reversing and remanding judgments; practice of Supreme Court..Mo. 483
- practice of Supreme Court in respect to requiring remittitur of damages. Mo. 484-485
- where damages are excessive the Supreme Court may indicate such excess and require plaintiff to remit same as condition of affirmanceMo. 484
- but see contrary ruling in a subsequent decision in another case..Mo. 485
- duty of District Court to inform jury, by instructions, of the issues of the case on trial, and party seeking more specific instructions must request correct instruction in order to secure review by Supreme CourtNeb. 530
- when court may refuse to order plaintiff to submit to physical examinationNeb. 530
- may take judicial notice of the way railways are managed in the practical running of them by officers who use the telegraph to direct the movement of trains....N. Y. 772

CRAWLING UNDER CARS.

boy, twelve years of age, engaged with his father as car cleaner, directed to go to tool house by his father, while crawling under cars of defendant on track used in joint occupancy with plaintiff's company, injured by sudden backing of engine without signal or warning; defendant liable, the boy being rightfully on the track, and the question of his negligence was for juryNeb. 544

CUSTOM.

proof of general custom of other companies as to use of certain rails on side track, admissible.... Minn. 321

evidence as to custom of switchman of getting on and off foot boards of moving engines admissible as bearing on question of negligence of an injured switchman in this respectMo. 482

DAMAGE ACT.

the Damage Act of 1855 construed. Mo. 451, 461, 463, 464

former ruling criticised and overruledMo. 461, 464-466

brakeman on car of gravel train thrown from car and killed by train colliding with cow on track causing several cars to be derailed; the Damage Act construed...Mo. 461

engineer killed in collision between trains; the Damage Act construed. Mo. 464

employee of one railroad company injured by negligence of another railroad; Consolidation Act construedMo. 466

DAMAGES.

evidence as to inability to work, amount of time lost through sickness, value of time lost, and reasonable expenses for medical services, admissible on amount of damages recoverable by person injuredMich. 4

include all that the injured person has been deprived of as a direct consequence of the injury...Mich. 4

the ill health of an injured party which might render a slight injury more serious than upon a healthy person does not prevent recovery of actual damages sustained by the injury.....Mich. 10

DAMAGES — continued.

not error for plaintiff to show what wages he commonly earned, but not proper to show he had no other means of support than day-labor, which was an indirect way of bringing his poverty before jury, which was not permissible. Mich. 51

minor employee, laborer in railway service, assisting in unloading ties on flat car ordered by employee in charge of the construction train to go back to the caboose and help stop the train, falling between cars, run over and fatally injured; excessive damages..Mich. 87

under the statute allowing widow or next of kin of person killed by negligence of railroad company to recover damages measured by the "pecuniary injuries" resulting to them, their actual pecuniary circumstances may not be considered, nor defendant's wealth.....Mich. 87

verdict of \$3,400 for killing of minor railroad employee of feeble intellect earning \$1.40 a day, excessive, measuring the damages under the statute giving "pecuniary injuries" to widow and next of kin...Mich. 87

fireman fatally injured in collision; erroneous admission of evidence as to pecuniary means of deceased at time of death.....Mich. 119

fireman killed in collision; erroneous admission of evidence as to pecuniary means of deceased at time of deathMich. 134

section boss cutting down trolley wire under direction of roadmaster fatally injured by recoil of the wire; erroneous charge on the question of damages.....Mich. 143

verdict for \$4,000 for injuries to boy between fifteen and sixteen years of age who lost three of his fingers while working near revolving saw, not excessive.....Minn. 188

in statutory action for death of railroad employee the damages are purely compensatory for pecuniary loss, nothing being recoverable for wounded feelings of relative, nor for pain and suffering of deceased previous to death...Minn. 294

in statutory action for death of railroad employee the measure of damages is the probable pecuniary loss of the widow or next of kin, and if verdict is greatly in ex-

DAMAGES — *continued.*

cess of amount arrived at, the court should set it aside or reduce it Minn. 294

while court has no power to substitute its own estimate of damages for that found by jury, it has the right to determine amount beyond which there is no evidence to support verdict, and may order new trial unless plaintiff consents to reduce verdict..... Minn. 294

distinction in amount of damages recoverable in actions for death and actions for wilful torts or personal injuries, the former being limited to pecuniary loss, and the latter allowing punitive damages and also damages for mental and physical pain, and injury to the feelings Minn. 294

verdict for \$3,500 for death of railroad employee, thirty-nine years of age, where the mother who was sole beneficiary had received at the most only \$50 a year from deceased, and her expectation of life was only about eight years, excessive, and judgment for plaintiff affirmed only on condition that verdict be reduced to \$2,000.... Minn. 294

verdict of \$40,133.33, reduced to \$25,000, for permanent injuries to engineer in collision, he being rendered a cripple for life, not excessive Minn. 300

where instructions given for defendant force the jury to a compromise verdict for plaintiff (one dollar damages) which is practically a verdict for defendant, it should be set aside..... Mo. 402

verdict for \$8,666 excessive where employee was struck by fall of iron bar; remittitur of \$3,666; judgment for \$5,000..... Mo. 415

the "American Experience Table" showing life expectancy, is a standard table recognized by statute and courts, and admissible in evidence in action for death.. Mo. 421

without evidence to warrant it an instruction awarding vindictive damages is improper..... Mo. 424

stone mason falling from swinging scaffold alleged to be defectively constructed; erroneous instruction permitting punitive damages.... Mo. 424

the Damage Act of 1855 construed.. Mo. 451, 461, 463, 464

DAMAGES — *continued.*

former ruling criticised and overruled Mo. 461, 464-466

verdict for \$25,000 for switchman, seventeen years old, run over in railroad yard, both legs being injured, resulting in right foot and left leg being amputated; remittitur of \$5,000; damages, \$20,000 not excessive Mo. 480

practice of Supreme Court in respect to requiring remittitur of damages Mo. 484-485

reasonable expectancy of life shown by mortality tables and testimony of physician may be considered by jury in estimating damages in action for death..... Mo. 482

widow suing for death of husband, a railroad employee, caused by company's negligence, may testify as to number of her children.... Mo. 482

verdict for \$12,500 for switchman whose arm had to be amputated, who suffered intense pain for several days, was in hospital for several weeks, spent considerable for medical services, and was rendered a cripple for life, not excessive.. Mo. 485

verdict for \$12,500 for switchman whose hand and part of left forearm had to be amputated; Trial Court required remittitur of \$2,500; judgment for \$10,000; Supreme Court required remittitur of \$3,000; judgment finally for \$7,000 Mo. 484

where damages are excessive the Supreme Court may indicate such excess and require plaintiff to remit same as condition of affirmance Mo. 484

but see contrary ruling in a subsequent decision in another case.. Mo. 485

verdict for \$9,250 for engineer injured by explosion of locomotive, excessive where injuries not shown to be permanent; remittitur of \$3,000 suggested, if filed, judgment for \$6,250 affirmed..... Neb. 530

brakeman coupling cars caught between projecting timber and box car and killed; nominal damages, one dollar only..... Neb. 567

verdict for \$5,000 for laborer injured by fall of pile driver, excessive; Trial Court required remittitur of \$2,350; judgment for \$2,650; Supreme Court held damages still

DAMAGES — continued.

- excessive, and suggested remittitur of \$1,450; if filed, judgment for plaintiff for \$1,200.....Neb. 577
- verdict for \$4,750 for employee injured by horse, excessive; remittitur filed for amount over \$3,500.. Neb. 594
- actions under the Death Statute and the damages recoverable..... N. J. 633, 643
- verdict of \$3,000 in action for benefit of next of kin, a mother and two brothers of deceased fireman, excessive and set aside, where deceased was twenty-two years of age, earned two dollars a day, paid his own board, and rendered little assistance to his mother who was about forty-one years old and able to support herself.....N. J. 643
- damages recoverable by widow and next of kin in statutory action for death are limited to pecuniary injuriesN. J. 643

DANGEROUS MACHINERY. See MACHINERY.

DANGEROUS PLACE.

- laborer in lime kiln killed by the fall of a stone upon which he was standing; master liable for failure to warn deceased of danger.... Mich. 5
- fall of "dock" in mill yard and employee injured while wheeling cart of lumber falling with it and injuredMich. 50
- where brakeman took a position exposing himself to greater danger he was not, as matter of law, guilty of contributory negligence, where it appeared that the position taken enabled him to render more effective service in the case of a car having left the track.. Mich. 98
- railroad employees injured; notes of casesMich. 154-173
- laborer employed in clearing grain from burning elevator fatally injured by falling wall; error to take case from jury as the questions whether defendants took proper care to see that place was safe to work in and that employees were not exposed to unnecessary risks were for jury to determineMinn. 215

DANGEROUS PLACE — continued.

- employee moving derrick on first floor of building falling into cellar, not entitled to recover, the danger being obvious and he assumed the risk.....Mo. 405
- laborer in grain elevator while working in bin under direction of defendant's superintendent, killed by fall of grain; nonsuit reversed; questions of negligence for jury.. N. Y. 790
- railroad employee, eighteen years of age, suffocated by cave-in of earth while he was cleaning out water pipes on defendant's premises; nonsuit reversed as question of defendant's negligence in furnishing reasonably safe place to work was for jury.....N. Y. 795
- miner injured by fall of rock in coal mine, the superintendent having notice of defect but not taking precautions to protect the workmen from danger; defendant liable for negligence of superintendentN. Y. 832

DEATH.

- laborer in lime kiln killed by the fall of a stone upon which he was standing; master liable for failure to warn deceased of danger..Mich. 5
- laborer engaged in molding ordered by defendant's foreman to get ladle of molten iron slipping on ice and water and fatally injured by explosion caused by molten metal coming in contact with the ice and water, the danger of which was not known to the employeeMich. 42
- employee falling into tannery vat and drowned; knowledge of danger; assumption of risk....Mich. 57
- minor employee, laborer in railway service, assisting in unloading ties on flat car ordered by employee in charge of the construction train to go back to the caboose and help stop the train, falling between cars, run over and fatally injured; excessive damagesMich. 87
- under the statute allowing widow or next of kin of person killed by negligence of railroad company to recover damages measured by the "pecuniary injuries" resulting to them, their actual pecuniary circumstances may not be considered, nor defendant's wealth.... Mich. 87

DEATH — *continued.*

verdict of \$3,400 for killing of minor railroad employee of feeble intellect earning \$1.40 a day, excessive, measuring the damages under the statute giving "pecuniary injuries" to widow and next of kin... Mich. 87

brakeman crushed between two cars while setting a brake on the way car of a freight train, another car having left the track owing to alleged defective track; reversible error in charge as to defendant's duty in respect to inspection and repair Mich. 98

fireman fatally injured in collision; erroneous admission of evidence as to pecuniary means of deceased at time of death Mich. 119

brakeman on ladder of car coming in contact with railroad bridge, thrown to track, run over and killed, contributory negligence and assumption of risk Mich. 126

fireman killed in collision; erroneous admission of evidence as to pecuniary means of deceased at time of death Mich. 134

section boss cutting down trolley wire under direction of roadmaster fatally injured by recoil of the wire; erroneous charge on the question of damages..... Mich. 143

railroad employees injured; notes of cases Mich. 154-173

laborer employed in clearing grain from burning elevator fatally injured by falling wall; error to take case from jury as the questions whether defendants took proper care to see that place was safe to work in and that employees were not exposed to unnecessary risks were for jury to determine.. Minn. 215

one employee killed and another injured in collapse of a large cistern wall which was being erected by defendants, as contractors and builders, in a convent building; defendants liable; questions of assumption of risk and contributory negligence passed upon..... Minn. 210

where laborer was fatally injured by fall of tank in building which was being erected by defendant, the work being done under direction of foreman of two gangs of men, the question whether either or both of such foremen were vice-principals, and whether the acci-

DEATH — *continued.*

dent resulted from their, or either of their negligence should have been submitted to jury..... Minn. 206

miner killed by descending cage in mine; obvious danger..... Minn. 231

employee of brewery scalded and fatally injured by bursting of ten-inch piping to boiler which was being put in brewery by defendants who had the contract for the same; judgment for defendants reversed, as the questions of independent contractor, fellow-servant and scope of employment were for jury to determine.. Minn. 234

brakeman on freight car fatally injured by contact with roof or awning projecting from side of elevator over side track upon which cars were being moved; rule of assumption of risk applied.. Minn. 280

in statutory action for death of railroad employee the measure of damages is the probable pecuniary loss of the widow or next of kin, and if verdict is greatly in excess of amount arrived at, the court should set it aside or reduce it Minn. 294

in statutory action for death of railroad employee the damages are purely compensatory for pecuniary loss, nothing being recoverable for wounded feelings of relative, nor for pain and suffering of deceased previous to death..... Minn. 294

jurisdiction of Probate Court to direct administration solely to prosecute statutory action for causing death of intestate..... Minn. 294

distinction in amount of damages recoverable in actions for death and actions for wilful torts or personal injuries, the former being limited to pecuniary loss, and the latter allowing punitive damages and also damages for mental and physical pain, and injury to the feelings Minn. 294

fireman killed by locomotive being thrown from track owing to a washout, erroneous instructions as to absolute duty of railroad company, without regard to degree of care exercised by it, to guard against such accidents..... Minn. 302

engineer killed by derailment of train caused by broken rail and defective switch Minn. 306

railroad employee fatally injured

DEATH — *continued.*

while assisting in coupling cars by conductor's orders; railroad company liable; question of scope of authorityMinn. 322

plasterer in employ of street-railway company engaged in plastering walls of conduit through which cable of defendant ran, killed while so employed; company not liableMinn. 326

construction of the statutes as to right of action for injuries resulting in death of railway employees and in cases of instantaneous deathMiss. 367

fireman killed in collision; action brought by widow and children of deceased not in conformity with statute giving right of action to the "legal or personal representative."Miss. 366

but this ruling is subsequently distinguishedMiss. 372

under Constitution 1890, section 193, action for injury resulting in death of railroad employee must be brought by executor or administrator of decedent, "the legal or personal representative," and not by parent or child, or husband and wifeMiss. 366

but this ruling is subsequently distinguishedMiss. 372

right of parent, under Code 1892, section 663, to recover for death of child, depends on whether child, had it survived, could have maintained action for the injury.. Miss. 372

it is only where railroad employee is killed through negligence of fellow-servant that the action must be brought by the personal representative under Constitution 1890, section 193; but where the negligence is that of the company itself, the action for death of a child is to be brought by the parent, under Code 1892, section 663 (distinguishing a former ruling, see Miss. 366)Miss. 372

brakeman killed while coupling cars; question of contributory negligence should have been submitted to jury.....Miss. 372

employee fatally injured by bursting of grindstone in defendant's factory, which was being run at excessive speed; master liable.... Mo. 390

DEATH — *continued.*

minor employee killed while riding in freight elevator; nonsuit; assumption of risk.....Mo. 404

employee killed by falling down elevator chute; master liable....Mo. 404

carpenter killed by fall of wall of building, owing to negligence of architect; latter liable.....Mo. 419

employee working upon scaffold about 125 feet from ground killed by falling therefrom, by reason of scaffold breaking; master liableMo. 421

night watchman in defendant's employ killed by falling through hatchway in factory; contributory negligenceMo. 421

employee killed by falling from bridge scaffolding, caused by negligence of fellow-servant; nonsuit sustainedMo. 425

carpenter falling from staging; danger being obvious and continuous, employee assumed the risk...Mo. 426

bridge laborer falling into river from bridge and drowned; fellow-servant rule applied and nonsuit sustainedMo. 426

lineman killed by fall of telegraph pole on premises of elevator company; obvious danger; contributory negligenceMo. 433

minor employee, a brakeman, while at his brake on top of freight car killed by head coming in contact with bridge; refusal to give defendant's requests to charge as to contributory negligence and assumption of risk.....Mo. 451, 452

brakeman on car of gravel train thrown from car and killed by train colliding with cow on track, causing several cars to be derailed; the Damage Act construedMo. 461

engineer killed in collision between trains; the Damage Act construedMo. 464

brakeman making running switch falling from car owing to defective handhold and run over; railroad liable for sending out defective carMo. 467

fall of bridge caused by derrick on caboose car of wrecking train catching in bridge timbers and employee killed; erroneous instructionsMo. 476

section hand struck and fatally injured by train; assumption of risk. Mo. 478

DEATH — continued.

- switchman killed by falling from defective foot board of switch engine; railroad company liable.... Mo. 481
- action by administrator in Missouri, under the Kansas statute, for death of railroad employee in defendant's employ, killed in a collision in Kansas.....Mo. 486
- carpenter working in boiler room fatally injured by explosion of steam boiler; master liable..... Mont. 525
- brakeman killed while coupling cars, his foot catching in unblocked guard-rail, he knowing the tracks, to be unblocked and dangerous; petition failing to negative presumption that deceased assumed risks. Neb. 555
- action by administrator for death of railroad employee in another State may be maintained under the statute of that State.....Neb. 562
- brakeman killed while coupling cars owing to failure of railroad company to block its switches and frogs; defendant not liable. Neb. 562
- brakeman found dead on track; no evidence of defendant's negligence; assumption of risk..Neb. 563
- brakeman coupling cars caught between projecting timber and box car and killed; nominal damages, one dollar, only.....Neb. 567
- car repairer killed; erroneous instruction, failing to distinguish between acts of vice-principal and fellow-servant.....Neb. 570
- section foreman clearing snow from railroad cut killed by rapidly moving train while trying to remove hand car from track to avoid collision; erroneous instructions as to signals.....Neb. 571
- street car driver kicked by horse and fatally injured; sufficient evidence to go to jury; nonsuit reversedNeb. 592
- switchman injured in stock yards; company liableNeb. 594
- employee killed by cave-in of tunnel; erroneous instruction on defendant's negligence in exposing employee to extra hazards..Neb. 596
- the Nebraska Death Statute, Comp. Stat. 1893, chap. 21.....Neb. 597
- employee working on viaduct being constructed by defendant, engaged in heating rivets for the

DEATH — continued.

- work, killed by falling from viaduct; assumption of risk....Neb. 600
- employee fatally injured by fall of elevator; master liable.....Neb. 602
- brakeman fatally injured by contact with overhead bridge; railroad company liable.....N. H. 617
- brakeman on heavily-loaded train killed by collapse of railroad bridge over which train was passing; railroad company liable. N. J. 633
- actions under the Death Statute and the damages recoverable.... N. J. 633, 643
- where fireman was killed by collapse of railroad trestle over which engine was passing, and it appeared the engineer had orders not to run his engine on the trestle, as it was not strong enough to support it, but deceased had no knowledge thereof, plaintiff was entitled to recover, as accident was caused in part by want of care as to safety of road-bedN. J. 643
- damages recoverable by widow and next of kin in statutory action for death are limited to pecuniary injuries.....N. J. 643
- liability of receiver of railroad for death of passenger killed by derailment of train caused by imperfect switchN. J. 667
- negligence of employee of subcontractor resulting in killing of person by explosion of nitroglycerine used for blasting purposes which was wrongfully stored on railroad premises; action not maintainable against railroad company or the contractor for the negligence of the employee of the subcontractor, the relation of master and servant not being created by the subcontractN. J. 668
- where conductor on running board of street car was killed by coming in contact with pole, the question of contributory negligence was for jury, and nonsuit reversed. N. J. 672
- stevedore killed while unloading steamship at dock, defective appliance to hoisting apparatus breaking and causing bags of rice to fall upon employee; steamship company liable...N. J. 673
- workman killed while engaged in

DEATH — *continued.*

- excavating a railroad tunnel;
negligence held to be that of fel-
low-servantN. J. 680
- laborer in quarry thrown from rock
by blasting operations owing to
defective machinery and killed;
nonsuit reversed as conflicting evi-
dence as to negligence was for
juryN. J. 719
- baggage-man on defendant's train
killed by collapse of bridge over
which train was passing, the fall
being occasioned by decay in its
timbers; railroad company not
liable where it appeared that
bridge was properly constructed
and the defect was not appar-
ent from inspection and it was
not shown that it had notice of
defectN. Y. 734
- fireman on freight train killed by
a number of cars of another
freight train which had become
detached colliding with his train;
the forward train was insuffi-
ciently equipped with brakemen
and was sent out by defendant's
agent, a head conductor, whose
duty it was to make up trains,
etc., railroad company liable for the
negligent act of its agent..N. Y. 765
- laborer in grain elevator while
working in bin under direction
of defendant's superintendent,
killed by fall of grain; nonsuit
reversed; questions of negligence
for jury.....N. Y. 790
- engineer killed in collision caused
by improper signals by incompe-
tent brakeman under direction
of conductor; railroad company
liable for act of incompetent em-
ployeeN. Y. 797
- employee moving damaged cars to
shops crushed between cars by
backing train which yardmaster
negligently signaled; act of fel-
low-servantN. Y. 798

DEATH STATUTE.

- pleading and practice under the
Death StatuteNeb. 596
- the Nebraska Death Statute,
Comp. Stat. 1893, ch. 21....Neb. 597
- actions under the Death Statute
and the damages recoverable...
N. J. 633, 643
- English Death Statute; Lord
Campbell's Act 649
- the New York Death Statute.... 833

DECLARATION. See PLEADING AND PRACTICE.

DECLARATIONS.

- of injured employee to railroad
agent cannot bind the company,
as proof of such declarations
would be mere hearsay evidence.
Minn. 321

DEFECT.

- where plaintiff alleged complaint
to defendant of defective emery
wheel and promise of defendant
to repair same, but there was no
evidence of such promise, it was
error to submit that question to
juryMich. 131
- where employee complained to
master of defect in machine
which the latter promised to
remedy, the questions of con-
tributory negligence and assump-
tion of risk were proper for jury
to determineMinn. 182
- employee injured while attending
to straw-cutter machine; master
liableMinn. 182
- employees injured by machinery and
appliances; notes of cases.....
Minn. 182-184
- where defective track is alleged as
cause of injury it must be shown
that defendant had notice of such
defect or could by reasonable care
have anticipated the danger....
Minn. 321
- when erroneous instructions not
prejudicialNeb. 530
- where machinery, etc., is obviously
defective and servant continues in
service, he assumes the risk of
injury, unless induced to con-
tinue by master's promise to rem-
edy defectNeb. 555
- baggage-man on defendant's train
killed by collapse of bridge over
which train was passing, the fall
being occasioned by decay in its
timbers; railroad company not
liable where it appeared that
bridge was properly constructed
and the defect was not appar-
ent from inspection and it was
not shown that it had notice of
defectN. Y. 734
- railroad company not liable for in-
jury caused by fall of railroad
bridge due to a latent defect not
discoverable by inspection, unless
it had notice, which must be
shown by the injured party.N. Y. 734

DEFECTIVE APPLIANCES.

employee, a top-filler in blast furnace engaged in putting coal and ore into top of furnace, injured by defective appliance to the hoisting machine, plaintiff working under direction of head engineer and another; master liable. Mich. 31

notes of cases.....Mich. 34-35

blacksmith struck in the eye by piece of steel which flew from sledge hammer which another employee was using; master not liable Mich. 57

mining accidents; notes of cases. Mich. 64-66

employees injured while working on vessels; notes of cases.. Mich. 76-77

brakeman killed by being thrown from logging train by reason of breaking of brake-chain; railroad liable for negligence of its car inspector in failing to inspect cars before starting on trip.... Mich. 121

railroad employees injured; notes of cases Mich. 154-173

employees injured; notes of cases. Minn. 182-184

minor employee, seventeen years of age, struck in the eye by flying fragment from tool struck by hammer by another employee; master not liable, the fellow-servant rule being applied....Minn. 254

railroad employees injured; notes of cases.....Minn. 347-358

section foreman injured while operating hand car on one railway which was leased by another, defective wheel and lever on the car being alleged; declaration held to show a cause of action against the lessee.....Miss. 369

employee working in and about coal hoist thrown under coal car owing to defective construction of the hoist; error to take case from jury where it was shown that plaintiff had pointed out defects to defendant's superintendent who promised to remedy same Mo. 377

employees injured; notes of cases. Mo. 377-380

fall of bar of iron on employee caused by defective appliance to crane; master liable. Mo. 414

servant injured by defective machinery, the use of which he could not foresee, may recover,

DEFECTIVE APPLIANCES — *cont'd.*

it being assumed that master will provide suitable appliances for servant to work with.... Mo. 442

brakeman caught between cars while coupling cars owing to alleged defective coupling apparatus; railroad company liable. Mo. 442

fall of bridge caused by derrick on caboose car of wrecking train catching in bridge timbers and employee killed; erroneous instructions Mo. 476

railroad employees injured; notes of cases..... Mo. 491-513

gripman of cable car struck by grip car; street railway company not liable Mo. 513

where master furnishes defective machinery and servant uses same carefully, believing there is no immediate danger, and it is reasonably probable that same can be operated safely with such care, the servant does not assume the risk, and if injured master is liable Neb. 530

brakeman injured by alleged defective coupler; allegation not sustained where it is clearly shown that injury was caused by reckless manner in which the coupler was pushed against another car by another employee..... Neb. 569

railroad employee injured while removing and replacing signal posts; defective appliance; railroad company liable..... Neb. 575

laborer engaged in building railroad-bridge piers injured by defective crowbar; railroad company liable..... Neb. 576

stevedore killed while unloading steamship at dock, defective appliance to hoisting apparatus breaking and causing bags of rice to fall upon employee; steamship company liable..... N. J. 673

brakeman thrown from freight car owing to defective brake rod; duty of railroad company to properly inspect cars.... N. Y. 787

railroad employees injured; notes of cases..... N. Y. 801-820

DEFECTIVE CAR.

notes of cases..... Mich. 154-173

received by one railroad from another and brakeman injured while coupling cars; railroad company liable..... Minn. 288

DEFECTIVE CAR — *continued.*

notes of cases.....Minn. 288-290
Minn. 347-358

section foreman injured while operating a hand car on one railway which was leased by another, defective wheel and lever on the car being alleged; declaration held to show a cause of action against the lessee.....Miss. 369

brakeman making running switch falling from car owing to defective handhold and run over; railroad liable for sending out defective carMo. 467

notes of cases....Mo. 467-469, 491-513

action maintainable against railroad corporation by one of its brakemen injured by reason of company permitting track to be blocked with snow and ice and a car to be out of repair, the plaintiff being in no fault..N. H. 607

DEFECTIVE ENGINE.

fireman injured by running into snowbank owing to alleged defect in locomotive; failure of evidence to support plaintiff's contention.

Minn. 308

railroad company which continues in use a defective and dangerous locomotive engine, after notice of its dangerous condition, is liable to servant injured thereby..N. Y. 730

DEFECTIVE HANDHOLD.

brakeman injured by defective handhold on foreign car; erroneous instruction on question of releaseMo. 460

railroad employees injured by defective handholds on foreign cars; notes of cases.....Mo. 467-469

brakeman making running switch falling from car owing to defective handhold and run over; railroad liable for sending out defective car.....Mo. 467

DEFECTIVE INSULATION.

employee under direction of foreman assisting in setting up printing press injured by electric shock due to alleged defective insulation of wire; questions of defendant's negligence and whether plaintiff was acting within scope of employment should have been submitted to juryMinn. 186

DEFECTIVE LOOM.

female employee struck in the eye by shuttle of loom after loomfixer had made repairs; master liableN. H. 628

DEFECTIVE MACHINERY. See MACHINERY.**DEFECTIVE ROADBED.**

where fireman was killed by collapse of railroad trestle over which engine was passing and it appeared the engineer had orders not to run his engine on the trestle as it was not strong enough to support it but deceased had no knowledge thereof, plaintiff was entitled to recover as accident was caused in part by want of care as to safety of roadbedN. J. 643

DEFECTIVE LADDER.

employee injured while unloading cargo of ice from vessel; defective ladder; contributory negligence for jury; nonsuit reversed.
N. J. 674

DEFECTIVE SCAFFOLD. See SCAFFOLD.**DEFECTIVE STREET.**

fire-engine driver in city fire department injured while driving along defective street; city liable.
Mich. 83

DEFECTIVE SWITCH.

engineer killed by derailment of train caused by broken rail and defective switch.....Minn. 306

liability of receiver of railroad for death of passenger killed by derailment of train caused by imperfect switchN. J. 667

DEFECTIVE TRACK.

brakeman crushed between two cars while setting a brake on the way car of a freight train, another car having left the track owing to alleged defective track; reversible error in charge as to defendant's duty in respect to inspection and repair.....Mich. 98

railroad employees injured; notes of casesMich. 154-173

employee on wood train injured in derailment caused by negligence of section foreman in taking up a rail for track repair without

DEFECTIVE TRACK — *continued.*

- putting out proper signals to warn approaching train; railroad liableMinn. 243
- engineer killed by derailment of train caused by broken rail and defective switch.....Minn. 306
- switchman injured while coupling cars; claim that foot was caught in splinter of rail and also of negligent loading of car whereby iron projected over end of car; recovery could not be had for latter cause where injury was caused therebyMinn. 321
- railroad employees injured; notes of casesMinn. 347-358
- engineer injured by derailment of train; common-law rule of fellow-servant applied.....Miss. 358
- railroad employee has right to rely on company's proper discharge of duty to inspect track, and his continuance in service was not an assumption of risk of defective trackMo. 455
- minor employee, a fireman, injured by overturning of engine, caused by alleged defective track; railroad company liable for failure to properly inspect track....Mo. 455
- railroad employees injured; notes of cases.....Mo. 491-513
- brakeman killed while coupling cars, his foot catching in unblocked guard rail, he knowing the tracks to be unblocked and dangerous; petition failing to negative presumption that deceased assumed risks.....Neb. 555
- switchman injured in stockyards; company liableNeb. 594
- railroad employees injured; notes of cases.....N. Y. 801-820

DEFECTIVE WAGON.

- master liable for injury to servant caused by defective wagon which he was driving; failure to keep promise to remedy defect after notice thereofMinn. 239

DEFENSE. See PLEADING AND PRACTICE.

- question of written instrument purporting to be a release and allegation of fraud in obtaining sameMo. 379, 380
- contributory negligence is matter of defense and plaintiff need not allege he was without fault..Mo. 411

DEFINITION.

- the Fellow-servant Act does not apply to street railway corporationsMinn. 326
- the Fellow-servant Act construed. Minn. 326
- the common-law rule of fellow-servant definedMiss. 365
- under Constitution 1890, section 193, action for injury resulting in death of railroad employee must be brought by executor or administrator of decedent, "the legal or personal representative," and not by parent or child, or husband and wife.....Miss. 366
- but this ruling is subsequently distinguishedMiss. 372
- definition of an expert.....Mo. 416
- not error for court to refuse to define term "common laborer," the meaning being obvious to jury.. Mo. 421

DEGREE OF CARE.

- master must furnish suitable and safe place for servant to work in as usual in similar occupation.. Mich. 1
- master introducing improved and complete machinery must take such precautions for safety of servants using it as customary with prudent men.....Mich. 1
- a youth between fifteen and sixteen years of age is required to exercise that amount of discretion which persons of his age and experience should exercise, and no more, and whether he is negligent is question for jury.. Minn. 188
- degree of care required of child of tender years is that of ordinary care reasonable for one of its ageNeb. 544
- surgeon is required only to exercise that degree of knowledge and skill ordinarily possessed by members of same profession.Neb. 569
- the general rule is that persons occupying real property for business purposes must exercise reasonable prudence and care to keep it in such condition that those who go there shall not be unreasonably and unnecessarily exposed to danger.....N. Y. 800

DELEGATION.

- duty of inspection of machinery and appliances, etc., when required by circumstances cannot

DELEGATION — *continued.*

be delegated by master as to avoid liability on his part...Mich. 51
 master cannot relieve himself of liability for employing incompetent servants by delegating that duty to another; if the latter is negligent in that respect the master is liableMich. 58
 duty to provide reasonably safe place for employee to work cannot be delegated by master to another so as to avoid liability for injury resulting from neglect of dutyMich. 98
 duty of master to provide reasonably safe place and machinery is not discharged after furnishing same by providing for inspection by a fellow-servant; the master must take reasonable measures to inform himself from time to time of their condition.....Mich. 112
 master cannot delegate his duty to another to provide safe place and machinery for use of servant so as to avoid responsibility for negligence in that regard.....Mich. 121
 whenever a master delegates to another the performance of a duty to a servant which rests upon himself absolutely, he is liable for the manner in which it is performed, and to that extent the agent stands in the place of the master; as to all other matters he is a mere co-servant with other employeesMinn. 200
 delegation by master to agent of duty required of him in furnishing safe place to work and machinery, etc., cannot relieve master from liability for neglect of such duty by agent....Minn. 243, 288
 master cannot delegate personal duty owing to servant to another person to escape liability for negligence in regard thereto....Mo. 414
 where master delegates to superintendent full power as to servants and work, he is liable for negligence in performance of such dutiesMo. 428
 master cannot escape responsibility by intrusting personal duty to an agentN. J. 719
 where general agent is clothed with duty of master in respect to machinery, etc., and he fails to properly discharge same, the master is liable for such neglect. N. Y. 747, 765

DELEGATION — *continued.*

liability of master for neglect of duty towards servant is not shifted by adoption of rules and regulations providing for performance of that duty by agent of the master.....N. Y. 783
 master cannot delegate duty to another so as to escape liability for injury to servant by its non-performanceN. Y. 832

DEMURRER. See PLEADING AND PRACTICE.

DEPOSITIONS.

when objections to depositions must be filed.....Neb. 530

DERAILMENT.

brakeman crushed between two cars while setting a brake on the way car of a freight train, another car having left the track owing to alleged defective track; reversible error in charge as to defendant's duty in respect to inspection and repair.....Mich. 98
 fireman on freight train injured by train being ditched through failure of engineer to obey signals; negligence of fellow-servant.... Mich. 117
 railroad employees injured; notes of cases.....Mich. 154-173
 employee on wood train injured in derailment caused by negligence of section foreman in taking up a rail for track repair without putting out proper signals to warn approaching train; railroad liableMinn. 243
 fireman killed by locomotive being thrown from track owing to a washout; erroneous instructions as to absolute duty of railroad company, without regard to degree of care exercised by it, to guard against such accidents... Minn. 302
 engineer killed by derailment of train caused by broken rail and defective switch.....Minn. 306
 railroad employees injured; notes of cases.....Minn. 347-358
 engineer injured by derailment of train; common-law rule of fellow-servant appliedMiss. 358
 brakeman on car of gravel train thrown from car and killed by train colliding with cow on track

DERAILMENT — continued.

causing several cars to be derailed; the Damage Act construed Mo. 461
 railroad employees injured; notes of cases Mo. 491-513
 liability of receiver of railroad for death of passenger killed by derailment of train caused by imperfect switch..... N. J. 667
 railroad employees injured; notes of cases N. Y. 801-820

DERRICK.

railroad employee injured by fall of derrick owing to negligence of foreman in constructing platform; railroad company liable, the foreman being held to be a vice-principal Minn. 261
 fall of bridge caused by derrick on caboose car of wrecking train catching in bridge timbers and employee killed; erroneous instructions Mo. 476

DETACHED CARS.

railroad employees injured; notes of cases Minn. 347-358
 railroad employees injured; notes of cases Mo. 491-513
 brakeman on engine injured by engine running into rear car of part of train ahead which became detached; nonsuit affirmed; contributory negligence; fellow-servant N. J. 659
 fireman on freight train killed by a number of cars of another freight train which had become detached colliding with his train; the forward train was insufficiently equipped with brakemen and was sent out by defendant's agent, a head conductor, whose duty it was to make up trains, etc., railroad company liable for the negligent act of its agent.... N. Y. 765

DISOBEDIENCE OF ORDERS.

burden upon servant to show lawful reason for refusal to obey master's orders Mich. 87
 master responsible for acts of servant within scope of employment where same are done in excess or even in disobedience of orders, express or implied, and is liable for injuries caused thereby

DISOBEDIENCE OF ORDERS — con

not only to outsiders but to subordinate fellow-employees. Mich. 87
 where fireman was killed by collapse of railroad trestle over which engine was passing and it appeared the engineer had orders not to run his engine on the trestle as it was not strong enough to support it but deceased had no knowledge thereof, plaintiff was entitled to recover as accident was caused in part by want of care as to safety of road-bed N. J. 643

DOMESTIC SERVANT.

wife of employer directing domestic servant to perform work which caused injury to servant who fell from a ladder while attempting to enter loft; servant not entitled to recover having assumed the risks of her employment. Mo. 433

DRIVER.

street car driver kicked by horse and fatally injured; sufficient evidence to go to jury; nonsuit reversed Neb. 592
 employee injured by vicious horse which he was driving; master liable Neb. 594

DRIVING.

fire-engine driver in city fire department injured while driving along defective street; city liable. Mich. 83
 master liable for injury to servant caused by defective wagon which he was driving; failure to keep promise to remedy defect after notice thereof..... Minn. 239

ELECTRICITY.

employee under direction of foreman assisting in setting up printing press injured by electric shock due to alleged defective insulation of wires; questions of defendant's negligence and whether plaintiff was acting within scope of employment should have been submitted to jury..... Minn. 186
 minor employee, a teamster in employee of street railroad company, injured by fire-alarm wire falling across trolley wire; erroneous instruction on defective appliance Neb. 593

ELECTRICITY — *continued.*

linemen injured by breaking of pole or by electricity; notes of casesN. J. 700-701

ELEVATOR.

minor employees injured while using elevators; master not liable. Minn. 196-197

employee stepping into opening in grain elevator in defendant's flouring mill; assumption of risk. Minn. 197

carpenter working in elevator shaft struck by descending elevator; erroneous instruction on hypothetical case not made by the evidenceMo. 402

petition failing to aver defendants had any authority or control over elevator which injured plaintiff, insufficient and demurrer sustainedMo. 403

minor employee killed while riding in freight elevator; nonsuit; assumption of risk.....Mo. 404

employee killed by falling down elevator chute; master liable.Mo. 404

carpenter working in elevator shaft struck by elevator operated by boy; nonsuit reversed, the question of contributory negligence being for the jury.....Mo. 516

employee fatally injured by fall of elevator; master liable.....Neb. 602

elevator accidents; notes of cases. N. J. 698-699

laborer in grain elevator, while working in bin under direction of defendant's superintendent, killed by fall of grain; nonsuit reversed; questions of negligence being for jury.....N. Y. 790

ELEVATOR AWNING.

brakeman on freight car fatally injured by contact with roof or awning projecting from side of elevator over side track upon which cars were being moved; rule of assumption of risk appliedMinn. 280

ELEVATOR OPERATOR.

carpenter working in elevator shaft and boy operating elevator, fellow-servantsMo. 516

ELEVATOR SHAFT.

carpenter working in elevator shaft struck by descending elevator; erroneous instruction on hypo-

ELEVATOR SHAFT. — *continued.*

thetical case not made by the evidenceMo. 402

employee killed by falling down elevator chute; master liable.Mo. 404

carpenter working in elevator shaft struck by elevator operated by boy; nonsuit reversed, the question of contributory negligence being for the jury.....Mo. 516

EMERGENCY.

where brakeman took a position exposing himself to greater danger he was not, as matter of law, guilty of contributory negligence, where it appeared that the position taken enabled him to render more effective service in the case of a car having left the track.. Mich. 98

EMERY WHEEL.

employee operating emery wheel in railroad car shops injured by breaking of wheel and some of the pieces flying into his face, assumed the risks where it appeared that he had worked for four years as a machinist and had knowledge of defect..Mich. 131

EMPLOYEE OF ANOTHER.

employee of another company injured by defective ladder on freight car; defendant not liable. Minn. 342

switchman of one railroad struck by engine of another running on adjoining track; defendant liable. Minn. 342

employee of steamboat company caught between landing stage and uncoupled car while he was removing staging which had been struck by defendant's train; defendant liableMinn. 343

contractor's servant working on railroad track struck by one of defendant's passing trains; defendant liable for failure to signal approach of train.....Minn. 344

servant of third party engaged, under direction of servant of defendant, in blasting rock, injured while withdrawing unexploded powder charge; defendant not liableMinn. 344

railroad company liable for injuries to employees of mills, etc., by trains operating on side tracks.. Minn. 345, 346

EMPLOYEE OF ANOTHER — *cont'd.*

- employee of one railroad company injured by negligence of another railroad; Consolidation Act construed Mo. 466
- employee of one company injured by negligent act of another..... Mo. 488, 489
- joint occupancy of grounds by railroad companies; liability of each for failure to exercise due care to prevent injury to employees of the other..... Neb. 544
- boy, twelve years of age, engaged with his father as car-cleaner, directed to go to tool-house by his father, while crawling under cars of defendant, on track used in joint occupancy with plaintiff's company, injured by sudden backing of engine without signal or warning, defendant liable, the boy being rightfully on the track, and question of his negligence being for jury..... Neb. 544
- employee of another company injured on grain elevator at defendant's piers by being caught between cars which were being loaded; erroneous instruction on the rule of law applicable to licensees N. Y. 800
- railroad employees injured; notes of cases N. Y. 801-820

EMPLOYERS' LIABILITY ACT.

See volume 13 AM. NEG. CAS.
857-864

ENGINE.

- brakeman injured while attempting to climb moving engine, due to defective step on engine; railroad not liable where the defect was caused by neglect of engineer, he being a fellow-servant of brakeman Mich. 120
- engine colliding with flat car and thrown from track and engineer injured; judgment for plaintiff reversed for erroneous instruction as to duty of railroad company in respect to side track..... Mich. 122
- fireman killed by locomotive being thrown from track, owing to a washout; erroneous instructions as to absolute duty of railroad company, without regard to degree of care exercised by it, to guard against such accidents.... Minn. 302

ENGINE — *continued.*

- fireman injured by engine running into snowbank, owing to alleged defect in locomotive; failure of evidence to support plaintiff's contention Minn. 308
- switchman injured on track by locomotive moved without customary signal; railroad company liable.. Minn. 314
- engine wiper assisting in coaling an engine in defendant's roundhouse injured by engine being negligently moved by co-employee; railroad company liable under the Fellow-Servant Act Minn. 336
- switchman of one railroad struck by engine of another running on adjoining track; defendant liable... Minn. 342
- railroad employees injured; notes of cases..... Minn. 347-358
- switchman injured by footboard of engine giving way; railroad company liable Miss. 369
- minor employee, a fireman, injured by overturning of engine, caused by alleged defective track; railroad company liable for failure to properly inspect track.... Mo. 455
- engineer injured by explosion of locomotive, the engine being alleged to be defective; railroad company liable Neb. 530
- brakeman on engine injured by engine running into rear car of part of train ahead, which became detached; nonsuit affirmed; contributory negligence; fellow-servant N. J. 659
- machinist making repairs in defendant's mill injured by negligent act of defendant's engineer in starting wheel; fellow-servant rule applied. N. J. 706
- fireman injured by explosion of locomotive boiler; railroad company liable N. Y. 730
- railroad company which continues in use a defective and dangerous locomotive engine, after notice of its dangerous condition, is liable to servant injured thereby.. N. Y. 730
- locomotive explosions; notes of cases N. Y. 730, 731

ENGINEER. See STATIONARY ENGINEER.

where no provision is made for inspection of engines, except by the engineers in charge, the latter

ENGINEER — continued.

- must be held to be representatives of the railway company.... Mich. 112
- fireman on freight train injured by train being ditched through failure of engineer to obey signals; negligence of fellow-servant.... Mich. 117
- brakeman injured while attempting to climb moving engine, due to defective step on engine; railroad not liable where the defect was caused by neglect of engineer, he being a fellow-servant of brakeman..... Mich. 120
- engine colliding with flat car and thrown from track and engineer injured; judgment for plaintiff reversed for erroneous instruction as to duty of railroad company in respect to side track..... Mich. 122
- not required to heed a signal to stop train, given by a stranger, when no danger is apparent..... Mich. 146
- railroad employees injured: notes of cases Mich. 154-173
- collision of passenger train with freight cars on main track, and engineer seriously injured, the freight cars being run on the track by switching crew, contrary to rules; railroad company liable.... Minn. 300
- injured by train running around a curve at excessive speed and into a washout, after a very heavy storm, the danger of which he knew, guilty of contributory negligence Minn. 302
- killed by derailment of train caused by broken rail and defective switch Minn. 306
- railroad employees injured; notes of cases Minn. 347-358
- injured by derailment of train; common-law rule of fellow-servant applied Miss. 358
- stationary engineer scalded by escape of steam from machinery in defendant's mill; erroneous instructions on assumption of risk; judgment for plaintiff reversed.. Mo. 390
- laborer employed in building a bridge and engineer operating hoisting machinery for its construction, working under same foreman, fellow-servants Mo. 425
- killed in collision between trains; the Damage Act construed... Mo. 464
- switchman injured while uncoupling cars; sudden starting of engine

ENGINEER — continued.

- by engineer on signal from an employee on train; held that these employees were fellow-servants.. Mo. 483
- railroad employees injured; notes of cases Mo. 491-513
- brakeman in switch gang fellow-servant with engineer of switch engine Mo. 517
- injured by explosion of locomotive, the engine being alleged to be defective; railroad company liable.. Neb. 530
- foreman of section crew and engineer of train not connected with work of sectionmen are not fellow-servants Neb. 573
- employee of independent contractor engaged in placing coal in defendant's coal pockets, injured by negligence of defendant's engineer; railroad company liable, the plaintiff and the engineer not being fellow-servants Neb. 580
- employee injured by coming in contact with hoisting appliance; superintendent's directions to engineer given in harsh and loud tone of voice alleged as negligence causing injury; master not liable N. H. 630
- brakeman on engine injured by engine running into rear car of part of train ahead which became detached; nonsuit affirmed; contributory negligence; fellow-servant N. J. 659
- brakeman injured in collision between two trains on single track the engineer running plaintiff's train taking the place of a sick employee by direction of defendant's manager or superintendent and running it at full speed, which was held to be cause of collision and the act of the engineer was a risk assumed by the brakeman.. N. Y. 752
- killed in collision caused by improper signals by incompetent brakeman under direction of conductor; railroad company liable for act of incompetent employee.. N. Y. 797
- ENGLISH RULINGS. See FOREIGN CASES.**
- EQUIPMENT OF TRAIN.**
- duty of railroad company to supply safe machinery, sufficient help, etc., for equipment of train.. N. Y. 765

EQUIPMENT OF TRAIN — *cont'd.*

fireman on freight train killed by a number of cars of another freight train, which had become detached, colliding with his train; the forward train was insufficiently equipped with brakeman and was sent by defendant's agent, a head conductor, whose duty it was to make up trains, etc.; railroad company liable for the negligent act of its agent N. Y. 765

ESCAPE OF STEAM.

from safety valve of boiler and employee scalded and falling from place where his duties did not call him; contributory negligence..... Minn. 236

EVIDENCE.

from competent persons as to dangerous character of machinery admissible in action for injuries sustained by contact with such machinery Mich. 4

as to inability to work, amount of time lost through sickness, value of time lost, and reasonable expenses for medical services, admissible on amount of damages recoverable by person injured.... Mich. 4

where person is injured by mill machinery it is improper to ask witness whether he has heard of similar injuries to other persons, as such a question calls for hearsay evidence Mich. 4

error in admitting evidence of statements of agent as binding upon principal is cured if principal impeaches such evidence by that of the agent in denial that such statements were made..... Mich. 16

an admission by defendant's vice-principal of knowledge, before the accident, of the particular defect causing it, made next day and away from place of accident, inadmissible Mich. 51

not error for plaintiff to show what wages he commonly earned, but not proper to show he had no other means of support than day-labor, which was an indirect way of bringing his poverty before jury, which was not permissible.. Mich. 51

of coemployees of injured employee that they were not informed of danger of employment, inadmis-

EVIDENCE — *continued.*

sible to rebut defense that the injured employee was so informed..

Mich. 66

where plaintiff claimed injury from arsenical poisoning, but defendant claimed it was caused by lead poisoning, it was error to admit testimony of physician in plaintiff's favor, which was based on a certain paper not in evidence, as the witness did not base his opinion upon a history of the case, but upon conclusions of another physician Mich. 66

employee inhaling poisonous matter in lead works; erroneous admission of certain medical evidence..

Mich. 66

one who has had fifteen years actual experience with 100 employees engaged in the manufacture of paris green, has had opportunity to observe, and has made observations of the effect upon such workmen is competent to testify as to disease affecting those engaged in such manufacture, and it was error to exclude such testimony in action for damages for injury sustained by employee inhaling poisonous matter in lead works Mich. 66

the Supreme Court will not notice evidence where verdict below shows jury must have found against it Mich. 87

under the statute allowing widow or next of kin of person killed by negligence of railroad company to recover damages measured by the "pecuniary injuries" resulting to them, their actual pecuniary circumstances may not be considered, nor defendant's wealth....

Mich. 87

error for court to express an opinion, in presence of jury, as to weight of testimony introduced as bearing upon credibility of witness Mich. 98

fireman fatally injured in collision; erroneous admission of evidence as to pecuniary means of deceased at time of death.... Mich. 119

where plaintiff alleged complaint to defendant of defective emery wheel, and promise of defendant to repair same, but there was no evidence of such promise, it was error to submit that question to jury Mich. 131

EVIDENCE — *continued.*

- fireman killed in collision; erroneous admission of evidence as to pecuniary means of deceased at time of death Mich. 134
- mortality tables, while not conclusive evidence as to probable life expectancy may be offered and considered with all testimony on the subject Mich. 134
- of defense by insurer on indemnity policy, admissible to show that defendants did not regard their agent or superintendent as an independent contractor Minn. 188
- opinions of witnesses possessing peculiar skill are admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment without such assistance..... Minn. 210
- foregoing rule applied in action growing out of collapse of cistern wall Minn. 210
- of subsequent repairs at place of accident or of similar accidents there inadmissible..... Minn. 306-308
- fireman injured by engine running into snowbank, owing to alleged defect in locomotive; failure of evidence to support plaintiff's contention Minn. 308
- not necessary to establish with absolute certainty, connection of cause and effect between negligent act and injury; it is sufficient if evidence furnishes reasonable basis for satisfying jury that negligent act was proximate cause of injury, but this conclusion must not rest on mere conjecture.... Minn. 308
- proof of general custom of other companies as to use of certain rails on side track, admissible.... Minn. 321
- declarations of injured employee to railroad agent cannot bind the company, as proof of such declarations would be mere hearsay evidence Minn. 321
- where defective track is alleged as cause of injury it must be shown that defendant had notice of such defect, or could, by reasonable care have anticipated the danger.. Minn. 321
- where there was evidence that injured party, prior to accident caused by flying piece of wood from machine, had no consump-

EVIDENCE — *continued.*

- tive symptoms, and several physicians testified that the disease could probably be attributed to such injury, the question of proximate cause of disease was properly submitted to jury.... Mo. 387
- physician who has practiced for twenty-five years competent to testify as an expert as to whether a blow received from flying substance could have caused pulmonary trouble, though he stated he was not a specialist in treatment of consumption Mo. 387
- carpenter working on elevator shaft struck by descending elevator; erroneous instruction on hypothetical case not made by the evidence Mo. 402
- improper admission of opinion evidence that wall of building that fell was defective..... Mo. 416
- the "American Experience Table" showing life expectancy, is a standard table recognized by statute and courts, and admissible in evidence in action for death.. Mo. 421
- instruction submitting question of fraud in obtaining release should not be given where there is no evidence to support it..... Mo. 460
- widow suing for death of husband, a railroad employee, caused by company's negligence, may testify as to number of her children.... Mo. 482
- as to custom of switchman of getting on and off footboards of moving engines, admissible as bearing on question of negligence of an injured switchman in this respect.. Mo. 482
- an expert builder of stairs may give his opinion as to proper slant of a step Mo. 482
- reasonable expectancy of life shown by mortality tables and testimony of physician may be considered by jury in estimating damages in action for death..... Mo. 482
- witnesses who show scientific or practical skill and experience as to matters of which they testify, are competent as experts.... Neb. 530
- books of science or art, when shown to be reputable or standard works, are competent evidence..... Neb. 530
- in operating trains outside of towns and villages, no rate of speed, however great, is alone sufficient evidence of negligence..... Neb. 573

EXCAVATION.

- employee while crossing a "bridge" over an excavation in defendant's copper mine, precipitated into the excavation, a distance of about 100 feet, by the breaking of a plank of the bridge; master not liable, the accident being due to negligence of fellow-servant..... Mich. 58
- laborer engaged in digging a ditch under direction of foreman, injured by cave-in; defendant liable. Minn. 220
- cave-in accidents; notes of cases... Minn. 220-221; Mo. 431-432

EXCESSIVE DAMAGES. See DAMAGES.**EXECUTOR.**

- under Constitution 1890, section 193, action for injury resulting in death of railroad employee must be brought by executor or administrator of decedent, "the legal or personal representative," and not by parent or child, or husband and wife Miss. 366
- but this ruling is subsequently distinguished Miss. 372

EXPERT.

- evidence from competent persons as to dangerous character of machinery admissible in action for injuries sustained by contact with such machinery..... Mich. 4
- one who has had fifteen years actual experience with 100 employees engaged in manufacture of paris green, has had opportunity to observe and has made observations of the effect upon such workmen is competent to testify as to disease affecting those engaged in such manufacture and it was error to exclude such testimony in action for damages for injury sustained by employee inhaling poisonous matter in lead works..... Mich. 66
- opinions of witnesses possessing peculiar skill are admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment without such assistance..... Minn. 210
- foregoing rule applied in action growing out of collapse of cistern wall Minn. 210

EXPERT — continued.

- preliminary question whether a witness offered as an expert has the necessary qualifications is for the court, and is largely within its discretion Minn. 210
- physician who has practiced for twenty-five years competent to testify as an expert as to whether a blow received from flying substance could have caused pulmonary trouble, though he stated he was not a specialist in treatment of consumption Mo. 387
- definition of an expert..... Mo. 416
- architects and builders qualified as experts on construction and strength of buildings..... Mo. 416
- improper admission of opinion evidence that wall of building that fell was defective..... Mo. 416
- not error to refuse to permit superintendent to give opinion as to competency of employee to select lumber for scaffold, the jury being competent to determine that question Mo. 421
- an expert builder of stairs may give his opinion as to proper slant of a step Mo. 482
- witnesses who show scientific or practical skill and experience as to matters of which they testify, are competent as experts..... Neb. 530

EXPLOSION.

- boy in employ of contractor injured by bursting of emery wheel on defendant's premises; defendant not liable Mich. 30
- laborer engaged in molding ordered by defendant's foreman to get ladle of molten iron, slipping on ice and water and fatally injured by explosion caused by molten metal coming in contact with the ice and water, the danger of which was not known to the employee.. Mich. 42
- employees injured by explosion; notes of cases..... Mich. 44
- employee operating emery wheel in railroad car shops injured by breaking of wheel and some of the pieces flying into his face, assumed the risks where it appeared that he had worked for four years as a machinist and had knowledge of defect Mich. 131
- railroad employees injured; notes of cases Mich. 154-173

EXPLOSION — *continued.*

- boiler on steamboat; notes of cases. Minn. 237, 238
- deck nand injured by explosion of boiler on steamboat; owners of boat liableMinn. 237
- employee in iron works injured by bursting of one of the hot ovens or furnaces, caused by alleged negligence of defendant's superintendent; nonsuit reversed, the case being for the jury.....Mo. 388
- employee fatally injured by bursting of grindstone in defendant's factory, which was being run at excessive speed; master liable..Mo. 390
- employee of mining company injured by explosion of two blasts which had not exploded at time of firing by other employees; defendant not liable, the fellow-servant and assumption of risk rules being applied, and instructions thereon held properMont. 519
- carpenter working in boiler room fatally injured by explosion of steam boiler; master liable.....Mont. 525
- engineer injured by explosion of locomotive, the engine being alleged to be defective; railroad company liableNeb. 530
- machine cake baker injured by explosion of steam kettle; master liableNeb. 602
- employee injured by explosion while removing an unexploded charge of powder placed in a hole previously drilled by him and others, assumed the risk.....N. H. 625
- negligence of employee of subcontractor resulting in killing of person by explosion of nitroglycerine used for blasting purposes, which was wrongfully stored on railroad premises; action not maintainable against railroad company or the contractor for the negligence of the employee of the subcontractor, the relation of master and servant not being created by the subcontractN. J. 668
- miner injured by explosion of giant powder; failure to instruct or warn employee of danger of new explosive when introduced into the work; company liable...N. J. 683
- discussion of the fellow-servant rule and cases distinguishing the doctrineN. J. 683-687
- employee injured by explosion of oil

EXPLOSION — *continued.*

- pipe in defendant's oil works; nonsuit affirmed; *res ipsa loquitur* appliedN. J. 689
- fireman injured by explosion of locomotive boiler; railroad company liable.....N. Y. 730
- locomotive explosions; notes of casesN. Y. 730, 731

EXTRA HAZARDS.

- where servant is injured by unusual risk due to master's negligence, the burden is upon latter to show servant's knowledge of the extra hazardsMich. I
- servant does not assume extra hazards to which he may be exposed by master of which he has no knowledgeMich. 87
- passenger brakeman engaged in yard duties outside scope of his employment, struck by projecting lumber from defectively loaded car which he was attempting to couple to box car; railroad company liable. Mich. 139
- discussion of question of assumption of risk, where servant is put to work outside of employment.. Mich. 139-142
- duty of master towards servant called upon to perform work outside scope of employment by direction of superior servant to warn him against all possible dangers except those which are obviousMich. 143
- switchman injured while coupling foreign cars; failure to instruct employee as to extra hazards; railroad company liable.....Miss. 368
- servant assumes all ordinary risks incident to employment, but not those resulting from latent defects unknown to him, but known to the master.....Mo. 414
- the rule of assumption of risk statedNeb. 596, 599, 600, 601
- employee killed by cave-in of tunnel; erroneous instruction on defendant's negligence in exposing employee to extra hazards..Neb. 596

EXTRAORDINARY STORM.

- female employee injured by fall of building, due to extraordinary storm; erroneous admission of evidence, etc.....Mo. 416

FALLING FROM CARS.

- minor employee, laborer in railway service, assisting in unloading ties on flat car ordered by employee in charge of the construction train to go back to the caboose and help stop the train, falling between cars, run over and fatally injured; excessive damages Mich. 87
- brakeman on ladder of car coming in contact with railroad bridge, thrown to track, run over and killed; contributory negligence and assumption of risk..... Mich. 126
- railroad employees injured; notes of cases Mich. 154-173
- railroad laborer attempting to board moving gravel train by direction of foreman, injured by falling as train was started without signal; railroad company liable..... Minn. 259
- section hand falling from hand car and run over by car following at excessive speed; railroad company liable Minn. 314
- railroad employees injured; notes of cases Minn. 347-358
- brakeman making running switch, falling from car, owing to defective handhold and run over; railroad liable for sending out defective car Mo. 467
- railroad employees injured; notes of cases Mo. 491-513
- switchman injured in stock yards; company liable Neb. 594
- brakeman thrown from freight car, owing to defective brake rod; duty of railroad company to properly inspect cars..... N. Y. 787
- railroad employees injured; notes of cases N. Y. 801-820

FALLING FROM LADDER.

- employee falling from ladder in saw mill; master not liable, the danger being obvious and one of the risks of employment..... Mich. 56
- wife of employer directing domestic servant to perform work which caused injury to servant, who fell from a ladder while attempting to enter loft; servant not entitled to recover, having assumed the risks of her employment..... Mo. 433

FALLING FROM VIADUCT.

- employee working on viaduct being constructed by defendant, engaged in heating rivets for the work, killed by falling from viaduct; assumption of risk..... Neb. 600

FALLING OBJECT.

- fall of "dock" in mill yard, and employee injured while wheeling cart of lumber falling with it and injured Mich. 50
- notes of cases..... Mich. 51-54
- fall of ore from roof of iron mine and a trammer injured while loading ore into a car; negligence, if any, that of fellow-servants..... Mich. 63
- mining accidents, notes of cases.... Mich. 64-66
- employees injured while working on vessels; notes of cases.. Mich. 76, 77
- where laborer was fatally injured by fall of tank in building, which was being erected by defendant, the work being done under direction of foremen of two gangs of men, the question whether either or both of such foremen were vice-principals, and whether the accident resulted from their, or either of their negligence, should have been submitted to jury..... Minn. 206
- notes of cases..... Minn. 208, 209
- employee struck by falling beam and tackle on vessel, after being warned of danger..... Minn. 230
- miner injured by stone falling from roof of tunnel in iron mine; defendant liable Minn. 233
- railroad employees injured; notes of cases Minn. 347-358
- miner injured by lump of coal which fell from car in hoisting cage at top of mine shaft, the cage being uncovered; master liable..... Mo. 397
- cases under the Coal Mines Act of 1881 Mo. 397-399
- employee injured by fall of iron column while working under direction of foreman; master liable. Mo. 412
- fall of bar of iron on employee caused by defective appliance to crane; master liable..... Mo. 414
- employee injured by fall of cross-beam, the danger of which was known to him, guilty of contributory negligence Mo. 415
- railroad employee injured by fall of pile driver; railroad company liable Neb. 577
- section man assisting in loading rails upon car covered with snow injured by rail falling upon him; negligence of fellow-servant..... N. H. 615
- laborer injured by fall of steel in-

FALLING OBJECT — *continued.*

got carelessly piled by fellow-laborers; master not liable....N. H. 626
 laborer in grain elevator, while working in bin under direction of defendant's superintendent, killed by fall of grain; nonsuit reversed, questions of negligence being for juryN. Y. 790
 miner injured by fall of rock in coal mine, the superintendent having notice of defect but not taking precautions to protect the workmen from danger; defendant liable for negligence of superintendentN. Y. 832

FALL OF BRIDGE. See BRIDGE.

FALL OF BUCKET IN MINE.

miner injured by fall of bucket in mine; knowledge of danger; assumption of risk; contributory negligence; nonsuit affirmed..... Nev. 604

FALL OF BUILDING.

female employee injured by fall of building, due to extraordinary storm; erroneous admission of evidence, etc.....Mo. 416

FALL OF DOOR.

railroad employee injured by fall of sliding door in defendant's warehouse; carelessness of man in charge of it; fellow-servant rule appliedN. J. 665

FALL OF FLOOR.

minor employee, a boy of nineteen years of age, engaged in working on railroad track, ordered by his foreman to assist in removing the debris from depot partially destroyed by fire, and while there ordered by another, not an employee of defendant, to shovel ashes on another floor, and injured by the floor giving way; defendant liableMinn. 247

FALL OF SCAFFOLD. See SCAFFOLD.

FALL OF TANK.

where laborer was fatally injured by fall of tank in building which was being erected by defendant, the work being done under direction of foremen of two gangs of men, the question whether either or

FALL OF TANK — *continued.*

both of such foremen were vice-principals, and whether the accident resulted from their, or either of their negligence, should have been submitted to jury.....Minn. 206

FALL OF WALL.

one employee killed and another injured in collapse of a large cistern wall which was being erected by defendants, as contractors and builders, in a convent building; defendants liable; questions of assumption of risk and contributory negligence passed upon....Minn. 210
 laborer employed in clearing grain from burning elevator fatally injured by falling wall; error to take case from jury as the questions whether defendants took proper care to see that place was safe to work in and that employees were not exposed to unnecessary risks were for jury to determineMinn. 215
 carpenter killed by fall of wall of building, owing to negligence of architect; latter liable.....Mo. 419

FEDERAL RULE.

as to fellow-servants..... 270

FELLOW-SERVANT.

superintendent having general authority to manage business was superior servant, and his act in starting machinery which employee was oiling was within scope of authority, and not that of a fellow-servantMich. 10
 foreman in mill charged with duty of having machinery covered if same is uncovered while employees are working, is not a fellow-servant of such employees, but represents the master, who is liable to employee injured by neglect of such duty.....Mich. 16
 person employed to provide safe place and supply machinery and tools for work is engaged in different employment to those using the same, and is not a fellow-servant with the latter.....Mich. 23-24
 the fellow-servant rule discussed. Mich. 31, 75, 112-122
 employee while crossing a "bridge" over an excavation in defendant's copper mine, precipitated into the excavation, a distance of about

FELLOW-SERVANT — continued.

100 feet, by the breaking of a plank of the bridge; master not liable, the accident being due to negligence of fellow-servant..... Mich. 58

timberman in charge of bridges or passages in mine, fellow-servant of laborer in mine, where the work in which both were engaged was under entire supervision of another Mich. 58

servant assumes risk of fellow-servant's negligence, even though latter may hold more responsible position or be in a different line of employment, so long as both are in same general business, and the negligence of one contributes to danger of other.. Mich. 58

servant assumes all the usual risks of employment, including negligence of fellow-servants.. Mich. 58-122

mining captain not fellow-servant of laborer in mine..... Mich. 62

trammer loading ore into a car in iron mine, the miners employed there, and the shift boss, fellow-servants Mich. 63

fall of ore from roof of iron mine and a trammer injured while loading ore into a car; negligence, if any, that of fellow-servants..... Mich. 63

employee in defendant's ship-building works injured by the breaking of a part of scaffold built by carpenters using the same, fellow-servant of carpenters..... Mich. 75

person employed to unload coal from vessel, and foreman in charge of the work not fellow-servants Mich. 77

owner of building not liable for injuries sustained by painter in employ of contractor by the giving way of a scaffold which had been erected by carpenters; negligence of fellow-servants Mich. 82

question of fellow-servant in relation to inspection of cars, track, etc., discussed..... Mich. 98; 101-104

brakeman on freight train and a car inspector fellow-servants ... Mich. 101

foreman of section men and the section men held to be fellow-servants in action by one of the section men for injuries sustained by the backing of engine against loaded cars, due to failure of foreman to give notice to the men of moving of train..... Mich. 111

FELLOW-SERVANT — continued.

action will lie by employee against master for injuries sustained by concurring negligence of master and fellow-servant Mich. 112

assistant roadmaster in general charge of division of railroad and absolute control of section hands thereon, is not a fellow-servant with the latter..... Mich. 119

fireman on freight train injured by train being ditched through failure of engineer to obey signals; negligence of fellow-servant.... Mich. 117

train dispatcher in absolute control of division of railroad so far as running and operation of trains is concerned, not a fellow-servant of employees acting under his orders Mich. 119

brakeman injured while attempting to climb moving engine, due to defective step on engine; railroad not liable where the defect was caused by neglect of engineer, he being a fellow-servant of brakeman Mich. 120

train dispatcher in absolute control of division of railroad so far as running and operation of trains is concerned, not a fellow-servant with those acting under his orders Mich. 134

master not liable to servant injured by negligence of co-servant engaged in same common employment Mich. 134

section boss and those working under him in relaying track held to be fellow-servants Mich. 136

section hand injured by freight car pushed against another car while he was attempting to climb upon car by order of section boss; fellow-servant applied Mich. 136

roadmaster in charge of certain work and section boss acting under his orders, not fellow-servants Mich. 143

railroad employees injured; notes of cases Mich. 154-173

employee acting as brakeman in mills, etc., injured in collision and while coupling cars; assumption of risk; fellow-servant..... Minn. 199, 200

laborer engaged with others in grading a railroad ordered by foreman to assist another in shoving out stringers, injured by fall of trestle which was not properly braced; defendant not liable, all

FELLOW-SERVANT — *continued.*

the laborers engaged in the different departments of the work being fellow-servantsMinn. 200
in the matter of building a railroad trestle the foreman was a fellow-servant with the workmen under himMinn. 200
it is not the rank or authority of one servant over others, but the nature of his service, which determines whether he is a vice-principal or fellow-servant.....Minn. 200
master not responsible for negligence of one servant resulting in injury to another, unless negligent in employment of such fellow-servantMinn. 200
whenever a master delegates to another the performance of a duty to a servant which rests upon himself absolutely, he is liable for the manner in which it is performed, and to that extent the agent stands in the place of the master; as to all other matters he is a mere co-servant with other employeesMinn. 200
where laborer was fatally injured by fall of tank in building which was being erected by defendant, the work being done under direction of foreman of two gangs of men, the question whether either or both of such foremen were vice-principals, and whether the accident resulted from their, or either of their negligence, should have been submitted to jury..... Minn. 206
discussion of fellow-servant rule... Minn. 200, 203, 205, 265, 280
employee of contractor injured by collapse of brickwork in building being erected for defendants; fellow-servant rule applied..Minn. 219
foreman having supreme authority over laborers digging a ditch was a vice-principal, and not a fellow-servant with the laborers...Minn. 220
cave-in accidents; notes of cases.... Minn. 220, 221
employee of brewery scalded and fatally injured by bursting of ten-inch piping to boiler which was being put in a brewery by defendants who had the contract for the same; judgment for defendants reversed, as the questions of independent contractor, fellow-servant and scope of em-

FELLOW-SERVANT — *continued.*

ployment were for jury to determineMinn. 234
section foreman intrusted with the duty of keeping track in repair and employee on wood train, injured in derailment caused by such foreman's neglect, not fellow-servantsMinn. 243
sectionman injured by a stick of wood thrown from tender owing to careless loading of wood by another servant; fellow-servant's negligenceMinn. 245
master not liable for injuries to servant caused by negligence of fellow-servantMinn. 245
minor employee, seventeen years of age, struck in the eye by flying fragments from tool struck by hammer by another employee; master not liable, the fellow-servant rule being applied.Minn. 254
a servant, though a minor, assumes the risk of negligence of fellow-servants as a hazard incident to the service.....Minn. 254
railroad company operating a line composed of lines or tracks of several different companies comes within the provisions of Laws 1887, c. 13.....Minn. 259
railroad employee injured by fall of derrick owing to negligence of foreman in constructing platform; railroad company liable, the foreman held to be a vice-principalMinn. 261
lineman repairing telegraph line after blasting injured by rock falling upon him by negligence of quarrymen engaged in blasting, all the parties being in the employ of same railroad company; fellow-servant rule applied..... Minn. 267
the Federal rule as to fellow-servants 270
notes of cases in which the fellow-servant rule was applied..... Minn. 276-278
the Iowa Statute relating to right of action for injuries sustained by railroad employees only is not in conflict with the Fourteenth Amendment to the Constitution of the United States.....Minn. 292
the Fellow-Servant Act does not apply to street railway corporationsMinn. 326
the Fellow-Servant Act construed.. Minn. 326

FELLOW-SERVANT — *continued.*

receiver operating railroad under appointment of court of equity is within the provisions of the Fellow-Servant Act, G. S. 1894, section 2701, and liable to employee injured by negligence of co-employee Minn. 336

engine wiper assisting in coaling an engine in defendant's round-house injured by engine being negligently moved by co-employee; railroad company liable under the Fellow-servant Act.. Minn. 336

the Fellow-Servant Act, Laws 1887, c. 13, G. S., 1894, section 2701... Minn. 325, 326, 329, 336, 337-340

railroad employees injured; cases within and without the Fellow-Servant Act Minn. 337-340

servant of third party engaged, under direction of servant of defendant, in blasting rock, injured while withdrawing unexploded powder charge; defendant not liable Minn. 344

railroad employees injured; notes of cases..... Minn. 347-358

engineer injured by derailment of train; common-law rule of fellow-servant applied Miss. 358

the Railroad Employees Fellow-Servant Act, Constitution 1890, section 193, extended to employees of other corporations, Laws 1892, 1896, 1898..... Miss. 358-359

railway company not liable for injury to employee by negligent conduct of co-employee... Miss. 364

servant assumes usual and ordinary risks incident to service, including negligence of fellow-servants Miss. 364

the common-law rule of fellow-servants defined Miss. 365

fireman on an engine and a telegraph operator are engaged in different departments of labor, in the meaning of the Constitution of 1890, section 193..... Miss. 366

railroad employee injured; application of the fellow-servant rule; notes of cases..... Miss. 366-367

it is only where railroad employee is killed through negligence of fellow-servant that the action must be brought by the personal representative under Constitution 1890, section 193; but where the negligence is that of the com-

FELLOW-SERVANT — *continued.*

pany itself, the action for death of a child is to be brought by the parent, under Code 1892, section 663 (distinguishing a former ruling, see Miss. 366)..... Miss. 372

foreman in charge of distinct piece of work in foundry and employees under him, not fellow-servants, the foreman being a vice-principal Mo. 383

superintendent of corporation with full authority to carry on business thereof, not a fellow-servant of the laborers, but a vice-principal, being an agent of the corporation Mo. 388

master not liable for injury to servant caused by negligence of fellow-servant Mo. 388, 442, 444-445. 517

servant may recover for injuries caused by joint negligence of master and fellow-servant... Mo. 411

foreman having control of laborers acting under his directions is not a fellow-servant, but represents the master Mo. 414

superintendent in charge of constructing scaffold for use of workmen is not a fellow-servant of the latter, but represents the master Mo. 424

laborer employed in building a bridge and engineer operating hoisting machinery for its construction, working under same foreman, fellow-servants . . . Mo. 425

employee killed by falling from bridge scaffolding caused by negligence of fellow-servant; nonsuit sustained Mo. 425

bridge laborer falling into river from bridge and drowned; fellow-servant rule applied and nonsuit sustained Mo. 426

master not liable for injuries to servant caused by negligence of fellow-servant, unless latter was incompetent and the fact was known by master at time of employment. Mo. 428

servant injured by negligence of co-servant cannot recover unless latter incompetent and master knew or, by ordinary care, ought to have known, of such incompetency at time of employment..... Mo. 442

fellow-servant rule and doctrine of assumption of risk discussed.. Mo. 442

car precipitated into river while run-

FELLOW-SERVANT — *continued.*

- ning over bridge or trestle, and brakeman on car injured; fellow-servant rule applied.....Mo. 444
- track hand run over by train; negligence of fellow-servant.....Mo. 444
- the Damage Act of 1855 construed. Mo. 451, 461, 463, 464
- former ruling criticised and overruledMo. 461, 464-466
- brakeman on car of gravel train thrown from car and killed by train colliding with cow on track causing several cars to be derailed; the Damage Act construed. Mo. 461
- railroad employees injured by negligence of fellow-servants not included in the term "any person" according to true meaning of the Railroad Corporation Act of 1865. Mo. 444, 463
- the Railroad Corporation Act construedMo. 444, 463 466
- master mechanic and wreckmaster not fellow-servant with a bridge carpenterMo. 476
- section hands ballasting track with stone hauled to them on construction train, which is unloaded by the trainmen, are not fellow-servants with the trainmen.....Mo. 478
- important ruling on the fellow-servant question which seems to undermine the proposition that the duty to direct the work is a personal duty of the master. (See preceding paragraph.)Mo. 479
- section foreman injured by piece of coal thrown from passing train by fireman on railroad operated by receivers; the custom was to send orders of roadmaster to section foreman by an employee on train who threw same to section foreman; held that the fireman was not a vice-principal or agent of the roadmaster, but a fellow-servant of the injured employee.. Mo. 479
- switchman injured while uncoupling cars; sudden starting of engine by engineer on signal from an employee on train; held that these employees were fellow-servants.. Mo. 483
- railroad employees injured; notes of casesMo. 491-513
- carpenter working in elevator shaft and boy operating elevator, fellow-servantsMo. 516

FELLOW-SERVANT — *continued.*

- brakeman in switch gang fellow-servant with engineer of switch engineMo. 517
- servant assumes ordinary risks of employment including negligence of fellow-servants.....Mont. 519
- employee of mining company injured by explosion of two blasts which had not exploded at time of firing by other employees; defendant not liable, the fellow-servant and assumption of risk rules being applied and instructions thereon held properMont. 519
- carpenter falling from floor of building and injured owing to alleged incompetency of fellow-servant; unskilful treatment by surgeon also alleged; evidence failed to sustain complaintMont. 526
- statutory modification of the common-law rule as to negligence of fellow-servant and superior servantMont. 527
- railroad employees injured; notes of casesMont. 528-530
- brakeman injured trying to board "kicked" car; railroad company not liable, the negligence, if any, being that a fellow-servant..Neb. 568
- brakeman is fellow-servant of another brakeman employed upon same trainNeb. 569
- brakeman injured by alleged defective coupler; allegation not sustained where it is clearly shown that injury was caused by reckless manner in which the coupler was pushed against another car by another employee.....Neb. 569
- car repairer killed; erroneous instruction failing to distinguish between acts of vice-principal and fellow-servantNeb. 570
- foreman of section crew and engineer of train not connected with work of section men are not fellow-servantsNeb. 573
- the fellow-servant rule stated..Neb. 574
- employee of independent contractor engaged in placing coal in defendant's coal pockets injured by negligence of defendant's engineer; railroad company liable, the plaintiff and the engineer not being fellow-servantsNeb. 580
- employee acting under foreman's orders in trying to disengage block of ice in chute in defendant's ice-house struck by heavy block sent

FELLOW-SERVANT — *continued.*

- down chute; defendant liable, the foreman not being a fellow-servantNeb. 601
- section man assisting in loading rails upon car covered with snow injured by rail falling upon him; negligence of fellow-servant..... N. H. 615
- servant assumes ordinary risks of employment including negligence of fellow-servants N. H. 607, 615, 617, 625
- laborer injured by fall of steel ingot carelessly piled by fellow-laborers; master not liable.....N. H. 626
- who are fellow-servants is not determined by rank or grade of service but by character of service performed; as a general rule those doing the work of a servant are fellow-servants, and a servant charged with performance of master's duty is, as to discharge of that duty, a vice-principal, for whose negligence the master is liableN. H. 628
- servant assumes ordinary risks of employment including negligence of fellow-servants..N. J. 633, 665. 673
- railroad company liable for injuries to servant from its own misconduct, but to warrant recovery the misconduct must be that of the company itself and not simply the negligence of a fellow-servant.... N. J. 633
- master using due care in selection and employment of servants is not responsible for injury to one caused by carelessness of another in course of common employment. N. J. 633
- where servant is injured partly by negligence of master and partly by that of a fellow-servant, the master is liable.....N. J. 643
- railroad employee injured by fall of sliding door in defendant's warehouse; carelessness of man in charge of it; fellow-servant rule appliedN. J. 665
- to constitute relation of fellow-servants, the service must be not only under same master but must be one having a common object.... N. J. 658
- brakeman on engine injured by engine running into rear car of part of train ahead which became detached; nonsuit affirmed; con-

FELLOW-SERVANT — *continued.*

- tributory negligence; fellow-servantN. J. 659
- if injured party was lawfully on premises where he was injured in course of employment he was fellow-servant with those whose negligence caused the injury; if he was a trespasser he assumed the risksN. J. 665
- discussion of the fellow-servant rule and cases distinguishing the doctrineN. J. 683-687
- a fellow-servant is anyone who serves and is controlled by same master and engaged in same common employmentN. J. 680
- master not liable to servant for negligence of fellow-servant unless negligent in selection of negligent servant or retaining him after notice of incompetency.....N. J. 680
- workman killed while engaged in excavating a railroad tunnel; negligence held to be that of fellow-servantN. J. 680
- rule of *respondet superior* discussedN. J. 706
- machinist making repairs in defendant's mill injured by negligent act of defendant's engineer in starting wheel; fellow-servant rule appliedN. J. 706
- erroneous instruction on the fellow-servant rule.....N. J. 707
- employee delivering hodful of brick to masons upon scaffold erected by them, all being in employ of defendant, a contractor constructing brick walls of building, injured by fall of scaffold; master not liable, the negligence being that of fellow servantsN. J. 717
- laborer in quarry thrown from rock by blasting operations owing to defective machinery and killed; nonsuit reversed as conflicting evidence was for jury.....N. J. 719
- notes of master and servant cases.. N. Mex. 728-729
- master not liable to servant for injury caused by another servant in same business of same master when master not guilty of any fault which occasioned the injury, either in the act causing it or in selection and employment of the one by whose fault it happened.. N. Y. 730
- fireman on locomotive, conductor of the train and a telegraph operator

FELLOW-SERVANT — *continued.*

- communicating orders as to trains, are fellow-servants in same common employment and for an injury to one by negligence of another, railroad company is not liableN. Y. 772
- a railway may vary its timetable set for servants for running trains and is only required to use due care and diligence in giving notice of the change by selecting competent servants to perform that duty, and a servant assumes the risk of negligence of such fellow-servantsN. Y. 772
- negligence of conductor and telegraph operator in transmission of orders from train dispatcher to engineer resulting in collision of trains and killing of fireman; receiver of railroad not liable, the negligence causing the injury being that of fellow-servants..N. Y. 772
- train dispatcher not a fellow-servant of those operating the train.. N. Y. 783
- master not liable for injury to servant caused by negligence of fellow-servant N. Y. 734, 747, 752, 765, 772, 798
- employee moving damaged cars to shops crushed between cars by backing train which yardmaster negligently signaled; act of fellow-servantN. Y. 798
- railroad employees injured; notes of casesN. Y. 801-820
- liability of master to servant injured by wrongful act of fellow-servant does not depend upon grade or rank of servant causing the injury but upon the character of the act in the performance of which the injury arises.....N. Y. 820
- employee injured in defendant's iron works by the gearing wheels of a pumping engine, the superintendent letting on the steam causing the wheel to start; judgment for plaintiff reversed for erroneous instruction and refusal to instruct on question of whether superintendent was representative of defendant or a fellow-servant..N. Y. 820
- where superintendent of iron works let on steam which caused machinery to move and injure an employee, he was not acting in master's place in that particular act, it not being his duty to operate machineryN. Y. 820

FELLOW-SERVANT — *continued.*

- but see strong dissenting opinion in the case stated in the preceding paragraphN. Y. 823
- servant assumes the ordinary risks of employment including negligence of fellow-servants..... N. Y. 734, 752, 772, 790, 798, 820, 832

FELLOW-SERVANT ACT.

- work done in constructing a yard with tracks in it, to be used with and as part of line of railroad already open to public, does not come within proviso to the Act of 1887, c. 13, section 1, exempting railroad company from liability to employee injured by co-employee working on a new road not open to public.....Minn. 259
- the Iowa Statute giving right of action to employee injured by negligence of another employee is not against public policy of laws of Minnesota, and action may be maintained in latter State...Minn. 292
- the Fellow-Servant Act does not apply to street railway corporations. Minn. 326
- the Fellow-Servant Act construed.. Minn. 326
- receiver operating railroad under appointment of court of equity is within the provisions of the Fellow-Servant Act, G. S. 1894, section 2701, and liable to employee injured by negligence of co-employeeMinn. 336
- railroad employees injured; cases within and without the Fellow-Servant ActMinn. 337-340
- the Fellow-Servant Act, Laws 1887, c. 13, G. S. 1894, section 2701..Minn. 325, 326, 329, 336, 337-340
- the Railroad Employees Fellow-Servant Act, Constitution 1890, section 193, extended to employees of other corporations, Laws 1892, 1896, 1898Miss. 358-359

FEMALE EMPLOYEE.

- injured by fall of building due to extraordinary storm; erroneous admission of evidence, etc...Mo. 416
- wife of employer directing domestic servant to perform work which caused injury to servant who fell from a ladder while attempting to enter loft; servant not entitled to recover having assumed the risks of her employment.....Mo. 433

FEMALE EMPLOYEE — continued.

injured while operating laundry mangle; knowledge of defect; assumption of risk.....Neb. 599
 girl, thirteen years of age, voluntarily operating straw cutter, not entitled to recover for injuries.....Neb. 599
 struck in the eye by shuttle of loom after loom-fixer had made repairs; master liable.....N. H. 628
 injured by machinery.....N. J. 715-716
 minor employees injured by machinery, etc.; notes and abstracts of casesN. Y. 842-846

FALSUS IN UNO, FALSUS IN OMNIBUS.

the maxim, *falsus in uno, falsus in omnibus*, applies only where witness has knowingly and wilfully testified falsely as to a matter of factNeb. 573

FENCE, COVER, OR GUARD.

minor employee, sixteen years old, removing a slab from gearing in sawmill, injured by trousers catching in uncovered cogs, his leg being crushed; master liable..... Mich. 4
 employee injured by leg being caught in uncovered gearing of machinery in mill; master liable.....Mich. 16
 statutory liability for uncovered or unguarded machinery, after notice given to proprietor.....Mich. 28
 minor employees injured by machinery; notes of cases...Mich. 26-28
 although it may be negligence for master to leave machinery uncovered, yet the servant is not necessarily negligent in working near it, knowing of its condition; the measure of the duty of each not being the same.....Minn. 173
 employee in sawmill injured by clothing catching in gearing of machinery, the same not being boxed or covered; defendant liableMinn. 173
 accidents from uncovered or unguarded machinery; notes of casesMinn. 175-179
 statute relating to cattle-guards and fencesMinn. 286
 miner injured by lump of coal which fell from car in hoisting cage at top of mine shaft, the cage being uncovered; master liable.....Mo. 397
 cases under the Coal Mines Act of 1881Mo. 397-399

FENCE, COVER, OR GUARD — con.
the Coal Mines Act of 1881.....

Mo. 397, 399, 400
 employee falling from platform, defective construction and absence of guard-rail being alleged, nonsuit reversed, the complaint being sufficient to show cause of action.

Mo. 411
 brakeman killed while coupling cars, his foot catching in unblocked guard-rail, he knowing the tracks to be unblocked and dangerous; petition failing to negative presumption, that deceased assumed risksNeb. 555

brakeman killed while coupling cars owing to failure of railroad company to block its switches and frogs; defendant not liable..Neb. 562
 minor employees injured by machinery, etc.; notes and abstracts of casesN. Y. 842-846

FIRE.

railroad company not liable for fire negligently set by section men which injured plaintiff's property. Minn. 346

FIRE DEPARTMENT.

relation of master and servant does not exist between city and members of its fire department..Mich. 83
 fire-engine driver in city fire department injured while driving along defective street; city liable..Mich. 83

FIREMAN.

on freight train injured by train being ditched through failure of engineer to obey signals; negligence of fellow-servant.....Mich. 117
 fatally injured in collision; erroneous admission of evidence as to pecuniary means of deceased at time of death.....Mich. 119
 killed in collision; erroneous admission of evidence as to pecuniary means of deceased at time of deathMich. 134
 railroad employees injured; notes of casesMich. 154-173
 killed by locomotive being thrown from track owing to a washout; erroneous instructions as to absolute duty of railroad company, without regard to degree of care exercised by it to guard against such accidentsMinn. 302
 injured by engine running into snow-bank owing to alleged defect in

FIREMAN — continued.

- locomotive; failure of evidence to support plaintiff's contention..... Minn. 308
- fireman on an engine and a telegraph operator are engaged in different departments of labor, in the meaning of the Constitution 1890, section 193.....Minn. 366
- killed in collision; action brought by widow and children of deceased not in conformity with statute giving right of action to the "legal or personal representative."Miss. 366
- but this ruling is subsequently distinguishedMiss. 372
- minor employee, a fireman, injured by overturning of engine, caused by alleged defective track; railroad company liable for failure to properly inspect track.....Mo. 455
- section foreman injured by piece of coal thrown from passing train by fireman on railroad operated by receivers; the custom was to send orders of roadmaster to section foreman by an employee on train who threw same to section foreman; held that the fireman was not a vice-principal or agent of the roadmaster, but a fellow-servant of the injured employee... Mo. 479
- railroad employees injured; notes of casesMo. 491-513
- where fireman was killed by collapse of railroad trestle over which engine was passing and it appeared the engineer had orders not to run his engine on the trestle as it was not strong enough to support it but deceased had no knowledge thereof, plaintiff was entitled to recover as accident was caused in part by want of care as to safety of roadbedN. J. 643
- injured by explosion of locomotive boiler; railroad company liable.. N. Y. 730
- on freight train killed by a number of cars of another freight train which had become detached colliding with his train; the forward train was insufficiently equipped with brakeman and was sent out by defendant's agent, a head conductor, whose duty it was to make up trains, etc.; railroad company liable for the negligent act of its agentN. Y. 765

FIREMAN — continued.

- negligence of conductor and telegraph operator in transmission of orders from train dispatcher to engineer resulting in collision of trains and killing of fireman; receiver of railroad not liable, the negligence causing the injury being that of fellow-servants...N. Y. 772
- fireman on locomotive, conductor of the train, and a telegraph operator communicating orders as to trains, are fellow-servants in same common employment and for an injury to one by negligence of another, railroad company is not liableN. Y. 772
- on freight train injured in collision with another train due to alleged negligence of train dispatcher in giving orders; railroad company liableN. Y. 783
- running "wild" train by order of defendant's superintendent injured in collision; inadequacy of rules for prevention of accidents; railroad company liable.....N. Y. 788
- railroad employees injured; notes of casesN. Y. 801-820

FLAGMAN.

- head brakeman on freight train injured by switch engine running at high speed crashing into train, train running without a headlight and no flagman being sent ahead to see if track was clear; question of constitutional law.....Mont. 527
- railroad employees injured; notes of casesN. Y. 801-820

FLYING OBJECT.

- blacksmith struck in the eye by piece of steel which flew from sledge hammer which another employee was using; master not liableMich. 57
- employee operating emery wheel in railroad car shops injured by breaking of wheel and some of the pieces flying into his face, assumed the risks where it appeared that he had worked for four years as a machinist and had knowledge of defectMich. 131
- minor employee, seventeen years of age, struck in the eye by flying fragment from tool struck by hammer by another employee; master not liable, the fellow-servant rule being applied.....Minn. 254

FLYING OBJECT — continued.

employee injured by piece of wood thrown from rip-saw machine, defective set screws being alleged; master liable.....Mo. 387

section foreman injured by piece of coal thrown from passing train by fireman on railroad operated by receivers; the custom was to send orders of roadmaster to section foreman by an employee on train who threw same to section foreman; held that the fireman was not a vice-principal or agent of the roadmaster, but a fellow-servant of the injured employee..Mo. 479

section hand injured by piece of coal which fell from passing train; railroad company liable.....Neb. 574

FOREIGN CAR.

cases involving the question of inspection of cars, etc.....Mich. 101-104

railroad company answerable for same degree of care in management and use of foreign car received by it as in use of own cars. Minn. 288

defective car received by one railroad from another and brakeman injured while coupling cars; railroad company liable.....Minn. 288

switchman injured while coupling foreign cars; failure to instruct employee as to extra hazards; railroad company liable.....Miss. 368

brakeman injured by defective hand hold on foreign car; erroneous instruction on question of release.. Mo. 460

railroad employees injured by defective hand holds on foreign cars; notes of cases.....Mo. 467-469

railroad employees injured; notes of casesN. Y. 801-820

FOREIGN CASES.

notes of and references to English cases...9, 91, 92, 93, 94, 96, 203, 242, 248, 271, 287, 318, 364, 381, 389, 410, 414, 446, 447, 448, 606, 614, 637, 638, 640, 642, 649, 650, 657, 684, 686, 687, 690, 691, 705, 706, 709, 711, 737, 743, 745, 746, 756, 757, 758, 761, 762, 767, 821, 822.

FOREMAN.

in mill charged with duty of having machinery covered if same is uncovered while employees are work-

FOREMAN — continued.

ing, is not a fellow-servant of such employees, but represents the master, who is liable to employee injured by neglect of such duty.... Mich. 16

person employed to unload coal from vessel and foreman in charge of the work not fellow-servants..... Mich. 77

of section men and the section men held to be fellow-servants in action by one of the section men for injuries sustained by the backing of engine against loaded cars due to failure of foreman to give notice to the men of moving of train. Mich. 111

in the matter of building a railroad trestle the foreman was a fellow-servant with the workmen under himMinn. 200

laborer engaged with others in grading a railroad ordered by foreman to assist another in shoving out stringers injured by fall of trestle which was properly braced; defendant not liable, all the laborers engaged in the different departments of the work being fellow-servantsMinn. 200

whenever a master delegates to another the performance of a duty to a servant which rests upon himself absolutely, he is liable for the manner in which it is performed, and to that extent the agent stands in the place of the master; as to all other matters he is a mere co-servant with other employeesMinn. 200

where laborer was fatally injured by fall of tank in building which was being erected by defendant, the work being done under direction of foremen of two gangs of men, the question whether either or both of such foremen were vice-principals, and whether the accident resulted from their, or either of their negligence, should have been submitted to jury.....Minn. 206

foreman having supreme authority over laborers digging a ditch was a vice-principal, and not a fellow-servant with the laborers.... Minn. 220

section foreman intrusted with the duty of keeping track in repair and employee on wood train injured in derailment caused by

FOREMAN — *continued.*

- such foreman's neglect, not fellow-servantsMinn. 243
- employee on wood train injured in derailment caused by negligence of section foreman in taking up a rail for track repair without putting out proper signals to warn approaching train; railroad liable. Minn. 243
- railroad employee attempting to board moving gravel train by direction of foreman injured by falling as train was started without signal; railroad company liable.. Minn. 259
- railroad employee injured by fall of derrick owing to negligence of foreman in constructing platform; railroad company liable, the foreman being held to be a vice-principalMinn. 261
- foreman in charge of distinct piece of work in foundry and employees under him not fellow-servants, the foreman being a vice-principal... Mo. 383
- employee injured by fall of iron column while working under direction of foreman; master liable.... Mo. 412
- foreman having control of laborers acting under his directions is not a fellow-servant, but represents the masterMo. 414
- foreman for mining company with full control of materials, etc., and employees, is a vice-principal of the corporation, and for injuries resulting from his negligence the corporation is liable.....Mont. 524
- employee acting under foreman's orders in trying to disengage block of ice in chute in defendant's ice-house struck by heavy block sent down chute; defendant liable, the foreman not being a fellow-servantNeb. 601
- discussion of the fellow-servant rule and cases distinguishing the doctrineN. J. 683-687
- railroad employee injured by fall of scaffold which was defectively constructed by incompetent employees under direction of foreman who was drunk at the time of the accident, the intemperate habits of the foreman being known by the agent who employed him; railroad company chargeable with notice of the habits of the foreman and liable for act of agent

FOREMAN — *continued.*

- in retaining him in employ after knowledge of said habit....N. Y. 747
- whether plaintiff was negligent remaining in employment after knowledge of a foreman's intemperate habits was a question for the juryN. Y. 747

FOUND DEAD ON TRACK.

- brakeman found dead on track; no evidence of negligence of defendant; assumption of risk.....Neb. 563

FOOTBOARD OF ENGINE.

- switchman injured by footboard of engine giving way; railroad company liableMiss. 369
- switchman killed by falling from defective footboard of switch engine; railroad company liable.....Mo. 481

FRAUD.

- question of written instrument purporting to be a release and allegation of fraud in obtaining same.. Mo. 379, 380
- instruction submitting question of fraud in obtaining release should not be given where there is no evidence to support it.....Mo. 460
- improper instructionspermitting jury to disregard release if the company's agent obtained it by "trick or artifice;" charge should be confined to fraud shown by evidence. Mo. 460

FREIGHT CAR AND TRAIN.
See COUPLING CARS, DEFECTIVE CARS, COLLISION, and kindred titles.

FREIGHT ELEVATOR. See ELEVATOR.

GEARING. See SET SCREW; MACHINERY.

- where defendant's superintendent turned on machinery while plaintiff was attempting to oil planer machine which he was running in factory and plaintiff was injured by gearing, question of contributory negligence properly submitted to juryMich. 10
- employee injured by leg being caught in uncovered gearing of machinery in mill; master liable.....Mich. 16
- employee, eighteen years of age, injured by foot catching in gearing

GEARING — *continued*.

wheel in sawmill, he having apparently slipped; master not liable, it being held that the injury was the result of a pure accident.....

Mich. 25

minor employees injured by machinery; notes of cases... Mich. 26-28

employee in sawmill injured by clothing catching in gearing of machinery, the same not being boxed or covered; defendant liable.....

Minn. 173

accidents from uncovered or unguarded machinery; notes of cases.

Minn. 175-179

employee injured in defendant's iron works by gearing wheels of a pumping engine, the superintendent letting on the steam causing the wheel to start; judgment for plaintiff reversed for erroneous instruction and refusal to instruct on question of whether superintendent was representative of defendant or fellow-servant... N. Y. 820

GIANT POWDER.

miner injured by explosion of giant powder; failure to instruct or warn employee of danger of new explosive when introduced into the work; company liable... N. J. 683

GRAIN ELEVATOR.

employee stepping into opening in grain elevator in defendant's flouring mill; assumption of risk. Minn. 167

laborer employed in clearing grain from burning elevator fatally injured by falling wall; error to take case from jury as the questions whether defendants took proper care to see that place was safe to work in and that employees were not exposed to unnecessary risks were for jury to determine... Minn. 215

laborer in grain elevator while working in bin under direction of defendant's superintendent, killed by fall of grain; nonsuit reversed; questions of negligence being for jury N. Y. 790

employee of another company injured in grain elevator at defendant's pier by being caught between cars which were being loaded; erroneous instruction on rule of law applicable to licensees... N. Y. 800

GRIPMAN.

of cable car struck by grip car; street railway company not liable Mo. 513

GUARD-RAIL. See FENCE, COVER OR GUARD.

employee falling from platform, defective construction and absence of guard-rail being alleged, nonsuit reversed, the complaint being sufficient to show cause of action Mo. 411

brakeman killed while coupling cars his foot catching in unblocked guard-rail, he knowing the tracks to be unblocked and dangerous; petition failing to negative presumption that deceased assumed risks..

Neb. 555

GUARD TO MACHINERY. See FENCE, COVER OR GUARD.**HAND CAR.**

railroad employees injured; notes of cases..... Mich. 154-173

section hand falling from hand car and run over by car following at excessive speed; railroad company liable Minn. 314

railroad employees injured; notes of cases Minn. 347-358

section foreman injured while operating hand car on one railway which was leased by another, defective wheel and lever on the car being alleged; declaration held to show a cause of action against the lessee Miss. 369

railroad employees injured; notes of cases Mo. 491-513

HARSH AND LOUD TONE OF VOICE.

employee injured by coming in contact with hoisting appliance; superintendent's directions to engineer given in harsh and loud tone of voice alleged as negligence causing injury; master not liable N. H. 630

HEARSAY EVIDENCE.

where person is injured by mill machinery it is improper to ask witness whether he had heard of similar injuries to other persons, as such a question calls for hearsay evidence Mich. 4

HEARSAY EVIDENCE — *continued.*

where plaintiff claimed injury from arsenical poisoning, but defendant claimed it was caused by lead poisoning, it was error to admit testimony of physician in plaintiff's favor which was based on a certain paper not in evidence, as the witness did not base his opinion upon a history of the case but upon conclusions of another physician Mich. 66
 declarations of injured employee to railroad agent cannot bind the company, as proof of such declarations would be mere hearsay evidence Minn. 321

HOISTING APPLIANCE.

employee, a top filler in blast furnace, engaged in putting coal and ore into top of furnace; injured by defective appliance to the hoisting machine, plaintiff working under direction of head engineer and another; master liable... Mich. 31
 defendant not liable for injuries sustained by plaintiff, an employee of contractor filling defendant's ice house, caused by breaking of wire cable attached to hoisting apparatus furnished by defendant, where same was improperly managed by fellow-servants of plaintiff... Mich. 53
 employee working in and about coal hoist thrown under coal car, owing to defective construction of the hoist; error to take case from jury where it was shown that plaintiff had pointed out defects to defendant's superintendent, who promised to remedy same... Mo. 377
 miner injured by lump of coal which fell from car in hoisting cage at top of mine shaft, the cage being uncovered; master liable Mo. 397
 employee injured by coming in contact with hoisting appliance; superintendent's directions to engineer given in harsh and loud tone of voice alleged as negligence causing injury; master not liable N. H. 630
 stevedore killed while unloading steamship at dock, defective appliance to hoisting apparatus breaking and causing bags of rice to fall upon employee; steamship company liable N. J. 673

HORSE.

street car driver kicked by horse and fatally injured; sufficient evidence to go to jury; nonsuit reversed... Neb. 592
 employee injured by vicious horse which he was driving; master liable Neb. 594

HUSBAND AND WIFE.

wife giving directions to domestic servant in her husband's employment is agent of her husband and is not liable for injury to servant obeying the order..... Mo. 433

HYPOTHETICAL CASE.

carpenter working on elevator shaft struck by descending elevator; erroneous instruction on hypothetical case not made by the evidence. Mo. 402

ICE AND WATER.

laborer engaged in molding, ordered by defendant's foreman to get ladle of molten iron slipping on ice and water and fatally injured by explosion caused by molten metal coming in contact with the ice and water, the danger of which was not known to the employee.. Mich. 42

ICE HOUSE.

defendant not liable for injuries sustained by plaintiff, an employee of contractor filling defendant's ice house, caused by breaking of wire cable attached to hoisting apparatus furnished by defendant where same was improperly managed by fellow-servant of plaintiff. Mich. 53
 employee acting under foreman's orders in trying to disengage block of ice in chute in defendant's ice house, struck by heavy block sent down chute; defendant liable, the foreman not being a fellow-servant Neb. 601

IMPROVED MACHINERY. See SAFE MACHINERY.

master introducing improved and complete machinery must take such precautions for safety of servants using it as customary with prudent men Mich. I
 an employer is not obliged to make his premises and machinery per-

IMPROVED MACHINERY — *cont'd.*

- fectly safe, or to have the most approved appliances.....Mich. 56
- duty of railroad company to provide reasonably safe track and equipments for employees, but not bound to use latest and improved structures, etc.....Mich. 126
- duty of master to furnish reasonably safe appliances for servant to work with, but not bound to furnish the newest or safest appliances, etc.....Neb. 555, 592, 593, 594

INCOMPETENT SERVANT. See COMPETENCY AND INCOMPETENCY.

INDEPENDENT CONTRACTOR.

- boy in employ of contractor injured by bursting of emery wheel on defendant's premises; defendant not liableMich. 30
- defendant not liable for injuries sustained by plaintiff, an employee of contractor filling defendant's ice house, caused by breaking of wire cable attached to hoisting apparatus furnished by defendant, where same was improperly managed by fellow-servants of plaintiff..Mich. 53
- owner of building not liable for injuries sustained by painter in employ of contractor, by the giving way of a scaffold which had been erected by carpenters; negligence of fellow-servantsMich. 82
- where one performs work for another, representing the will of that other, not only as to the result, but also as to the means by which that result is accomplished, he is not an independent contractor, but the agent of that other, who is responsible for his acts and omissions within scope of his authorityMinn. 188
- evidence of defense by insurer on indemnity policy admissible to show that defendants did not regard their agent or superintendent as an independent contractor.... Minn. 188
- employee of contractor injured by collapse of brickwork in building being erected for defendants; fellow-servant rule applied....Minn. 219
- employee of brewery scalded and fatally injured by bursting of ten-inch piping to boiler, which was being put in a brewery by defendants who had the contract for the

INDEPENDENT CONTRACTOR — *continued.*

- same; judgment for defendants reversed, as the questions of independent contractor, fellow-servant, and scope of employment were for jury to determine.....Minn. 234
- employee of independent contractor engaged in placing coal in defendant's coal pockets, injured by negligence of defendant's engineer; railroad company liable, the plaintiff and the engineer not being fellow-servantsNeb. 580
- workman in employ of rolling mill engaged in erecting a railroad bridge, injured by train negligently run by defendant's engineer over the bridge; nonsuit reversed as the question of who the plaintiff's employer was should have been left to the jury.....N. J. 658
- subsequent decision affirmed judgment for plaintiff (see preceding paragraph)N. J. 659
- negligence of employee of sub-contractor resulting in killing of person by explosion of nitroglycerine used for blasting purposes, which was wrongfully stored on railroad premises; action not maintainable against railroad company or the contractor for the negligence of the employee of the sub-contractor, the relation of master and servant not being created by the sub-contractN. J. 668
- cases in which the question of independent contractor is involved... N. J. 668-670

INDEMNITY POLICY.

- evidence of defense by insurer on indemnity policy admissible to show that defendants did not regard their agent or superintendent as an independent contractor.... Minn. 188

INFANT. [MINOR EMPLOYEES].

- minor employee, sixteen years old, removing a slab from gearing in saw mill, injured by trousers catching in uncovered cogs, his leg being crushed; master liable.. Mich. 4
- employee, eighteen years of age, injured by foot catching in gearing wheel in saw mill, he having apparently slipped; master not liable, it being held that the injury

INFANT — *continued.*

- was the result of a pure accident. Mich. 25
- minor employees injured by machinery; notes of cases... Mich. 26-28
- minor employee injured by sparks from molten iron, caused by alleged incompetency of assistant; master not liable..... Mich. 29
- boy in employ of contractor, injured by bursting of emery wheel on defendant's premises; defendant not liable Mich. 30
- minor employee, laborer in railway service, assisting in unloading ties on flat car, ordered by employee in charge of the construction train to go back to the caboose and help stop the train, falling between cars, run over and fatally injured; excessive damages Mich. 87
- railroad employees injured; notes of cases Mich. 154-173
- boy between fifteen and sixteen years of age, while removing refuse from under revolving saw under directions of defendant's superintendent, injured by hand being caught by the saw; master.. liable Minn. 188
- a youth between fifteen and sixteen years of age is required to exercise that amount of discretion which persons of his age and experience should exercise, and no more, and whether he is negligent is question for jury..... Minn. 188
- whether master is negligent in failing to warn minor employees of danger of machinery, question for jury Minn. 188
- verdict for \$4,000 for injuries to boy between fifteen and sixteen years of age who lost three of his fingers while working near revolving saw, not excessive Minn. 188
- the statute, G. S. 1894, section 5164, authorizing father to bring action for injuries to child, is constitutional, the action being for benefit of child, and the judgment would be a bar to another action by child Minn. 190
- minor employees injured by machinery; notes of cases..... Minn. 189-192
- minor employees injured while using elevators; master not liable. Minn. 196, 197
- minor employee, a boy nineteen years of age, engaged in working on railroad track, ordered by his

INFANT — *continued.*

- foreman to assist in removing the debris from depot partially destroyed by fire, and while there ordered by another, not an employee of defendant, to shovel ashes on another floor, and injured by the floor giving way; defendant liable Minn. 247
- where danger in working about machinery is obvious, and a minor employee, nineteen years old, having worked on machine for a long time, is injured by the rollers of machine, the master is not negligent in setting him to work nor failing to inform him of danger.. Minn. 251
- minor employee, nineteen years old, working in railroad shop, injured by fingers being caught in rollers of machine; knowledge of danger; master not liable..... Minn. 251
- a servant, though a minor, assumes the risk of negligence of fellow-servants as a hazard incident to the service Minn. 254
- minor employee, seventeen years of age, struck in the eye by flying fragment from tool struck by hammer by another employee; master not liable, the fellow-servant rule being applied.... Minn. 254
- minor employees injured while coupling cars..... Miss. 370, 371
- right of parent, under Code 1892, section 663, to recover for death of child, depends on whether child, had it survived, could have maintained action for the jury... Miss. 372
- it is only where railroad employee is killed through negligence of fellow-servant that the action must be brought by the personal representative under Constitution 1890, section 193; but where the negligence is that of the company itself, the action for death of a child is to be brought by the parent, under Code 1892, section 663 (distinguishing a former ruling, see Miss. 366)..... Miss. 372
- clothing of minor employee, a boy, seventeen years of age, caught by set screw of revolving shaft and employee injured; master liable for failure to instruct employee as to danger Mo. 383
- where minor employee, twenty years of age, was injured by rollers of machine, the danger being ob-

INFANT — *continued.*

- vious, master was not liable nor negligent in not warning employee of danger Mo. 384
- minor employee killed while riding in freight elevator; nonsuit; assumption of risk..... Mo. 404
- minor employee, a brakeman, while at his brake on top of freight car killed by head coming in contact with bridge; refusal to give defendant's requests to charge as to contributory negligence and assumption of risk..... Mo. 451, 452
- minor employee, a fireman, injured by overturning of engine, caused by alleged defective track; railroad company liable for failure to properly inspect track..... Mo. 455
- minor employees injured in service of railroad companies; notes of cases Mo. 455-458
- minor employee, a switchman, run over by car; railroad company liable; heavy damages..... Mo. 480
- verdict for \$25,000 for switchman, seventeen years old, run over in railroad yard, both legs being injured, resulting in right foot and left leg being amputated; remittitur of \$5,000 damages, \$20,000 not excessive Mo. 480
- boy, twelve years of age, engaged with his father as car cleaner, directed to go to tool house by his father, while crawling under cars of defendant on track used in joint occupancy with plaintiff's company, injured by sudden backing of engine without signal or warning; defendant liable, the boy being rightfully on the track, and the question of his negligence being for jury Neb. 544
- degree of care required of child of tender years is that of ordinary care, reasonable for one of its age Neb. 544
- minor employee, a teamster in employ of street railroad company, injured by fire alarm wire falling across trolley wire; erroneous instruction on defective appliance.. Neb. 593
- girl, thirteen years of age, voluntarily operating straw cutter, not entitled to recover for injuries.. Neb. 599
- boy, seventeen years old, inexperienced in use of machinery, injured by circular saw on defendant's premises; defendant liable.. N. J. 714

INFANT — *continued.*

- servant assumes ordinary risks of employment, but where he is an infant it is master's duty to warn and instruct him as to dangers.. N. J. 714
- railroad employee, eighteen years of age, suffocated by cave-in of earth while he was cleaning out water pipes on defendant's premises; nonsuit reversed, as question of defendant's negligence in furnishing reasonably safe place to work was for jury..... N. Y. 795
- minor employee injured in mine; defendant liable; question at issue related to practice in regard to bringing of suit by infant, and appointment of guardian..... N. Y. 839
- boy, twelve years old, assisting in operating machinery, attempting to put heavy cylinder in place, slipping, and in attempting to save himself from falling, threw out his hand and thrust it into cogwheels about nine inches from end of cylinder; defendant not liable, the danger being obvious and unnecessary to instruct boy thereon, and the proximate cause of injury was accidental slipping and not ignorance of machinery.. N. Y. 842
- the law requires that minor employees should be properly instructed as to danger of machinery and if injury happens by reason of failure to so instruct, then, as a general rule, master is liable N. Y. 842
- where minor is familiar with use of machinery and is aware of danger in operating it, the fact that he is a minor does not alter general rule that servant assumes all ordinary risks of employment, including those from obvious dangers..... N. Y. 842
- minor employees injured by machinery, etc.; notes and abstracts of cases N. Y. 842-846

INSPECTION.

- duty of inspection of machinery and appliances, etc., when required by circumstances cannot be delegated by master as to avoid liability on his part..... Mich. 51
- an instruction that if defendant railway company allowed its track to become out of repair, it is liable

INSPECTION — *continued.*

- for the resulting damages, was erroneous, as if track was reasonably safe as originally constructed the duty of defendant was reasonable inspection to see that it continued in such condition..... Mich. 98
- duty of master to provide safe place to work in continuing to the extent of reasonable inspection of premises and repairing same when necessary Mich. 98
- question of fellow-servant in relation to inspection of cars, track, etc., discussed..... Mich. 98; 101-104
- cases involving the question of inspection of cars, etc.... Mich. 101-104
- where no provision is made for inspection of engines except by the engineers in charge, the latter must be held to be representatives of the railway company..... Mich. 112
- duty of master to provide reasonably safe place and machinery is not discharged after furnishing same by providing for inspection by a fellow-servant; the master must take reasonable measures to inform himself from time to time of their condition..... Mich. 112
- brakeman killed by being thrown from logging train by reason of breaking of brake-chain; railroad liable for negligence of its car inspector in failing to inspect cars before starting on trip..... Mich. 121
- railroad company answerable for same degree of care in management and use of foreign car received by it as in use of own cars Minn. 288
- railroad employees injured while coupling cars; question of inspection; notes of cases..... Minn. 288-290
- minor employee, a fireman, injured by overturning of engine, caused by alleged defective track; railroad company liable for failure to properly inspect track..... Mo. 455
- railroad employee has right to rely on company's proper discharge of duty to inspect track, and its continuance in service was not an assumption of risk of defective track Mo. 455
- railroad employees injured by defective handholds on foreign cars; notes of cases..... Mo. 467-469

INSPECTION — *continued.*

- where railroad company exercises reasonable care in providing safe and suitable coupler for car, and exercises care in inspection thereof, it will not be liable for its suddenly becoming out of repair and before opportunity can be had to remedy defect..... N. J. 659
- duty of master to furnish suitable appliances for use by servant, and this includes duty to keep same in repair and make proper inspection N. J. 673, 689, 700
- duty of master to provide safe place to work and suitable machinery for use by servant, and this duty includes proper inspection and repair N. J. 719, 720
- baggage-man on defendant's train killed by collapse of bridge over which train was passing, the fall being occasioned by decay in its timbers; railroad company not liable where it appeared that bridge was properly constructed and the defect was not apparent from inspection, and it was not shown that it had notice of defect.. N. Y. 734
- brakeman thrown from freight car owing to defective brake rod; duty of railroad company to properly inspect cars..... N. Y. 787
- railroad employees injured; notes of cases N. Y. 801-820

INSTANTANEOUS DEATH.

- construction of the statutes as to right of action for injuries resulting in death of railway employees and in cases of instantaneous death Miss. 367

INSTRUCTING EMPLOYEE. See WARNING.

- whether master is negligent in failing to warn minor employees of danger of machinery, question for jury Minn. 188
- minor employees injured by machinery; notes of cases..... Minn. 189-192
- where danger in working about machinery is obvious, and a minor employee, nineteen years old, having worked on machine for a long time, is injured by the rollers of machine, the master is not negligent in setting him to work nor failing to inform him of danger.. Minn. 251

INSTRUCTING EMPLOYEE—*con.*

switchman injured while coupling foreign cars; failure to instruct employee as to extra hazards; railroad company liable.....Miss. 368

clothing of minor employee, a boy seventeen years of age, caught by set screw of revolving shaft and employee injured; master liable for failure to instruct employee as to danger.....Mo. 383

where minor employee, twenty years of age, was injured by rollers of machine, the danger being obvious, master was not liable nor negligent in not warning employee of dangerMo. 384

inexperienced employee, operating saw machine, injured while trying to fix belt to machine; failure to warn him of danger; master liableN. H. 629

master not bound to warn or instruct employees as to dangers open to ordinary observation, except in cases of youth, ignorance, inexperience, or want of capacity. N. H. 630

miner injured by explosion of giant powder; failure to instruct or warn employee of danger of new explosive when introduced into the work; company liable....N. J. 683

servant assumes ordinary risks of employment, but where he is an infant it is master's duty to warn and instruct him as to dangers... N. J. 714

boy, twelve years old, assisting in operating machinery, attempting to put heavy cylinder in place, slipping, and in trying to save himself from falling, threw out his hand and thrust it into cog-wheels about nine inches from end of cylinder; defendant not liable, danger being obvious and unnecessary to instruct boy as to same, and the proximate cause of injury was accidental slipping, and not ignorance of machinery.....N. Y. 842

the law requires that minor employees should be properly instructed as to danger of machinery, and if injury happens by reason of failure to so instruct, then, as a general rule, master is liable. N. Y. 842

minor employees injured by machinery, etc.; notes and abstracts of casesN. Y. 842-846

INSTRUCTION. [CHARGE TO JURY].

that if defendant railway company allowed its track to become out of repair it is liable for the resulting damages, was erroneous, as if track was reasonably safe as originally constructed duty of defendant was reasonable inspection to see it continued in such condition.

Mich. 98

jury must receive law and testimony in open court and not be allowed to take to jury room the requests to charge given by the court. Mich. 122

suggesting or assuming existence of a fact not conceded in the case, in the charge to the jury, is damaging errorMich. 122

engine colliding with flat car and thrown from track, and engineer injured; judgment for plaintiff reversed for erroneous instruction as to duty of railroad company in respect to side track.....Mich. 122

where plaintiff alleged complaint to defendant of defective emery wheel, and promise of defendant to repair same, but there was no evidence of such promise, it was error to submit that question to juryMich. 131

section boss cutting down trolley wire under direction of road-master, fatally injured by recoil of the wire; erroneous charge on the question of damages.....Mich. 143

fireman killed by locomotive being thrown from track, owing to a washout, erroneous instructions as to absolute duty of railroad company, without regard to degree of care exercised by it, to guard against such accidents.....Minn. 302

stationary engineer scalded by escape of steam from machinery in defendant's mill; erroneous instructions on assumption of risk; judgment for plaintiff reversed.. Mo. 390

where instructions given for defendant force the jury to a compromise verdict for plaintiff (one dollar damages) which is practically a verdict for defendant, it should be set aside.....Mo. 402

carpenter working in elevator shaft struck by descending elevator; erroneous instruction on hypothetical case not made by the evidenceMo. 402

without evidence to warrant it an instruction awarding vindictive damages is improper.....Mo. 424

INSTRUCTION — *continued.*

stone mason falling from swinging scaffold alleged to be defectively constructed; erroneous instruction permitting punitive damages..Mo. 424
 which present issues not fairly raised by pleading and evidence, misleadingMo. 435
 minor employee, a brakeman, while at his brake on top of freight car killed by head coming in contact with bridge; refusal to give defendant's requests to charge as to contributory negligence and assumption of risk.....Mo. 451, 452
 submitting question of fraud in obtaining release should not be given where there is no evidence to support itMo. 460
 improper permitting jury to disregard release if the company's agent obtained it by "trick or artifice;" charge should be confined to fraud shown by evidence. Mo. 460
 brakeman injured by defective handhold on foreign car; erroneous instruction on question of release.. Mo. 460
 on negligence should not be given where there is no evidence to support itMo. 476
 erroneous, on assumption of risk.. Mo. 476
 where complaint only charged negligence and carelessness of employees, proper to charge there was no claim of their incompetencyMont. 519
 duty of District Court to inform jury, by instructions, of the issues of the case on trial and party seeking more specific instructions must request correct instruction in order to secure review by Supreme CourtNeb. 530
 when erroneous instructions not prejudicialNeb. 530
 car repairer killed; erroneous instruction failing to distinguish between acts of vice-principal and fellow-servantNeb. 570
 section foreman cleaning snow from railroad cut killed by rapidly moving train while trying to remove hand car from track to avoid collision; erroneous instructions as to signals.....Neb. 571
 error to charge jury may consider whether or not the statutory highway signals were given in determining whether train was in other

INSTRUCTION — *continued.*

respects negligently operated..... Neb. 573
 several workmen constructing track injured in collision of construction train with cattle on track; erroneous instruction as to running train at full speed on question of negligenceNeb. 578
 minor employee, a teamster in employ of street railroad company, injured by fire alarm wire falling across trolley wire; erroneous instruction on defective appliance.. Neb. 593
 employee killed by cave-in of tunnel; erroneous instruction on defendant's negligence in exposing employee to extra hazards...Neb. 596
 erroneous, on the fellow-servant ruleN. J. 707
 employee of another company injured on grain elevator at defendant's pier by being caught between cars which were being loaded; erroneous instruction on rule of law applicable to licensees..N. Y. 800
 employee injured in defendant's iron works by the gearing wheels of pumping engine, the superintendent letting on the steam causing the wheel to start; judgment for plaintiff reversed for erroneous instruction and refusal to instruct on question of whether superintendent was representative of defendant or a fellow-servant.... N. Y. 820
 INSURER.
 evidence of defense by insurer on indemnity policy admissible to show that defendants did not regard their agent or superintendent as an independent contractor.... Minn. 188
 INTOXICATION.
 railroad employee injured by fall of scaffold, which was defectively constructed by incompetent employees, under direction of foreman who was drunk at the time of the accident, the intemperate habits of the foreman being known by the agent who employed him; railroad company chargeable with notice of the habits of the foreman and liable for act of agent in retaining him in employ after knowledge of said habits....N. Y. 747
 whether plaintiff was negligent in remaining in employment after

INTOXICATION — *continued.*

knowledge of a foreman's intemperate habits was a question for the jury N. Y. 747
 railroad employees injured; notes of cases N. Y. 801-820

JOINT NEGLIGENCE.

action will lie by employee against master for injuries sustained by concurring negligence of master and fellow-servant Mich. 112
 servant may recover for injuries caused by joint negligence of master and fellow-servant Mo. 411
 where servant is injured partly by negligence of master and partly by that of a fellow-servant, the master is liable N. J. 643

JOINT OCCUPANCY.

boy, twelve years of age, engaged with his father as car cleaner, directed to go to tool house by his father, while crawling under cars of defendant on track used in joint occupancy with plaintiff's company, injured by sudden backing of engine without signal or warning; defendant liable, the boy being rightfully on the track, and the question of his negligence was for jury Neb. 544
 of grounds by railroad companies; liability of each for failure to exercise due care to prevent injury to employees of the other.... Neb. 544

JUDGMENT.

reversing and remanding judgments; practice of Supreme Court. Mo. 483

JUDICIAL NOTICE.

the "American Experience Table" showing life expectancy is a standard table recognized by statute and courts, and admissible in evidence in action for death.. Mo. 421
 courts may take judicial notice of the way railways are managed in the practical running of them by officers who use the telegraph to direct the movement of trains.... N. Y. 772

JURISDICTION.

jurisdiction of Probate Court to direct administration solely to prosecute statutory action for causing death of intestate.. Minn. 294

JURISDICTION — *continued.*

action by administrator for death of railroad employee in another state may be maintained under the Statute of that State..... Neb. 562

JURY.

must receive law and testimony in open court and not be allowed to take to jury room the requests to charge given by the court.. Mich. 122

"KICKED" CAR.

railroad employees injured; notes of cases Mich. 154-173
 brakeman injured trying to board "kicked" car; railroad company not liable, the negligence, if any, being that of a fellow-servant.... Neb. 568

KNOWLEDGE OF DANGER. See ASSUMPTION OF RISK.**KNOWLEDGE OF DEFECT.**

servant voluntarily remaining in employment after knowledge of defect, and without promise of master to remedy same, cannot recover for injury sustained thereby. Mich. 1
 an admission by defendant's vice-principal of knowledge, before the accident, of the particular defect causing it, made next day and away from place of accident, inadmissible Mich. 51
 employee cannot recover where he has equal means of knowledge of defect as master Mich. 122
 employee operating emery wheel in railroad car shops injured by breaking of wheel and some of the pieces flying into his face, assumed the risks where it appeared that he had worked for four years as a machinist and had knowledge of defect Mich. 131
 the fact that a servant knows of the defective condition of machinery, etc., with which he works, does not necessarily charge him with contributory negligence or assumption of risk; he must also understand the risks to which such defects expose him Minn. 173
 distinction between knowledge by servant of defect and knowledge of danger Minn. 247-249
 servant cannot wholly ignore a known defect in appliance, but

KNOWLEDGE OF DEFECT — *cont'd.*

must exercise due care in its use, and question whether he is negligent in its use is for jury....Mo. 467
 where machinery, etc., is obviously defective and servant continues in service, he assumes the risk of injury, unless induced to continue by master's promise to remedy defect. Neb. 555
 servant continuing in service after knowledge of defect or danger assumes the risksNev. 604
 where servant knows of defective machinery, etc., or of incompetency of fellow-servant, and he continues in service without promise of master to remedy defect, such continuance in service may be contributory negligence, but where inducement to remain is made by master's promise to remedy defect the question of negligence is for jury.....N. Y. 747

LADDER.

wife of employer directing domestic servant to perform work which caused injury to servant, who fell from a ladder while attempting to enter loft; servant not entitled to recover, having assumed the risks of her employment.....Mo. 433

LADDER OF CAR.

brakeman on ladder of car coming in contact with railroad bridge, thrown to track, run over and killed; contributory negligence and assumption of risk.....Mich. 126
 employee of another company injured by defective ladder on freight car; defendant not liable. Minn. 342

LATENT DEFECT.

duty of master to inform servant of latent dangers in employment, especially where danger to be avoided, requires a knowledge of scientific factsMich. 42
 in absence of evidence showing notice given by defendant's agent of latent danger, or servant's knowledge thereof, it cannot be said that servant assumed all the risks and perils ordinary and extraordinary, of employment, or was guilty of contributory negligence.. Mich. 42
 servant assumes all ordinary risks incident to employment, but not

LATENT DEFECT — *continued.*

those resulting from latent defects unknown to him, but known to the master.....Mo. 414
 where railroad bridge properly constructed presents an obvious danger to an employee, the danger is one incident to the employment; but where danger is not obvious a duty is required of railroad company to give notice to employee.. N. J. 652
 baggageman on defendant's train killed by collapse of bridge over which train was passing, the fall being occasioned by decay in its timbers; railroad company not liable where it appeared that bridge was properly constructed and the defect was not apparent from inspection, and it was not shown that it had notice of defect..N. Y. 734

LAUNDRY MACHINE.

female employee injured while operating laundry mangle; knowledge of defect; assumption of riskNeb. 599
 minor employees injured by machinery, etc.; notes and abstracts of casesN. Y. 842-846

LAW OF PLACE.

the Iowa statute giving right of action to employee injured by employee of another employee is not against public policy of laws of Minnesota, and action may be maintained in latter State...Minn. 292
 brakeman injured coupling cars; action under the Iowa statute; right to sue in another State.....Minn. 292
 action by administrator in Missouri, under Kansas statute, for death of railroad employee in defendant's employ killed in a collision in KansasMo. 486
 action by administrator for death of railroad employee in another State may be maintained under the statute of that State.....Neb. 562

LEAD POISONING.

employee inhaling poisonous matter in lead works; erroneous admission of certain medical evidence.. Mich. 66

LESSOR AND LESSEE.

servant of lessee of railroad cannot recover of lessor for injury in use

LESSOR AND LESSEE — continued.

of machinery, he must look for redress to the lessee.....Miss. 369
 section foreman injured while operating a hand car on one railway which was leased by another, defective wheel and lever on the car being alleged; declaration held to show a cause of action against the lesseeMiss. 369

LICENSEE.

switchman of one railroad struck by engine of another running on adjoining track; defendant liable... Minn. 342

employee of another company injured on grain elevator of defendant's pier by being caught between cars which were being loaded; erroneous instruction on rule of law applicable to licensees...N. Y. 800
 the general rule is that persons occupying real property for business purposes must exercise reasonable prudence and care to keep it in such condition that those who go there shall not be unreasonably and unnecessarily exposed to dangerN. Y. 800

LIFE EXPECTANCY.

mortality tables, while not conclusive evidence as to probable life expectancy, may be offered and considered with all testimony on the subjectMich. 134
 the "American Experience Table" showing life expectancy, is a standard table recognized by statute and courts, and admissible in evidence in action for death...Mo. 421
 reasonable expectancy of life, shown by mortality tables, and testimony of physician, may be considered by jury in estimating damages in action for death.....Mo. 482

LIME KILN.

laborer in lime kiln killed by the fall of a stone upon which he was standing; master liable for failure to warn deceased of danger..... Mich. 5

LINEMAN.

repairing telegraph line after blasting, injured by rock falling upon him by negligence of quarrymen engaged in blasting, all the parties being in the employ of same

LINEMAN — continued.

railroad company; fellow-servant rule appliedMinn. 267
 killed by fall of telegraph pole on premises of elevator company; obvious danger; contributory negligenceMo. 433
 where employee was injured by falling from electric light pole, owing to broken step, the defect being obvious, he assumed the risk and could not recover, and verdict for him not sustained...N. J. 699
 injured by breaking of pole or by electricity; notes of cases..... N. J. 700, 701

LOADING AND UNLOADING.

employees injured while working on vessels; notes of cases....Mich. 76-77
 railroad employees injured; notes of casesMich. 154-173
 switchman injured while coupling cars; claim that foot was caught in splinter of rail and also of negligent loading of car whereby iron projected over end of car; recovery could not be had for latter cause where injury was caused therebyMinn. 321
 railroad employees injured; notes of casesMo. 491-513
 section men assisting in loading rails upon car covered with snow injured by rail falling upon him; negligence of fellow-servant..... N. H. 615
 stevedore killed while unloading steamship at dock, defective appliance to hoisting apparatus breaking and causing bags of rice to fall upon employee; steamship company liable.....N. J. 673
 employee injured while unloading cargo of ice from vessel; defective ladder; contributory negligence for jury, nonsuit reversed...N. J. 674
 railroad employees injured; notes of casesN. Y. 801-820

LOCOMOTIVE. See ENGINE.**MACHINERY [INJURED BY].**

workman carrying slabs from gang plank in sawmill slipping on wet bark and falling against cog wheels that caught his trousers and injured him; contributory negligence for jury where plaintiff had not been warned nor knew that wheels were uncovered. Mich.

MACHINERY — *continued.*

evidence from competent persons as to dangerous character of machinery admissible in action for injuries sustained by contact with such machinery Mich. 4

minor employee, sixteen years old, removing a slab from gearing in sawmill, injured by trousers catching in uncovered cogs, his leg being crushed; master liable. Mich. 4

clothing caught by and employees falling against machinery; notes of cases Mich. 7-8

where defendant's superintendent turned on machinery while plaintiff was attempting to oil planer machine which he was running in factory and plaintiff was injured by gearing, question of contributory negligence properly submitted to jury Mich. 10

employees injured while cleaning or repairing machinery; notes of cases Mich. 10-12

employee injured by leg being caught in uncovered gearing of machinery in mill; master liable..... Mich. 16

accidents caused by machinery; notes of cases Mich. 16-18

employee, eighteen years of age, injured by foot catching in gearing wheel of sawmill, he having apparently slipped; master not liable, it being held that the injury was the result of a pure accident.... Mich. 25

minor employees injured by machinery; notes of cases... Mich. 26-28

statutory liability for uncovered or unguarded machinery, after notice given to proprietor..... Mich. 28

employee, a top filler in blast furnace engaged in putting coal and ore into top of furnace, injured by defective appliance to the hoisting machine, plaintiff working under direction of head engineer and another; master liable..... Mich. 31

employee operating emery wheel in railroad car shops injured by breaking of wheel and some of the pieces flying into his face, assumed the risks where it appeared that he had worked for four years as a machinist and had knowledge of defect..... Mich. 131

employee in sawmill injured by clothing catching in gearing of machinery, the same not being boxed or covered; defendant liable Minn. 173

MACHINERY — *continued.*

although it may be negligence for master to leave machinery uncovered, yet the servant is not necessarily negligent in working near it, knowing of its condition; the measure of the duty of each not being the same..... Minn. 173

accidents from uncovered or unguarded machinery; notes of cases. Minn. 175-179

clothing of employee caught by set screw while attempting to oil machinery; contributory negligence. Minn. 181

employee injured while attending to straw-cutter machine; master liable Minn. 182

accidents caused by machinery and appliances; notes of cases..... Minn. 182-184

employee under direction of foreman assisting in setting up printing press injured by electric shock due to alleged defective insulation of wire; questions of defendant's negligence and whether plaintiff was acting within scope of employment should have been submitted to jury Minn. 186

boy, between fifteen and sixteen years of age, while removing refuse from under revolving saw under directions of defendant's superintendent, injured by hand being caught by the saw; master liable Minn. 188

whether master is negligent in failing to warn minor employees of danger of machinery, question for jury Minn. 188

minor employees injured by machinery; notes of cases. Minn. 189-192

where danger in working about machinery is obvious, and a minor employee, nineteen years old, having worked on machine for a long time, is injured by the rollers of machine, the master is not negligent in setting him to work nor failing to inform him of danger.. Minn. 251

minor employee, nineteen years old, working in railroad shop injured by fingers being caught in rollers of machine; knowledge of danger; master not liable..... Minn. 251

railroad employees injured; notes of cases Minn. 347-358

while a servant assumes risk of danger from machinery which is obvious, he does not necessarily as-

MACHINERY — continued.

sume it where it is reasonable to suppose that with care it can be used with safety; in such case the question is for jury.....Mo. 377

employee working in and about coal hoist thrown under coal car, owing to defective construction of the hoist; error to take case from jury where it was shown that plaintiff had pointed out defects to defendant's superintendent who promised to remedy same....Mo. 377

defective appliances and machinery; notes of cases.....Mo. 377-380

clothing of minor employee, a boy seventeen years of age, caught by set screw of revolving shaft and employee injured; master liable for failure to instruct employee as to danger.....Mo. 383

employee injured by steam hammer; master not liable; assumption of riskMo. 384

where minor employee, twenty years of age, was injured by rollers of machine, the danger being obvious, master was not liable nor negligent in not warning employee of dangerMo. 384

employee injured by piece of wood thrown from rip-saw machine, defective set screws being alleged; master liableMo. 387

employee fatally injured by bursting of grindstone in defendant's factory which was being run at excessive speed; master liable..Mo. 390

stationary engineer scalded by escape of steam from machinery in defendant's mill; erroneous instructions on assumption of risk; judgment for plaintiff reversed..Mo. 390

railroad employees injured; notes of casesMo. 491-513

where master furnishes defective machinery and servant uses same carefully believing there is no immediate danger, and it is reasonably probable that same can be operated safely with such care, the servant does not assume the risk, and if injured master is liableNeb. 530

where machinery, etc., is obviously defective and servant continues in service, he assumes the risk of injury, unless induced to continue by master's promise to remedy defectNeb. 555

MACHINERY — continued.

female employee injured operating laundry mangle; knowledge of defect; assumption of risk.....Neb. 599

girl, thirteen years of age, voluntarily operating straw cutter, not entitled to recover for injuries..Neb. 599

female employee struck in the eye by shuttle of loom after loom-fixer had made repairs; master liableN. H. 628

inexperienced employee operating saw machine injured while trying to fix belt to machine; failure to warn him of danger; master liableN. H. 629

master not bound to warn or instruct employees as to dangers open to ordinary observation, except in cases of youth, ignorance, inexperience, or want of capacity..N. H. 630

machinist making repairs in defendant's mill injured by negligent act of defendant's engineer in starting wheel; fellow-servant rule appliedN. J. 706

boy, seventeen years old, inexperienced in use of machinery, injured by circular saw on defendant's premises; defendant liable..N. J. 714

female employees injured by machineryN. J. 715-716

laborer in quarry thrown from rock by blasting operations, owing to defective machinery, and killed; nonsuit reversed as conflicting evidence as to negligence was for juryN. J. 719

assumption of risk; cases in which the question is involved.....N. J. 720

notes of master and servant cases..N. Mex. 728-729

where servant knows of defective machinery, etc., or of incompetency of fellow-servant, and he continues in service without promise of master to remedy defect, such continuance in service may be contributory negligence, but where inducement to remain is made by master's promise to remedy defect the question of negligence is for jury.....N. Y. 747

railroad employees injured; notes of casesN. Y. 801-820

employee injured in defendant's iron works by the gearing wheels of a pumping engine, the superintendent

MACHINERY — *continued.*

ent letting on the steam causing the wheel to start; judgment for plaintiff reversed for erroneous instruction and refusal to instruct on question of whether superintendent was representative of defendant or a fellow-servant.. N. Y. 820
 boy, twelve years old, assisting in operating machinery, attempting to put heavy cylinder in place, slipping and in trying to save falling threw out his hand and thrust it into cog wheels about nine inches from end of cylinder; defendant not liable, the danger being obvious and unnecessary to instruct boy as to danger, and the proximate cause of injury was accidental slipping of plaintiff and not his ignorance of machinery... N. Y. 842

the law requires that minor employee should be properly instructed as to danger of machinery and if injured because of failure to instruct him, then, as a general rule, master is liable..... N. Y. 842

where minor is familiar with use of machinery and is aware of danger in operating it, the fact that he is a minor does not alter general rule that servant assumes all ordinary risks of employment, including those from obvious dangers.. N. Y. 842

minor employees injured by machinery, etc.; notes and abstracts of cases..... N. Y. 842-846

MACHINERY. Duty to furnish safe materials, etc. See **SAFE MACHINERY AND APPLIANCES.**

MALPRACTICE.

voluntary employment of surgical services for another does not render the volunteer liable for malpractice or negligence of the surgeon, provided surgeon possesses ordinary skill of the profession and there was no reason to suspect otherwise..... Neb. 569

MASTER AND SERVANT. See the various subdivisions relating to duties, etc.

workman in employ of rolling mill engaged in erection of railroad bridge injured by train negligently run by defendant's engineer over

MASTER AND SERVANT — *cont'd.*

the bridge; nonsuit reversed as the question of who the plaintiff's employer was should have been left to jury..... N. J. 658
 subsequent decision affirmed judgment for plaintiff. (See preceding paragraph.)..... N. J. 659
 negligence of employee of sub-contractor resulting in killing of person by explosion of nitroglycerine used for blasting purposes which was wrongfully stored on railroad premises; action not maintainable against railroad company or the contractor for the negligence of the employee of the sub-contractor, the relation of master and servant not being created by the sub-contract N. J. 668
 cases in which the question of independent contractor is involved.... N. J. 668-670

MASTER MECHANIC.

not fellow-servant with a bridge carpenter Mo. 476

MAXIM.

falsus in uno, falsus in omnibus, applies only where witness has knowingly and wilfully testified falsely as to a matter of fact... Neb. 573

res ipsa loquitur discussed and applied..... N. J. 689, 690, 691, 694
respondeat superior discussed..... 711, 785, 821, 830

MEASURE OF DAMAGES. See **DAMAGES.**

MEDICAL SERVICES.

voluntary employment of surgical services for another does not render the volunteer liable for malpractice or negligence of the surgeon, provided surgeon possesses ordinary skill of the profession and there was no reason to suspect otherwise..... Neb. 569

MENTAL SUFFERING.

in statutory action for death of railroad employee the damages are purely compensatory for pecuniary loss, nothing being recoverable for wounded feelings of relative, nor for pain and suffering of deceased previous to death..... Minn. 294

MENTAL SUFFERING — continued.

distinction in amount of damages recoverable in actions for death and actions for wilful torts or personal injuries, the former being pecuniary loss, and the latter allowing punitive damages and also damages for mental and physical pain, and injury to the feelings... Minn. 294

MINE.

employee while crossing a "bridge" over an excavation in defendant's copper mine, precipitated into the excavation, a distance of about 100 feet, by the breaking of a plank of the bridge; master not liable, the accident being due to negligence of fellow-servant.... Mich. 58

fall of ore from roof of iron mine and a trammer injured while loading ore into a car; negligence, if any, that of fellow-servant.. Mich. 63

accidents in; notes of cases.. Mich. 64-66

miner killed by descending cage in mine; obvious danger..... Minn. 231

miner injured by stone falling from roof of tunnel in iron mine; defendant liable..... Minn. 233

miner injured by lump of coal which fell from car in hoisting cage at top of mine shaft, the cage being uncovered; master liable..... Mo. 397

the Coal Mines Act of 1881..... Mo. 397, 399, 400

cases under the Coal Mines Act of 1881 Mo. 397-399

employee of mining company injured by explosion of two blasts which had not exploded at time of firing by other employees; defendant not liable, the fellow-servant and assumption of risk rules being applied and instructions thereon held proper Mont. 519

cave-in of tunnel and fall of roof in mine and employee injured; master liable..... Mont. 524

miner injured by fall of bucket in mine; knowledge of danger; assumption of risk; contributory negligence; nonsuit affirmed. Nev. 604

miner injured by explosion of giant powder; failure to instruct or warn employee of danger of new explosive when introduced into the work; company liable.. N. J. 683

notes of master and servant cases.. N. Mex. 728-729

miner injured by fall of rock in coal

MINE — continued.

mine, the superintendent having notice of defect but not taking precautions to protect the workmen from danger; defendant liable for negligence of superintendent N. Y. 832

minor employee injured in mine; defendant liable; question at issue related to practice in regard to bringing of suit by infant, and appointment of guardian..... N. Y. 839

MINING BOSS.

timberman in charge of bridges or passages in mine fellow-servant of laborer in mine, where the work in which both were engaged was under entire supervision of another Mich. 58

mining captain not fellow-servant of laborer in mine..... Mich. 62

trammer loading ore into a car in iron mine, the miners employed there, and the shift boss, fellow-servants Mich. 63

discussion of the fellow-servant rule and cases distinguishing the doctrine N. J. 683-687

MINOR EMPLOYEE. See the title INFANT.**MOLTEN IRON.**

minor employee injured by sparks from molten iron caused by alleged incompetency of assistant; master not liable..... Mich. 29

laborer engaged in molding ordered by defendant's foreman to get ladle of molten iron slipping on ice and water and fatally injured by explosion caused by molten metal coming in contact with the ice and water, the danger of which was not known to the employee.. Mich. 42

MORTALITY TABLES.

while not conclusive evidence as to probable life expectancy may be offered and considered with all testimony on the subject... Mich. 134

the "American Experience Table" showing life expectancy, is a standard table recognized by statute and courts, and admissible in evidence in action for death.. Mo. 421

reasonable expectancy of life shown by mortality tables and testimony

MORTALITY TABLES — *continued.*

of physician may be considered by jury in estimating damages in action for death.....Mo. 482

MOTORMAN.

street-railway employees injured by various causes; notes of cases.. Minn. 326-329

MUNICIPAL CORPORATION.

fire-engine driver in city fire department injured while driving along defective street; city liable...Mich. 83
relation of master and servant does not exist between city and members of its fire department...Mich. 83
cave-in accidents; notes of cases... Minn. 220-221; Mo. 431, 432

NEGLIGENCE.

railroad company cannot contract with its employees to release itself from liability for its own negligenceMich. 98

negligence cannot be presumed, it must be proved.....Mich. 122; Minn. 308; Mo. 483; Neb. 593; N. J. 689

not necessary to establish with absolute certainty connection of cause and effect between negligent act and injury; it is sufficient if evidence furnishes reasonable basis for satisfying jury that negligent act was proximate cause of injury, but this conclusion must not rest on mere conjecture.... Minn. 308

person committing negligent act liable for injury resulting from it, although he could not have reasonably anticipated such injury happeningMinn. 314
can be founded only on the neglect of some duty.....Mo. 403

servant may recover for injuries caused by joint negligence of master and fellow-servant.....Mo. 411

when question of fact and when of lawMo. 482

instruction should not be given where there is no evidence to support it. Mo. 476

where there is conflicting evidence the question should be left to the juryMo. 476

in operating trains outside of towns and villages, no rate of speed, however great, is alone sufficient evidence of negligence.....Neb. 573

NEGLIGENCE — *continued.*

railroad company liable for injuries to servant from its own misconduct, but to warrant recovery the misconduct must be that of the company itself and not simply the negligence of a fellow-servant.. N. J. 633

where servant is injured partly by negligence of master and partly by that of a fellow-servant, the master is liable.....N. J. 643

NEXT OF KIN.

under the statute allowing widow or next of kin of person killed by negligence of railroad company to recover damages measured by the "pecuniary injuries" resulting to them, their actual pecuniary circumstances may not be considered, nor defendant's wealth.... Mich. 87

declaration defective in not stating facts as to existence of wife and children of decedent who would be entitled to damages in action for death.....Mich. 143

action by administrator in Missouri under the Kansas statute, for death of railroad employee in defendant's employ killed in a collision in Kansas.....Mo. 486

actions under the Death Statute and the damages recoverable..... N. J. 633, 643

NITROGLYCERINE.

negligence of employee of sub-contractor resulting in killing of person by explosion of nitroglycerine used for blasting purposes which was wrongfully stored on railroad premises; action not maintainable against railroad company or the contractor for the negligence of the employee of the sub-contractor, the relation of master and servant not being created by the sub-contractN. J. 668

NOMINAL DAMAGES.

where instructions given for defendant force the jury to a compromise verdict for plaintiff (one dollar damages) which is practically a verdict for defendant, it should be set aside.....Mo. 402

brakeman coupling cars caught between projecting timber and box car and killed; nominal damages, one dollar, only.....Neb. 567

NONSUIT.

it must appear by affirmative proof that master failed to exercise reasonable care in providing safe and suitable appliances for servant, and if it does not injured servant will be nonsuited in action for injuries resulting from use of appliances..
N. J. 659

NOTES.

clothing caught by and employees falling against machinery... Mich. 7-8
while cleaning or repairing machinery Mich. 10-12
machinery and defective appliances. Mich. 16-18; 26-28; 34-35; Minn. 182-184; Mo. 377-380; N. Y. 842-846
minor employees injured by machinery... Mich. 26-28; Minn. 189-192
explosion cases Mich. 44
falling objects..... Mich. 51-54; Minn. 208-209
mining accidents..... Mich. 64-66
accidents on vessels..... Mich. 76-77
liability of master for tort of servant resulting in injury to third person... Mich. 83-87; Minn. 241-243; Miss. 373-375; Mo. 435-438; Neb. 603-604; N. H. 623
question of inspection of cars, etc.. Mich. 101-104
railroad employees injured; various causes... Mich. 101-104; 154-173; Minn. 347-358; Mo. 491-513; Mo. 517-518; Mont. 528-530; N. H. 623; N. Y. 801-820
accidents from uncovered or unguarded machinery..... Minn. 175-179
falling objects..... Minn. 208-209
cave-in accidents..... Minn. 220-221
fall of scaffold..... Minn. 227
explosion of boiler on steamboat... Minn. 237-238
cases in which the fellow-servant rule was applied..... Minn. 276-278
railroad employees injured by projecting objects or objects near track Minn. 280-286
railroad employees injured while coupling cars; question of inspection Minn. 288-290
street-railway employees injured; various causes Minn. 326-329
railroad employees injured; cases within and without the Fellow-Servant Act Minn. 337-340
railroad employees injured; limitation of statute; common-law rule. Miss. 363-364
railroad employees injured; applica-

NOTES — *continued.*

tion of the fellow-servant rule.... Miss. 366-367
cases under the Coal Mines Act of 1881 Mo. 397-399
minor employees injured in service of railroad companies.... Mo. 455-458
railroad employees injured by defective hand holds on foreign cars.. Mo. 467-469
notes of master and servant and railroad cases in the Missouri Courts of Appeals..... Mo. 516-518
discussion of the fellow-servant rule and cases distinguishing the doctrine N. J. 683-687
elevator accidents..... N. J. 698-699
lineman injured by breaking of pole or by electricity..... N. J. 700-701
assumption of risk; cases in which the question is involved.... N. J. 720
property damaged; miscellaneous cases N. J. 721-722
notes of master and servant cases.. N. Mex. 728-729
locomotive explosions.... N. Y. 730-731
railroad bridge accidents.. N. Y. 734-736
liability of receivers of railroads for injuries to employees.. N. Y. 772-774
the federal rule as to fellow-servants 270
Missouri "Railroad Corporation Law" 463, 466
liability of receivers of railroads; New Jersey rule..... 667-668
jurisdiction of the appellate division of the Supreme Court and also of the Court of Appeals of New York 833-834
release; acceptance of benefits from railroad relief department; Nebraska ruling 590
relief department for railroad employees; Nebraska ruling..... 590
statutory liability in actions for injuries to, and death of employees, and the damages recoverable therefor; rulings on Statutes in Missouri, Nebraska, New York, and England.... 451, 597, 833, 649-650
Fellow-Servant Statutes; Minnesota and Mississippi..... 325; 337-340; 358-359
fellow-servant rule in the English leading case of *Priestly v. Fowler*. 271, 614, 637, 657, 737
English cases on the "fellow-servant" rule 637-638; 756-759
Lord Campbell's Act..... 649
measure of damages in the *Baxendale* case; English rule..... 317

NOTES — continued.

assumption of risk; ignorance and knowledge of danger or defect;
 English cases91-94
 unfenced and unguarded machinery;
 English ruling761-762
respondeat superior; English rule..
 637-638; 756-759
 notes of, and references to, English cases9, 91, 92, 93, 94, 96, 203, 242, 248, 271, 287, 318, 364, 381, 389, 410, 414, 446, 447, 448, 606, 614, 637, 638, 640, 642, 649, 650, 657, 684, 686, 687, 690, 691, 705, 706, 709, 711, 737, 743, 745, 746, 755, 756, 757, 758, 759, 761, 762, 767, 821, 822.

NOTICE. See KNOWLEDGE OF DEFECT; KNOWLEDGE OF DANGER.

statutory liability for uncovered or unguarded machinery, after notice given to proprietor.....Mich. 28
 duty of master to provide competent servants and liability for retaining same after notice of unfitness.... Mich. 58
 acceptance of money from benefit fund of mining company; question of validity of release signed by wife or injured employee; ignorance as to contents of signed paper Mich. 80
 railroad employee not bound by unpublished and unenforced rule of railroad company.....Minn. 288
 where defective track is alleged as cause of injury it must be shown that defendant had notice of such defect or could by reasonable care have anticipated the danger. Minn. 321
 railroad employee who, having opportunity and ability, neglects to read all of receipt releasing company from all claims for injury, and signs same, will not afterwards be heard to say that he did not read it.....Mo. 460
 where railroad bridge properly constructed presents an obvious danger to an employee, the danger is one incident to the employment; but where danger is not obvious a duty is required of railroad company to give notice to employee.. N. J. 652
 master not liable to servant for negligence of fellow-servant unless negligent in selection of negligent servant or retaining him after notice of incompetency.....N. J. 680
 railroad company which continues in use a defective and dangerous

NOTICE — continued.

locomotive engine after notice of its dangerous condition, is liable to servant injured thereby..N. Y. 730
 railroad company not liable for injury caused by fall of railroad bridge due to a latent defect not discoverable by inspection, unless it had notice, which must be shown by the injured party..N. Y. 734
 railroad employee injured by fall of scaffold which was defectively constructed by incompetent employees under direction of foreman who was drunk at the time of the accident, the intemperate habits of the foreman being known by the agent who employed him; railroad company chargeable with notice of the habits of the foreman and liable for act of agent in retaining him in employ after knowledge of said habits...N. Y. 747
 whether plaintiff was negligent remaining in employment after knowledge of a foreman's intemperate habits was a question for the juryN. Y. 747
 a railway may vary its time-table set for servants for running trains and is required to use due care and diligence in giving notice of the change by selecting competent servants to perform that duty, and a servant assumes the risk of negligence of such fellow-servants.. N. Y. 772
 miner injured by fall of rock in coal mine, the superintendent having notice of defect but not taking precautions to protect the workmen from danger; defendant liable for negligence of superintendentN. Y. 832

OBJECT NEAR TRACK.

railroad employees injured by projecting objects or objects near track; notes of cases...Minn. 280-286
 where conductor on running-board of street car was killed by coming in contact with pole, the question of contributory negligence was for jury, and nonsuit reversed..N. J..672

OBJECT THROWN FROM TRAIN.

section man injured by a stick of wood thrown from tender owing to careless loading of wood by another servant; fellow-servant's negligenceMinn. 245

OBSTRUCTION.

action maintainable against railroad corporation by one of its brakemen injured by reason of company permitting track to be blocked with snow and ice and a car to be out of repair, the plaintiff being in no fault.....N. H. 607

OBVIOUS DANGER. See **KNOWLEDGE OF DANGER**; **ASSUMPTION OF RISK**.

OIL WORKS.

employee injured by explosion of oil pipe in defendant's oil works; non-suit affirmed; *res ipsa loquitur* appliedN. J. 689

OPINION EVIDENCE.

where plaintiff claimed injury from arsenical poisoning, but defendant claimed it was caused by lead poisoning, it was error to admit testimony of physician in plaintiff's favor which was based on a certain paper not in evidence, as the witness did not base his opinion upon a history of the case, but upon conclusions of another physicianMich. 66

opinions of witnesses possessing peculiar skill are admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment without such assistance.....Minn. 210

foregoing rule applied in action growing out of collapse of cistern wallMinn. 210

improper admission of opinion evidence that wall of building that fell was defective.....Mo. 416

not error to refuse to permit superintendent to give opinion as to competency of employee to select lumber for scaffold, the jury being competent to determine that questionMo. 421

an expert builder of stairs may give his opinion as to proper slant of a stepMo. 482

OVERHEAD BRIDGE.

brakeman fatally injured by contact with overhead bridge; railroad company liable.....N. H. 617

brakeman on top of car struck by bridge under which train was passing assumed the risks, having knowledge of the danger....N. J. 652

OWNER OF BUILDING.

not liable for injuries sustained by painter in employ of contractor by the giving way of a scaffold which had been erected by carpenter; negligence of fellow-servants.....Mich. 82

PARENT AND CHILD.

the statute, G. S. 1894, section 5164, authorizing father to bring action for injuries to child, is constitutional, the action being for benefit of child, and the judgment would be a bar to another action by child. Minn. 190

it is only where railroad employee is killed through negligence of fellow-servant that the action must be brought by the personal representative under Constitution 1890, section 193; but where the negligence is that of company itself, the action for death of a child is to be brought by the parent, under Code 1892, section 663 (distinguishing a former ruling, see Miss. 366).....Miss. 372

right of parent, under Code 1892, section 663, to recover for death of child, who, had it survived, could have maintained action for the injuryMiss. 372

actions under the Death Statute, and the damages recoverable.....N. J. 633, 643

PARTIES.

fireman killed in collision; action brought by widow and children of deceased not in conformity with statute giving right of action to the "legal or personal representative"Miss. 366

but this ruling is subsequently distinguishedMiss. 372

under Constitution 1890, section 193, action for injury resulting in death of railroad employee must be brought by executor or administrator of decedent, "the legal or personal representative," and not by parent or child, or husband and wifeMiss. 366

but this ruling is subsequently distinguishedMiss. 372

construction of the statutes as to right of action for injuries resulting in death of railway employees and in cases of instantaneous deathMiss. 367

it is only where railroad employee is

PARTIES — *continued.*

killed through negligence of fellow-servant that the action must be brought by the personal representative under Constitution 1890, section 193; but where the negligence is that of the company itself, the action for death of a child is to be brought by the parent, under Code 1892, section 663 (distinguishing a former ruling, see Miss. 366).....Miss. 372
 right of parent, under Code 1892, section 663, to recover for death of child, depends on whether child, had it survived, could have maintained action for the injury Miss. 372
 actions under the Death Statute and the damages recoverable.... N. J. 633, 643

PARTING OF TRAIN. See DETACHED CARS; TRAIN BREAKING APART.

PASSENGER.

it is negligence for stranger or passenger to attempt to board a moving trainMich. 146
 liability of receiver of railroad for death of passenger killed by derailment of train, caused by imperfect switchN. J. 667

PASSING TRAIN.

section foreman injured by piece of coal thrown from passing train by fireman on railroad operated by receivers; the custom was to send orders of roadmaster to section foreman by an employee on train who threw same to section foreman; held that the fireman was not a vice-principal or agent of the roadmaster, but a fellow-servant of the injured employee.... Mo. 479
 section hand injured by piece of coal which fell from passing train; railroad company liable.....Neb. 574

PECUNIARY INJURY.

under the statute allowing widow or next of kin of person killed by negligence of railroad company to recover damages measured by "pecuniary injuries" resulting to them, their actual pecuniary circumstances may not be considered, nor defendant's wealth..... Mich. 87

PECUNIARY INJURY — *continued.*

in statutory action for death of railroad employee the damages are purely compensatory for pecuniary loss, nothing being recoverable for wounded feelings of relative, nor for pain and suffering of deceased previous to death....Minn. 294
 distinction in amount of damages recoverable in actions for death and actions for wilful torts or personal injuries, the former being limited to pecuniary loss, and the latter allowing punitive damages and also damages for mental and physical pain, and injury to the feelingsMinn. 294
 actions under the Death Statute, and the damages recoverable..... N. J. 633, 643
 damages recoverable by widow and next of kin in statutory action for death are limited to pecuniary injuriesN. J. 643

PECUNIARY MEANS.

fireman fatally injured in collision; erroneous admission of evidence as to pecuniary means of deceased at time of death.....Mich. 119, 134

PERSONAL INJURY.

the ill health of an injured party which might render a slight injury more serious than upon a healthy person, does not prevent recovery of actual damages sustained by the injury.....Mich. 10
 distinction in amount of damages recoverable in actions for death and actions for wilful torts or personal injuries, the former being limited to pecuniary loss, and the latter allowing punitive damages and also damages for mental and physical pain, and injury to the feelingsMinn. 294
 where there was evidence that injured party, prior to accident caused by flying piece of wood from machine, had no consumptive symptoms, and several physicians testified that the disease could probably be attributed to such injury, the question of proximate cause of disease was properly submitted to jury.....Mo. 387
 physician who has practiced for twenty-five years competent to testify as an expert as to whether a blow received from flying sub-

PERSONAL INJURY — *continued.*

stance could have caused pulmonary trouble, though he stated he was not a specialist in treatment of consumption Mo. 387

PERSONAL REPRESENTATIVE.

construction of the statutes as to right of action for injuries resulting in death of railway employees and in cases of instantaneous death Miss. 367

fireman killed in collision; action brought by widow and children of deceased not in conformity with statute giving right of action to the "legal or personal representative" Miss. 366

but this ruling is subsequently distinguished Miss. 372

under Constitution 1890, section 193, action for injury resulting in death of railroad employee must be brought by executor or administrator of decedent, "the legal or personal representative," and not by parent or child, or husband and wife Miss. 366

but this ruling is subsequently distinguished... .. Miss. 372

it is only where railroad employee is killed through negligence of fellow-servant that the action must be brought by the personal representative under Constitution 1890, section 193; but where the negligence is that of the company itself, the action for death of a child is to be brought by the parent, under Code 1892, section 663 (distinguishing a former ruling) see Miss. 360)..... Miss. 372

action by administrator in Missouri under the Kansas statute, for death of railroad employee in defendant's employ killed in a collision in Kansas..... Mo. 486

action by administrator for death of railroad employee in another State may be maintained under the statute of that State.. Neb. 562

actions under the Death Statute, and the damages recoverable.... N. J. 633, 643

PERSON NOT EMPLOYEE. See ASSISTING EMPLOYEE.

person not employee injured while attempting to board moving train in order to signal train at request of railroad employee; voluntary

PERSON NOT EMPLOYEE — *cont'd.*

assumption of risk; railroad company not liable..... Mich. 146

where person, not employee, was injured in attempt to board a moving train in order to carry out request of watchman to signal the train to avoid danger, and it did not appear that watchman had authority to make the request, nor did he ask the person to board the moving train, the injured person assumed the risk and was guilty of gross negligence..... Mich. 146

it is negligence for stranger or passenger to attempt to board a moving train Mich. 146

engineer not required to heed a signal to stop train, given by a stranger, when no danger is apparent Mich. 146

PETITION. See COMPLAINT.**PHYSICAL EXAMINATION.**

when court may refuse to order plaintiff to submit to physical examination Neb. 530

PHYSICIAN.

where plaintiff claimed injury from arsenical poisoning, but defendant claimed it was caused by lead poisoning, it was error to admit testimony of physician in plaintiff's favor which was based on a certain paper not in evidence, as the witness did not base his opinion upon a history of the case, but upon conclusions of another physician Mich. 66

railroad company not liable for assault by physician in its employ upon an assistant..... Mich. 346

physician who has practiced for twenty-five years competent to testify as an expert as to whether a blow received from flying substance could have caused pulmonary trouble, though he stated he was not a specialist in treatment of consumption Mo. 387

surgeon is required only to exercise that degree of knowledge and skill ordinarily possessed by members of the same profession..... Neb. 569

voluntary employment of surgical services for another does not render the volunteer liable for malpractice or negligence of the surgeon, provided surgeon possesses

PHYSICIAN — *continued.*

ordinary skill of the profession
and there was no reason to sus-
pect otherwiseNeb. 569

POISONOUS MATTER.

employee inhaling poisonous matter
in lead works; erroneous admis-
sion of certain medical evidence..
Mich. 66

where plaintiff claimed injury from
arsenical poisoning, but defend-
ant claimed it was caused by lead
poisoning, it was error to admit
testimony of physician in plain-
tiff's favor which was based on a
certain paper not in evidence, as
the witness did not base his opin-
ion upon a history of the case, but
upon conclusions of another phy-
sicianMich. 66

one who has had fifteen years actual
experience with 100 employees, en-
gaged in manufacture of paris
green, has had opportunity to ob-
serve, and has made observations
of, the effect upon such workmen,
is competent to testify as to dis-
ease affecting those engaged in
such manufacture, and it was
error to exclude such testimony in
action for damages for injury
sustained by employee inhaling
poisonous matter in lead works..
Mich. 66

PLEADING AND PRACTICE.

error in admitting evidence of state-
ments of agent as binding upon
principal is cured if principal im-
peaches such evidence by that of
the agent in denial that such state-
ments were made.....Mich. 16

failure to aver duty of defendant
to exercise care in those acts
which were alleged to be negli-
gent, may be taken advantage of
by special demurrer, but not after
verdictMich. 31

the Supreme Court will not notice
evidence where verdict below
shows jury must have found
against itMich. 87

jury must receive law and testimony
in open court and not be allowed
to take to jury room the requests
to charge given by the court....
Mich. 122

where plaintiff alleged complaint to
defendant of defective emery
wheel, and promise of defendant
to repair same, but there was no

PLEADING AND PRACTICE. — *con.*

evidence of such promise, it was
error to submit that question to
juryMich. 131

declaration defective in not stating
facts as to existence of wife and
children of decedent, who would
be entitled to damages in action
for deathMich. 143

practice in regard to special de-
murrer to declaration.....Mich. 146

jurisdiction of probate court to di-
rect administration solely to
prosecute statutory action for
causing death of intestate...Minn. 294

not necessary to establish with ab-
solute certainty connection of
cause and effect between negligent
act and injury; it is sufficient if
evidence furnishes reasonable
basis for satisfying jury that neg-
ligent act was proximate cause of
injury, but this conclusion must
not rest on mere conjecture.....
Minn. 308

section foreman injured while oper-
ating hand car on one railway,
which was leased by another, de-
fective wheel and lever on the car
being alleged; declaration held to
show a cause of action against the
lesseeMiss. 369

question of written instrument pur-
porting to be a release and allega-
tion of fraud in obtaining same..
Mo. 379, 380

where instructions given for defend-
ant force the jury to a compro-
mise verdict for plaintiff (one dol-
lar damages) which is practically
a verdict for defendant, it should
be set aside.....Mo. 402

petition failing to aver defendants
had any authority or control over
elevator which injured plaintiff,
insufficient, and demurrer sus-
tainedMo. 403

negligence can be founded only on
the neglect of some duty.....Mo. 403

employee falling from platform, de-
fective construction and absence
of guard-rail being alleged, non-
suit reversed, the complaint being
sufficient to show cause of action.
Mo. 411

contributory negligence is matter of
defense and plaintiff need not al-
lege he was without fault....Mo. 411

employee falling from scaffold; in-
sufficiency of complaint.....Mo. 426

variance between pleading and
proofMo. 480

PLEADING AND PRACTICE. — *con.*

- reversing and remanding judgments; practice of Supreme Court Mo. 483
- practice of Supreme Court in respect to requiring remittitur of damages Mo. 484, 485
- where complaint only charged negligence and carelessness of employees, proper to charge there was no claim of their incompetency Mont. 519
- duty of District Court to inform jury, by instructions, of the issues of the case on trial, and party seeking more specific instructions must request correct instruction in order to secure review by Supreme Court Neb. 530
- when objections to depositions must be filed Neb. 530
- when court may refuse to order plaintiff to submit to physical examination Neb. 530
- brakeman killed while coupling cars, his foot catching in unblocked guard-rail, he knowing the tracks to be unblocked and dangerous; petition failing to negative presumption the deceased assumed risks..... Neb. 555
- pleading and practice under the Death Statute Neb. 596
- it must appear by affirmative proof that master failed to exercise reasonable care in providing safe and suitable appliances for servant, and if it does not injured servant will be nonsuited in action for injuries resulting from use of appliances N. J. 659
- minor employee injured in mine; defendant liable; question at issue related to practice in regard to bringing of suit by infant, and appointment of guardian..... N. Y. 839

POLE.

- lineman killed by fall of telegraph pole on premises of elevator company; obvious danger; contributory negligence Mo. 433
- where conductor on running-board of street car was killed by coming in contact with pole, the question of contributory negligence was for jury, and nonsuit reversed... N. J. 672
- where employee was injured by falling from electric light pole, owing to broken step, the defect being obvious, he assumed the risk and

POLE — *continued.*

- could not recover, and verdict for him not sustained..... N. J. 699
- lineman injured by breaking of pole or by electricity; notes of cases... N. J. 700-701

PRESUMPTION.

- contributory negligence presumes a careless act or omission.... Mich. 1
- negligence cannot be presumed, it must be proved..... Mich. 122; Minn. 308; Mo. 483; Neb. 593; N. J. 689
- not necessary to establish with absolute certainty, connection of cause and effect between negligent act and injury; it is sufficient if evidence furnishes reasonable basis for satisfying jury that negligent act was proximate cause of injury, but this conclusion must not rest on mere conjecture..... Minn. 308
- in absence of notice to contrary, servant may assume that master has exercised due care in furnishing proper appliances N. J. 673

PRINCIPAL AND AGENT.

- error in admitting evidence of statements of agent as binding upon principal is cured if principal impeaches such evidence by that of the agent in denial that such statements were made..... Mich. 16
- master liable for negligence in respect to such acts and duties as are required of him without regard to rank or title of agent intrusted with their performance, the latter occupying the place of the master, who is liable for manner of performance..... Mich. 31
- corporations must act through agents, and it is immaterial whether duly authorized agent is or is not a stockholder..... Mich. 31
- servant who negligently discharges his duties and injures a third person is not personally liable to the latter; in such case the maxim *respondeat superior* obtains, the principal is liable for the injury and the agent is then liable to the principal for the damages which latter may have sustained.... Mo. 433
- agent or servant is personally liable to third persons for misfeasance and positive wrongs not done in course of employment..... Mo. 433
- wife giving directions to domestic servant in her husband's employment is agent of her husband and

PRINCIPAL AND AGENT. — *cont'd.*

is not liable for injury to servant obeying the order.....Mo. 433

PROJECTING OBJECT.

passenger-brakeman engaged in yard duties outside scope of his employment, struck by projecting lumber from defectively loaded car which he was attempting to couple to box car; railroad company liable.

Mich. 139

railroad employees injured; notes of casesMich. 154-173

brakeman on freight car fatally injured by contact with roof or awning projecting from side of elevator over side track upon which cars were being moved; rule of assumption of risk applied.

Minn. 280

railroad employees injured by projecting objects or objects near track; notes of cases...Minn. 280-286

switchman injured while coupling cars; claim that foot was caught in splinter of rail and also of negligent loading of car, whereby iron projected over end of car; recovery could not be had for latter cause where injury was caused therebyMinn. 321

brakeman coupling cars caught between projecting timber and box car and killed; nominal damages, one dollar, only....Neb. 567

PROMISE TO REPAIR.

where plaintiff alleged complaint to defendant of defective emery wheel and promise of defendant to repair same, but there was no evidence of such promise, it was error to submit that question to juryMich. 131

where employee complained to master of defect in machine, which the latter promised to remedy, the questions of contributory negligence and assumption of risk were proper for jury to determineMinn. 182

employees injured by machinery and appliances; notes of cases....Minn. 182-184

master liable for injury to servant, caused by defective wagon which he was driving; failure to keep promise to remedy defect after notice thereofMinn. 239

PROMISE TO REPAIR — *continued.*

employee working in and about coal hoist thrown under coal car, owing to defective construction of the hoist; error to take case from jury, where it was shown that plaintiff had pointed out defects to defendant's superintendent who promised to remedy same....Mo. 377

where machinery, etc.; is obviously defective, and servant continues in service, he assumes the risk of injury, unless induced to continue by master's promise to remedy defectNeb. 555

the rule of assumption of risk statedNeb. 596, 599, 600, 601

where servant knows of defective machinery, etc., or of incompetency of fellow-servant, and he continues in service without promise of master to remedy defect, such continuance in service may be contributory negligence, but where inducement to remain is made by master's promise to remedy defect, the question of negligence is for jury.....N. Y. 747

PROPERTY.

railroad company not liable for fire, negligently set by section men, which injured plaintiff's property. Minn. 346

cases in which the question of independent contractor is involved...N. J. 668-670

property damaged; miscellaneous casesN. J. 721, 722

PROXIMATE CAUSE.

not necessary to establish with absolute certainty, connection of cause and effect between negligent act and injury; it is sufficient if evidence furnishes reasonable basis for satisfying jury that negligent act was proximate cause of injury, but this conclusion must not rest on mere conjecture....Minn. 308

person committing negligent act liable for injury resulting from it, although he could not have reasonably anticipated such injury happeningMinn. 314

switchman injured while coupling cars; claim that foot was caught in splinter of rail and also of negligent loading of car whereby iron projected over end of car; recovery

PROXIMATE CAUSE — continued.

ery could not be had for latter cause where injury was caused therebyMinn. 321

where there was evidence that injured party, prior to accident caused by flying piece of wood from machine, had no consumptive symptoms, and several physicians testified that the disease could probably be attributed to such injury, the question of proximate cause of disease was properly submitted to jury.....Mo. 387

physician who has practiced for twenty-five years competent to testify as an expert as to whether a blow received from flying substance could have caused pulmonary trouble, though he stated he was not a specialist in treatment of consumptionMo. 387

brakeman making running switch falling from car, owing to defective handhold and run over; railroad liable for sending out defective carMo. 467

brakeman injured by alleged defective coupler; allegation not sustained, where it is clearly shown that injury was caused by reckless manner in which the coupler was pushed against another car by another employeeNeb. 569

boy, twelve years old, assisting in operating machinery, attempting to put heavy cylinder in place, slipping, and in trying to save himself from falling, threw out his hand and thrust it into cog-wheels about nine inches from end of cylinder; defendant not liable, danger being obvious, and unnecessary to instruct boy as to same, and proximate cause of injury was accidental slipping and not ignorance of machinery.....N. Y. 842

PUBLIC POLICY.

the Iowa statute giving right of action to employee injured by negligence of another employee, is not against public policy of laws of Minnesota, and action may be maintained in latter State....Minn. 292

contract exempting master from liability for negligence in performance of his duties towards his servants is illegal, being contrary to public policy.....Mo. 379

validity of railroad relief fund asso-

PUBLIC POLICY — continued.

ciation, the question of acceptance of benefits by an injured employee operating as a release, and the powers of a railroad corporation under its charter to organize such relief fund, discussed.....Neb. 581

PULMONARY CONSUMPTION.

where there was evidence that injured party, prior to accident caused by flying piece of wood from machine, had no consumptive symptoms, and several physicians testified that the disease could probably be attributed to such injury, the question of proximate cause of disease was properly submitted to jury.....Mo. 387

physician who has practiced for twenty-five years competent to testify as an expert as to whether a blow received from flying substance could have caused pulmonary trouble, though he stated he was not a specialist in treatment of consumptionMo. 387

PUNITIVE DAMAGES. See DAMAGES.

distinction in amount of damages recoverable in actions for death and actions for wilful torts or personal injuries, the former being limited to pecuniary loss, and the latter allowing punitive damages for mental and physical pain, and injury to the feelings.....Minn. 294

stone mason falling from swinging scaffold alleged to be defectively constructed; erroneous instruction permitting punitive damages.....Mo. 424

without evidence to warrant it, an instruction awarding vindictive damages is improper.....Mo. 424

QUARRY.

laborer in quarry thrown from rock by blasting operations, owing to defective machinery, and killed; nonsuit reversed as conflicting evidence as to negligence was for juryN. J. 719

QUESTION OF LAW AND FACT.

where testimony is conflicting on question of contributory negligence, same is for jury.....Mich. 1; 31; Mo. 476

**QUESTION OF LAW AND FACT —
continued.**

workman carrying slabs from gang-plank in saw mill, slipping on wet bark and falling against cog-wheels that caught his trousers and injured him; contributory negligence for jury, where plaintiff had not been warned nor knew that wheels were uncovered..... Mich. 1

suggesting or assuming existence of a fact not conceded in the case, in the charge to the jury, is damaging error Mich. 122

where employee complained to master of defect in machine which the latter promised to remedy, the questions of contributory negligence and assumption of risk were proper for jury to determine..... Minn. 182

employee under direction of foreman, assisting in setting up printing press, injured by electric shock due to alleged defective insulation of wire; questions of defendant's negligence and whether plaintiff was acting within scope of employment should have been submitted to jury..... Minn. 186

a youth, between fifteen and sixteen years of age, is required to exercise that amount of discretion which persons of his age and experience should exercise, and no more, and whether he is negligent is question for jury.... Minn. 188

laborer employed in clearing grain from burning elevator fatally injured by falling wall; error to take case from jury as the questions whether defendants took proper care to see that place was safe to work in and that employees were not exposed to unnecessary risks were for jury to determine Minn. 215

employee of brewery scalded and fatally injured by bursting of ten-inch piping to boiler which was being put in a brewery by defendants who had the contract for the same; judgment for defendants reversed, as the questions of independent contractor, fellow-servant, and scope of employment were for jury to determine..... Minn. 234

brakeman killed while coupling cars; question of contributory negligence should have been submitted to jury Miss. 372

while a servant assumes risk of dan-

**QUESTION OF LAW AND FACT —
continued.**

ger from machinery, which is obvious, he does not necessarily assume it where it is reasonable to suppose that with care it can be used with safety; in such case the question is for jury..... Mo. 377

where there was evidence that injured party, prior to accident caused by flying piece of wood from machine, had no consumptive symptoms, and several physicians testified that the disease could probably be attributed to such injury, the question of proximate cause of disease was properly submitted to jury..... Mo. 387

servant cannot wholly ignore a known defect in appliance, but must exercise due care in its use, and question whether he is negligent in its use is for jury.... Mo. 467

when negligence is question of fact and when of law..... Mo. 482

carpenter working in elevator shaft struck by elevator operated by boy; nonsuit reversed, the question of contributory negligence being for the jury..... Mo. 516

boy, twelve years of age, engaged with his father as car cleaner, directed to go to tool house by his father, while crawling under cars of defendant on track used in joint occupancy with plaintiff's company, injured by sudden backing of engine without signal or warning; defendant liable, the boy being rightfully on track, and question of his negligence being for jury Neb. 544

brakeman on top of car coming in contact with iron bar of railroad bridge; questions of notice of danger by master or knowledge by servant properly for jury; railroad company liable..... N. J. 652

workman in employ of rolling mill, engaged in erecting a railroad bridge, injured by train negligently run by defendant's engineer over the bridge; nonsuit reversed, as the question of who the plaintiff's employer was should have been left to jury..... N. J. 658

subsequent decision affirmed judgment for plaintiff (see preceding paragraph) N. J. 659

where conductor on running-board of street car was killed by coming in contact with pole, the question of contributory negligence

QUESTION OF LAW AND FACT — *continued.*

- was for jury, and nonsuit reversedN. J. 672
- employee injured while unloading cargo of ice from vessel; defective ladder; contributory negligence for jury; nonsuit reversed. N. J. 674
- laborer in quarry thrown from rock by blasting operations, owing to defective machinery, and killed; nonsuit reversed as conflicting evidence was for jury.....N. J. 719
- whether plaintiff was negligent in remaining in employment after knowledge of a foreman's intemperate habits was a question for the juryN. Y. 747
- where servant knows of defective machinery, etc., or of incompetency of fellow-servant, and he continues in service without promise of master to remedy defect, such continuance in service may be contributory negligence, but where inducement to remain is made by master's promise to remedy defect, the question of negligence is for jury.....N. Y. 747
- laborer in grain elevator while working in bin under direction of defendant's superintendent, killed by fall of grain; nonsuit reversed; questions of negligence for juryN. Y. 790
- railroad employee, eighteen years of age, suffocated by cave-in of earth while he was cleaning out water pipes on defendant's premises; nonsuit reversed as question of defendant's negligence in furnishing reasonably safe place to work was for jury.....N. Y. 795

RAILROAD BRIDGE. See BRIDGE.

- brakeman on ladder of car coming in contact with railroad bridge, thrown to track, run over and killed, contributory negligence and assumption of risk.....Mich. 126
- brakeman on heavily loaded train, killed by collapse of railroad bridge, over which train was passing; railroad company liable.....N. J. 633

RAILROAD COMPANY. See SAFE MACHINERY; SAFE PLACE TO WORK, ETC.

- cannot contract with its employees to release itself from liability for its own negligence.....Mich. 98

RAILROAD COMPANY — *continued.*

- owes duty to public to keep its tracks, etc., in suitable and safe condition, but an employee has no right of action against the company on this obligation....Mich. 117
- bound to provide reasonably safe track and equipments for employees, but not to use latest and improved structures, etc....Mich. 126
- operating a line composed of lines or tracks of several different companies comes with the provisions of Laws 1887, c. 13.....Minn. 259
- work done in constructing a yard with tracks in it, to be used with and as part of line of railroad already open to public, does not come within proviso to the Act of 1887, c. 13, section I, exempting railroad company from liability to employee injured by co-employee working on a new road not open to public.....Minn. 259
- answerable for same degree of care in management and use of foreign car received by it as in use of own carsMinn. 288
- the Iowa statute relating to right of action for injuries sustained by railroad employees only is not in conflict with the Fourteenth Amendment to the Constitution of the United States.....Minn. 292
- the statute relating to liability from injuries to employees extended to railroad and other corporations.. Miss. 358
- liability for acts of incompetent agent where it has had notice of the sameMiss. 365
- Railroad Consolidation Act of 1870, construedMo. 466
- not an insurer of observance of rules but obliged to use reasonable care to enforce them....Mo. 483
- question of constitutional law under Railroad Corporation Act..Mont. 527
- joint occupancy of grounds by railroad companies; liability of each for failure to exercise due care to prevent injury to employees of the otherNeb. 544
- validity of railroad relief fund association, the question of acceptance of benefits by an injured employee operating as a release, and the powers of a railroad corporation under its charter to organize such relief fund, discussed.....Neb. 581
- liable for injuries to servant from

RAILROAD COMPANY — *continued.*

its own misconduct, but to warrant recovery the misconduct must be that of the company itself and not simply the negligence of a fellow-servant N. J. 633

duty of railroad company in construction of bridges falls within duty of master to furnish reasonably safe place to work and materials for servant to work with.. N. J. 652

duty to provide reasonably safe roadbed and equipments for use of employees and to select competent subordinates to supervise, inspect and repair, but the company is not bound to insure absolute safety of employees..... N. Y. 734

liability for act of agent..... N. Y. 765

may vary its time-table set for servants for running trains, and is only required to use due care and diligence in giving notice of the change by selecting competent servants to perform that duty, and a servant assumes the risk of negligence of such fellow-servants.. N. Y. 772

RAILROAD CONSOLIDATION ACT.

Act of 1870, construed..... Mo. 466

RAILROAD CORPORATION ACT.

railroad employees injured by negligence of fellow-servants not included in the term "any person" according to true meaning of the Railroad Corporation Act of 1865. Mo. 444, 463

the Act construed..... Mo. 444, 463, 466

question of constitutional law under the Railroad Corporation Act.... Mont. 527

RAILROAD EMPLOYEE. See SUBDIVISIONS OF EMPLOYMENT.

RAILROAD RELIEF FUND. See RELIEF FUND.

RAILROAD YARD.

work done in constructing a yard with tracks in it, to be used with, and as part of line of railroad already open to public, does not come within proviso to the Act of 1887, c. 13, section 1, exempting railroad company from liability

RAILROAD YARD — *continued.*

ity to employee injured by co-employee working on a new road not open to public..... Minn. 259

railroad employees injured; notes of cases... Minn. 347-358; Mo. 491-513; N. Y. 801-820

switchman coupling cars in railroad yard stepping into ditch and arm caught between bumpers of car; railroad company liable..... Mo. 484

RECEIVER.

operating railroads under appointment of court of equity is within provisions of the Fellow-Servant Act, G. S. 1894, section 2701, and liable to employee injured by negligence of co-employee.. Minn. 336

liability for death of passenger killed by derailment of train caused by imperfect switch.. N. J. 667

statute relating to appointment..... N. J. 667

negligence of conductor and telegraph operator in transmission of orders from train dispatcher to engineer, resulting in collision of trains and killing of fireman; receiver of railroad not liable, the negligence causing the injury being that of fellow-servants.. N. Y. 772

liability for injuries to employees; notes of cases..... N. Y. 772-774

RELEASE.

acceptance of money from benefit fund of mining company; question of validity of release signed by wife of injured employee; ignorance as to contents of signed paper Mich. 80

railroad company cannot contract with its employees to release itself from liability for its own negligence Mich. 98

receipt of twenty-five dollars from railroad company and signing of formal release by injured party who was quite ignorant and of weak intellect; invalidity of release Minn. 314

voluntary payment of money to injured employee by defendant merely as "wages" during disability, does not constitute a satisfaction of cause of action.. Minn. 319

contract exempting master from liability for negligence in performance of his duties towards his ser-

RELEASE — continued.

vants is illegal, being contrary to public policy Mo. 379
question of written instrument purporting to be a release and allegation of fraud in obtaining same..

Mo. 379, 380
brakeman injured by defective handhold on foreign car; erroneous instruction on question of release..

Mo. 460
railroad employee who, having opportunity and ability, neglects to read all of receipt releasing company from all claims for injury, and signs same, will not afterwards be heard to say that he did not read it..... Mo. 460

improper instructions permitting jury to disregard release if the company's agent obtained it by "trick or artifice;" charge should be confined to fraud shown by evidence Mo. 460

instruction submitting question of fraud in obtaining release should not be given, where there is no evidence to support it..... Mo. 460

validity of railroad relief fund association, the question of acceptance of benefits by an injured employee operating as a release and the powers of a railroad corporation under its charter to organize such relief fund, discussed.. Neb. 581

contract releasing railroad company from damages for its negligence void for want of consideration.. N. Y. 801

RELIEF FUND.

validity of railroad relief fund association, the question of acceptance of benefits by an injured employee operating as a release, and the powers of a railroad corporation under its charter to organize such fund, discussed..... Neb. 581

REMITTITUR. See DAMAGES.

while court has no power to substitute its own estimate of damages for that found by jury, it has the right to determine amount beyond which there is no evidence to support verdict, and may order new trial unless plaintiff consents to reduce verdict..... Minn. 294

verdict for \$3,500 for death of railroad employee, thirty-nine years of age, where the mother who was sole beneficiary had received at

REMITTITUR — continued.

the most only \$50 a year from deceased, and her expectation of life was only about eight years, excessive, and judgment for plaintiff affirmed only on condition that verdict be reduced to \$2,000. Minn. 294

verdict of \$40,133.33 reduced to \$25,000 for permanent injuries to engineer in collision, he being rendered a cripple for life, not excessive Minn. 300

verdict for \$8,666 excessive where employee was struck by fall of iron bar; remittitur of \$3,666; judgment for \$5,000..... Mo. 415

verdict for \$25,000 for switchman, seventeen years old, run over in railroad yard, both legs being injured, resulting in right foot and left leg being amputated; remittitur of \$5,000; damages, \$20,000 not excessive Mo. 480

verdict for \$12,500 for switchman whose hand and part of left forearm had to be amputated; Trial Court required remittitur of \$2,500; judgment for \$10,000; Supreme Court required remittitur of \$3,000; judgment finally for \$7,000 Mo. 484

where damages are excessive the Supreme Court may indicate such excess and require plaintiff to remit same as condition of affirmation Mo. 484

but see contrary ruling in a subsequent decision in another case.. Mo. 485

practice of Supreme Court in respect to requiring remittitur of damages Mo. 484-485

verdict for \$9,250 for engineer injured by explosion of locomotive, excessive, where injuries not shown to be permanent; remittitur of \$3,000 suggested, if filed, judgment for \$6,250 affirmed.... Neb. 530

verdict for \$5,000 for laborer injured by pile driver, excessive; trial court required remittitur of \$2,350; judgment for \$2,650; Supreme Court held damages still excessive, and suggested remittitur of \$1,450; if filed, judgment for plaintiff for \$1,200..... Neb. 577

verdict for \$4,750 for employee injured by horse, excessive; remittitur filed for amount over \$3,500.. Neb. 594

REPAIRS. See PROMISE TO REPAIR.

RES GESTÆ.

error in admitting evidence of statements of agent as binding upon principal is cured if principal impeaches such evidence by that of the agent in denial that such statements were made.....Mich. 16
an admission by defendant's vice-principal of knowledge, before the accident, of the particular defect causing it, made next day and away from place of accident, inadmissibleMich. 51

RES IPSA LOQUITUR.

employee injured by explosion of oil pipe in defendant's oil works; nonsuit affirmed; *res ipsa loquitur* appliedN. J. 689

RESPONDEAT SUPERIOR. See, also, FELLOW-SERVANT; VICE-PRINCIPAL.

whenever a master delegates to another the performance of a duty to a servant which rests upon himself absolutely, he is liable for the manner in which it is performed, and to that extent the agent stands in the place of the master; as to all other matters he is a mere co-servant with other employeesMinn. 200

servant who negligently discharges his duties and injures a third person is not personally liable to the latter; in such case the maxim *respondeat superior* obtains, the principal is liable for the injury and the agent is then liable to the principal for the damages which latter may have sustained....Mo. 433

the doctrine of *respondeat superior* discussed.....N. J. 706; N. Y. 828-831

fireman on freight train killed by a number of cars of another freight train which had become detached colliding with his train; the forward train was insufficiently equipped with brakemen and was sent out by defendant's agent, a head conductor, whose duty it was to make up trains, etc.; railroad company liable for the negligent act of its agent.....N. Y. 765

fireman on freight train injured in collision with another train due to alleged negligence of train dis-

RESPONDEAT SUPERIOR — *cont'd.*

patcher in giving orders; railroad company liable.....N. Y. 783

fireman running "wild" train by order of defendant's superintendent injured in collision; inadequacy of rules for prevention of accidents; railroad company liableN. Y. 788

liability of master to servant injured by wrongful act of fellow-servant does not depend upon grade or rank of servant causing the injury but upon the character of the act in the performance of which the injury arises.....N. Y. 820

where superintendent of iron works let on steam which caused machinery to move and injure an employee, he was not acting in master's place in that particular act, it not being his duty to operate machinery.....N. Y. 820

but see strong dissenting opinion in the case stated in the preceding paragraphN. Y. 823

REVOLVING MACHINERY. See MACHINERY.

RISK OF EMPLOYMENT. See ASSUMPTION OF RISK.

employee assumes the usual and ordinary risks of his employment, including negligence of fellow-servants and obvious dangers.....

Mich. 1, 42, 58, 87, 122, 126
see also the rule stated in.....

Minn. 210, 247, 280
also inMiss. 364

same ruling in...Mo. 377, 390, 414, 424, 442, 444, 445, 482.

also inMont. 519
stated inNeb. 555

and inNev. 604
also inN. H. 607, 615, 617, 625

and also in...N. J. 633, 699, 714, 719, 720
and inN. Y. 734, 752, 772, 790,

798, 820, 832.

discussion and application of the rule of assumption of risk. Mo. 405, 442, 451, 467, 474, 475, 476, 477.

and in.....Neb. 596, 599, 600, 601

ROADBED. See SAFE PLACE TO WORK.

ROADMASTER.

assistant roadmaster in general charge of division of railroad and absolute control of section hands

ROADMASTER — continued.

thereon is not a fellow-servant with the latter.....Mich. 119
roadmaster in charge of certain work and section boss acting under his orders, not fellow-servants.

Mich. 143

section foreman injured by piece of coal thrown from passing train by fireman on railroad operated by receivers; the custom was to send orders of roadmaster to section foreman by an employee on train who threw same to section foreman; held that the fireman was not a vice-principal or agent of the roadmaster but a fellow-servant of the injured employee..Mo. 479

ROOF OF MINE.

fall of ore from roof of iron mine and a trammer injured while loading ore into a car; negligence, if any, that of fellow-servants..Mich. 63
mining accidents; notes of cases...

Mich. 64-66

miner injured by stone falling from roof of tunnel in iron mine; defendant liable.....Minn. 233

cases under the Coal Mines Act of 1881Mo. 397-399

cave-in of tunnel and fall of roof of mine and employee injured; master liableMont. 524

RULE OF LAW. See MASTER AND SERVANT; MAXIM.

RULES AND REGULATIONS.

railroad employee not bound by unpublished and unenforced rule of railroad companyMinn. 288

collision of passenger train with freight cars on main track, and engineer seriously injured, the freight cars being run on the track by switching crew contrary to rules; railroad company liable...

Minn. 300

duty of railroad company to use ordinary care in operating railroad and to adopt and enforce reasonable rules for protection of employeesMo. 483

rule habitually disregarded by master amounts to no rule.....Mo. 483

master not an insurer of observance of rules but obliged to use reasonable care to enforce them....Mo. 483

a railway may vary its time-table set for servants for running trains and is only required to use due

RULES AND REGULATIONS — con.

care and diligence in giving notice of the change by selecting competent servants to perform that duty, and a servant assumes the risk of negligence of such fellow-servantsN. Y. 772

liability of master for neglect of duty towards servant is not shifted by adoption of rules and regulations providing for performance of that duty by the agent of the masterN. Y. 783

fireman running "wild" train by order of defendant's superintendent injured in collision; inadequacy of rules for prevention of accidents; railroad company liable.....N. Y. 788

RUNAWAY CARS.

fireman on freight train killed by a number of cars on another freight train which had become detached colliding with his train; the forward train was insufficiently equipped with brakeman and was sent by defendant's agent, a head conductor, whose duty it was to make up trains, etc.; railroad company liable for the negligent act of its agent.....N. Y. 765

RUNNING-BOARD.

where conductor on running-board of street car was killed by coming in contact with pole, the question of contributory negligence was for jury, and nonsuit reversed.
N. J. 672

RUNNING OF TRAINS.

courts may take judicial notice of the way railways are managed in the practical running of them by officers who use the telegraph to direct the movement of trains..
N. Y. 772

a railway may vary its time-table set for servants for running trains and is only required to use due care and diligence in giving notice of the change by selecting competent servants to perform that duty, and a servant assumes the risk of negligence of such fellow-servants.
N. Y. 772

RUNNING SWITCH.

brakeman making running switch falling from car owing to defective hand hold and run over; railroad liable for sending out defective carMo. 467

RUN OVER.

- minor employee, laborer in railway service, assisting in unloading ties on flat car ordered by employee in charge of the construction train to go back to the caboose and help stop the train, falling between cars, run over and fatally injured; excessive damages Mich. 87
- brakeman on ladder of car coming in contact with railroad bridge, thrown to track, run over and killed; contributory negligence and assumption of risk Mich. 126
- section hand falling from hand car and run over by car following at excessive speed; railroad company liable Minn. 314
- switchman injured on track by locomotive moved without customary signal; railroad company liable... Minn. 314
- railroad employees injured; notes of cases Minn. 347-358
- track hand run over by train; negligence of fellow-servant Mo. 444
- brakeman making running switch falling from car owing to defective hand hold and run over; railroad liable for sending out defective car Mo. 467
- minor employee, a switchman, run over by car; railroad company liable; heavy damages Mo. 480
- brakeman killed while coupling cars owing to failure of railroad company to block its switches and frogs; defendant not liable... Neb. 562
- railroad employees injured; notes of cases N. Y. 801-820

SAFE MACHINERY, etc. DUTY OF MASTER TO FURNISH.

- duty of master to provide reasonably safe machinery, etc., for use of servant and to select competent fellow-servants Mich. 51-56; Minn. 173, 200, 243, 247, 280; Mo. 414, 416, 424, 482; Mont. 524, 525; Nev. 604; N. H. 607, 615; N. J. 665; N. Y. 747, 765, 772, 790, 797, 820, 832
- duty of master to furnish reasonably safe appliances for servant to work with, but not bound to furnish the newest or safest appliances, etc... Mich. 1, 56; Mo. 476; Neb. 555, 592, 593, 594; N. Y. 734
- discussion of the law of master and servant Mich. 75
- duty of master to provide reasonably safe place and machinery is

SAFE MACHINERY — continued.

- not discharged after furnishing same by providing for inspection by a fellow-servant; the master must take reasonable measures to inform himself from time to time of their condition Mich. 112
- master cannot delegate his duty to another to provide safe place and machinery for use of servant so as to avoid responsibility for negligence in that regard... Mich. 121; Minn. 288; Mo. 428; N. Y. 747, 765
- duty of railroad company to provide safe machinery, etc., for use of employees Mich. 122, 126; Mo. 467, 474, 476, 477; N. J. 652, 659; N. Y. 734, 765
- servant injured by defective machinery, the use of which he could not foresee, may recover, it being assumed that master will provide suitable appliances for servant to work with Mo. 442
- master must use all reasonable diligence to protect servant from unnecessary risks, and for failure resulting in injury to servant he is responsible N. J. 633
- duty of railroad company in construction of bridges falls within duty of master to furnish reasonably safe place to work and materials for servant to work with. N. J. 652
- where railroad company exercises reasonable care in providing safe and suitable coupler for car and exercises reasonable care in inspection thereof, it will not be liable for its suddenly becoming out of repair and before opportunity can be had to remedy defect N. J. 659
- duty of master to furnish suitable appliances for use by servant and this includes duty to keep same in repair and make proper inspection. N. J. 673, 689, 700, 719, 720
- duty of railroad company to provide reasonably safe roadbed and equipments for use of employees and to select competent subordinates to supervise, inspect, and repair, but the company is not bound to insure absolute safety of employees. N. Y. 734
- duty of railroad company to supply safe machinery, sufficient help, etc., for equipment of train N. Y. 765

SCOPE OF EMPLOYMENT — *cont'd.*

where servant having authority directs another servant to do work outside of his employment the latter assumes only the risks of danger as are apparent.....Mich. 143

the question whether a servant is called upon to do work outside scope of employment does not turn upon whether master would be liable for personal negligence of superior servant; it is a question of authority of the person ordering the work to be performed... Mich. 143

duty of master towards servant called upon to perform work outside scope of employment by direction of superior servant to warn him against all possible dangers except those which are obvious..... Mich. 143

employee under direction of foreman assisting in setting up printing press injured by electric shock due to alleged defective insulation of wires; questions of defendant's negligence and whether plaintiff was acting within scope of employment should have been submitted to juryMinn. 186

employee of brewery scalded and fatally injured by bursting of ten-inch piping to boiler which was being put in a brewery by defendants who had the contract for the same; judgment for defendants reversed, as the questions of independent contractor, fellow-servant, and scope of employment were for jury to determine.....Minn. 234

minor employee, a boy nineteen years of age, engaged in working on railroad track, ordered by his foreman to assist in removing the debris from depot partially destroyed by fire, and while there ordered by another, not an employee of defendant, to shovel ashes on another floor, and injured by the floor giving way; defendant liable.....Minn. 247

railroad company not liable for assault by physician in its employ upon an assistantMinn. 346

railroad company not liable for fire, negligently set by section men which injured plaintiff's property. Minn. 346

servant who negligently discharges his duties and injures a third per-

SCOPE OF EMPLOYMENT — *cont'd.*

son is not personally liable to the latter; in such case the maxim *respondeat superior* obtains, the principal is liable for the injury and the agent is then liable to the principal for the damages which latter may have sustained. Mo. 433

agent or servant is personally liable to third persons for misfeasances and positive wrongs not done in course of employment... Mo. 433

the fact that a servant disobeys instructions of master does not relieve latter from liability.....Mo. 435

SECTION BOSS OR FOREMAN.

those working under him in relaying track held to be fellow-servantsMich. 136

the fact that section hand was directed by section boss to perform service outside scope of employment did not give him right of action against railroad company where danger was apparent and work was performed without objectionMich. 136

cutting down trolley wire under direction of roadmaster fatally injured by recoil of the wire; erroneous charge on the question of damagesMich. 143

roadmaster in charge of certain work and section boss acting under his orders not fellow-servantsMich. 143

employee on wood train injured in derailment caused by negligence of section foreman in taking up a rail for track repair without putting out proper signals to warn approaching train; railroad liable. Minn. 243

section foreman intrusted with the duty of keeping track in repair and employee on wood train injured in derailment caused by such foreman's neglect, not fellow-servantsMinn. 243

injured while operating hand car on one railway which was leased by another, defective wheel and lever on the car being alleged; declaration held to show a cause of action against the lessee.....Miss. 369

injured by piece of coal thrown from passing train by fireman on railroad operated by receivers; the

SECTION BOSS OR FOREMAN —
continued.

custom was to send orders of roadmaster to section foreman by an employee on train who threw same to section foreman; held that the fireman was not a vice-principal or agent of the roadmaster, but a fellow-servant of the injured employee Mo. 479
railroad employees injured; notes of cases Mo. 491-513
clearing snow from railroad cut killed by rapidly-moving train while trying to remove hand car from track to avoid collision; erroneous instructions as to signals Neb. 571
engineer of train and section foreman not connected with work of section men are not fellow-servants Neb. 573

SECTION HAND.

question of fellow-servant in relation to inspection of cars, track, etc., discussed..... Mich. 98; 101-104
foreman of section men and the section men held to be fellow-servants in action by one of the section men for injuries sustained by the backing of engine against loaded cars due to failure of foreman to give notice to the men of moving of train..... Mich. 111
assistant roadmaster in general charge of division of railroad and absolute control of section hands thereon is not a fellow servant with the latter..... Mich. 119
injured by freight car pushed against another car while he was attempting to climb upon car by order of section boss; fellow-servant rule applied Mich. 136
section boss and those working under him in relaying track held to be fellow-servants Mich. 136
the fact that sectionhand was directed by section boss to perform service outside scope of employment did not give him right of action against railroad company where danger was apparent and work was performed without objection Mich. 136
railroad employees injured; notes of cases Mich. 154-173
injured by a stick of wood thrown from tender owing to careless loading of wood by another ser-

SECTION HAND — *continued.*

vant; fellow-servant's negligence. Minn. 245
falling from hand car and run over by car following at excessive speed; railroad company liable.. Minn. 314
railroad company not liable for fire, negligently set by section men which injured plaintiff's property. Minn. 346
railroad employees injured; notes of cases Minn. 347-358
run over by train; negligence of fellow-servant Mo. 444
struck and fatally injured by train; assumption of risk..... Mo. 478
ballasting track with stone hauled to them on construction train, which is unloaded by the trainmen, are not fellow-servants with the trainmen Mo. 478
railroad employees injured; notes of cases Mo. 491-513
injured by piece of coal which fell from passing train; railroad company liable Neb. 574
assisting in loading rails upon car covered with snow injured by rail falling upon him; negligence of fellow-servant N. H. 615
railroad employees injured; notes of cases N. Y. 801-820

SECTION OF TRAIN. See TRAIN BREAKING APART.

SELECTING EMPLOYEES. See COMPETENCY AND INCOMPETENCY.

SET SCREW. See CLOTHING CAUGHT.

clothing of employee caught by set screw while attempting to oil machinery; contributory negligence, Minn. 181
clothing of minor employee, a boy seventeen years of age, caught by set screw of revolving shaft and employee injured; master liable for failure to instruct employee as to danger Mo. 383
employee injured by piece of wood thrown from rip-saw machine, defective set screws being alleged; master liable Mo. 387

SIDE TRACK.

engine colliding with flat car and thrown from track and engineer injured; judgment for plaintiff re-

SIDE TRACK — continued.

versed for erroneous instruction as to duty of railroad company in respect to side track.....Mich. 122
brakeman on freight car fatally injured by contact with roof or awning projecting from side of elevator over side track upon which cars were being moved; rule of assumption of risk applied. Minn. 280
railroad company liable for injuries to employees of mills, etc., by trains operating on side tracks... Minn. 345, 346

SIGNAL.

fireman on freight train injured by train being ditched through failure of engineer to obey signals; negligence of fellow-servant..... Mich. 117
engineer not required to heed a signal to stop train given by a stranger when no danger is apparent Mich. 146
person not employee injured while attempting to board moving train in order to signal train at request of railroad employee; voluntary assumption of risk; railroad company not liable..... Mich. 146
employee on wood train injured in derailment caused by negligence of section foreman in taking up a rail for track repair without putting out proper signals to warn approaching train; railroad liable. Minn. 243
railroad employee attempting to board moving gravel train by direction of foreman injured by falling as train was started without signal; railroad company liable.... Minn. 259
switchman injured on track by locomotive moved without customary signal; railroad company liable.. Minn. 314
contractor's servant working on railroad track struck by one of defendant's passing trains; defendant liable for failure to signal approach of train..... Minn. 344
switchman injured while uncoupling cars; sudden starting of engine by engineer on signal from an employee on train; held that these employees were fellow-servants.. Mo. 483
boy, twelve years of age, engaged with his father as car cleaner, directed to go to tool house by his father, while crawling under cars

SIGNAL — continued.

of defendant on track used in joint occupancy with plaintiff's company, injured by sudden backing of engine without signal or warning; defendant liable, the boy being rightfully on track, and question of his negligence was for jury. Neb. 544
section foreman clearing snow from railroad cut killed by rapidly-moving train while trying to remove hand car from track to avoid collision; erroneous instructions as to signals Neb. 571
error to charge that jury may consider whether or not the statutory highway signals were given in determining whether train was in other respects negligently operated Neb. 573
engineer killed in collision caused by improper signals by incompetent brakeman under direction of conductor; railroad company liable for act of incompetent employee N. Y. 797

SLIDING DOOR.

railroad employee injured by fall of sliding door in defendant's warehouse; carelessness of men in charge of it; fellow-servant rule applied N. J. 665

SNOWBANK.

fireman injured by engine running into snowbank owing to alleged defect in locomotive; failure of evidence to support plaintiff's contention Minn. 308

SNOW AND ICE.

action maintainable against railroad corporation by one of its brakemen injured by reason of company permitting track to be blocked with snow and ice and a car to be out of repair, the plaintiff being in no fault N. H. 607

SPEED.

engineer injured by train running around a curve at excessive speed and into a washout, after a very heavy storm, the danger of which he knew, guilty of contributory negligence Minn. 302
sectionhand falling from hand car and run over by car following at

SPEED — *continued.*

- excessive speed; railroad company liableMinn. 314
- employee fatally injured by bursting of grindstone in defendant's factory which was being run at excessive speed; master liable.. Mo. 390
- in operating trains outside of towns and villages, no rate of speed, however great, is alone sufficient evidence of negligence.....Neb. 573
- several workmen constructing track injured in collision of construction train with cattle on track; erroneous instruction as to running train at full speed on question of negligenceNeb. 578
- brakeman injured in collision between two trains on single track, the engineer running plaintiff's train taking the place of a sick employee by direction of defendant's manager or superintendent and running it at full speed which was held to be cause of collision and the act of engineer was a risk assumed by the brakeman..N. Y. 752

STAGING. See **SCAFFOLD.**

STATIONARY ENGINEER.

- scalded by escape of steam from machinery in defendant's mill; erroneous instructions on assumption of risk; judgment for plaintiff reversedMo. 390
- laborer employed in building a bridge and engineer operating hoisting machinery for its construction, working under same foreman, fellow-servantsMo. 425
- machinist making repairs in defendant's mill injured by negligent act of defendant's engineer in starting wheel; fellow-servant rule appliedN. J. 706

STATUTE.

- statutory liability for uncovered or unguarded machinery, after notice given to proprietorMich. 28
- under the statute allowing widow or next of kin of person killed by negligence of railroad company to recover damages measured by the "pecuniary injuries" resulting to them, their actual pecuniary circumstances may not be considered, nor defendant's wealthMich. 87

STATUTE — *continued.*

- the statute, G. S. 1894, section 5164, authorizing father to bring action for injuries to child, is constitutional, the action being for benefit of child, and the judgment would be a bar to another action by childMinn. 190
- railroad company operating a line composed of lines or tracks of several different companies comes within the provisions of Laws 1887, c. 13.....Minn. 259
- work done in constructing a yard with tracks in it, to be used with and as part of line of railroad already open to public, does not come within proviso to the Act of 1887, c. 13, section 1, exempting railroad company from liability to employee injured by co-employee working on a new road not open to publicMinn. 259
- cattle-guards and fencesMinn. 286
- action under the Iowa Statute; right to sue in another State... Minn. 292
- the Iowa Statute giving right of action to employee injured by negligence of another employee is not against public policy of laws of Minnesota, and action may be maintained in latter State...Minn. 292
- the Iowa Statute relating to right of action for injuries sustained by railroad employees only is not in conflict with the Fourteenth Amendment to the Constitution of the United States.....Minn. 292
- jurisdiction of Probate Court to direct administration solely to prosecute statutory action for causing death of intestate.....Minn. 294
- in statutory action for death of railroad employee the damages are purely compensatory for pecuniary loss, nothing being recoverable for wounded feelings of relative, nor for pain and suffering of deceased previous to deathMinn. 294
- the Fellow-Servant Act, Laws 1887, c. 13, G. S. 1894, section 2701 ... Minn. 325, 326, 329, 336, 337-340
- the Fellow-Servant Act, Laws 1887, does not apply to street railway corporations Minn. 326
- the Fellow-Servant Act construed. Minn. 326
- receiver operating railroad under appointment of Court of Equity is within the provisions of the Fellow-Servant Act, G. S. 1894, sec-

SUFFOCATION — continued.

nonsuit reversed as question of defendant's negligence in furnishing reasonably safe place to work was for jury.....N. Y. 795

SUPERINTENDENT.

having general authority to manage business was superior servant, and his act in starting machinery which employee was oiling was within scope of authority, and not that of a fellow-servant....Mich. 10

servant does not assume risk of master's negligence or that of any one intrusted by master with superintendenceMich. 58

timberman in charge of bridges or passages in mine fellow-servant of laborer in mine, where the work in which both were engaged was under entire supervision of anotherMich. 58

employee in iron works injured by bursting of one of the hot ovens or furnaces, caused by alleged negligence of defendant's superintendent; nonsuit reversed, the case being for the jury.....Mo. 388

of corporation with full authority to carry on business thereof, not a fellow-servant of the laborers, but a vice-principal, being an agent of the corporationMo. 388

not error to refuse to permit superintendent to give opinion as to competency of employee to select lumber for scaffold, the jury being competent to determine that questionMo. 421

in charge of constructing scaffold for use of workmen is not a fellow-servant of the latter, but represents the masterMo. 424

where master delegates to superintendent full power as to servants and work, he is liable for negligence in performance of such dutiesMo. 428

person clothed by corporation with control and management of a distinct department, with duty of superintendent, is a vice-principal.. Neb. 570

employee injured coming in contact with hoisting appliance; superintendent's directions to engineer, given in harsh and loud tone of voice, alleged as negligence causing injury; master not liable.....N. H. 630

SUPERINTENDENT — continued.

discussion of the fellow-servant rule and cases distinguishing the doctrineN. J. 683-687

fireman running "wild" train by order of defendant's superintendent, injured in collision; inadequacy of rules for prevention of accident; railroad company liable.....N. Y. 788

of grain elevator owned by railroad company is agent of corporation and his negligence in performance of duty to servants is negligence of the corporation.....N. Y. 790

employee injured in defendant's iron works by the gearing wheels of pumping engine, the superintendent letting on the steam causing the wheel to start; judgment for plaintiff reversed for erroneous instruction and refusal to instruct on question of whether superintendent was representative of defendant or a fellow-servant..N. Y. 820

where superintendent of iron works let on steam which caused machinery to move and injure an employee, he was not acting in master's place in that particular act, it not being his duty to operate machineryN. Y. 820

but see dissenting opinion in the case stated in the preceding paragraph. N. Y. 823

miner injured by fall of rock in coal mine, the superintendent having notice of defect, but not taking precautions to protect the workmen from danger; defendant liable for negligence of superintendentN. Y. 832

SUPERIOR SERVANT. See the titles **FELLOW-SERVANT**; **VICE-PRINCIPAL**, ETC.

SURGEON.

carpenter falling from floor of building and injured, owing to alleged incompetency of fellow-servant; unskilful treatment by surgeon also alleged; evidence failed to sustain complaintMont. 526

is required only to exercise that degree of knowledge and skill ordinarily possessed by members of same professionNeb. 569

voluntary employment of surgical services for another does not render the volunteer liable for mal-

SURGEON — *continued.*

practice or negligence of the surgeon, provided surgeon possesses ordinary skill of the profession, and there was no reason to suspect otherwiseNeb. 569

SWITCHMAN.

railroad employees injured; notes of casesMich. 127-130; 154-173
injured on track by locomotive moved without customary signal; railroad company liable.....Minn. 314
injured while coupling cars; claim that foot was caught in splinter of rail, and also of negligent loading of car, whereby iron projected over end of car; recovery could not be had for latter cause, where injury was caused thereby..Minn. 321
of one railroad struck by engine of another running on adjoining track; defendant liable.....Minn. 342
injured while coupling foreign cars; failure to instruct employee as to extra hazards; railroad company liableMiss. 368
injured by footboard of engine giving way; railroad company liable. Miss. 369
minor employee, a switchman, run over by car; railroad company liable; heavy damages.....Mo. 480
killed by falling from defective footboard of switch engine; railroad company liableMo. 481
injured while uncoupling cars; sudden starting of engine by engineer on signal from an employee on train; held that these employees were fellow-servantsMo. 483
coupling cars in railroad yard, stepping into ditch and arm caught between bumpers of car; railroad company liableMo. 484
railroad employees injured; notes of casesMo. 491-513
railroad employees injured; notes of casesMont. 528-530
injured in stock yards; company liableNeb. 594
railroad employees injured; notes of casesN. H. 623
railroad employees injured; notes of casesN. Y. 801-820

TACKLE AND BEAM.

employee struck by falling beam and tackle on vessel, after being warned of danger.....Minn. 230

TEAMSTER.

minor employee, a teamster in employ of street railroad company injured by fire alarm wire falling across trolley wire; erroneous instruction on defective appliance.. Neb. 593

TELEGRAPH OPERATOR.

fireman on an engine and a telegraph operator are engaged in different departments of labor, in the meaning of the Constitution 1890, section 193Miss. 366
negligence of conductor and telegraph operator in transmission of orders from train dispatcher to engineer, resulting in collision of trains and killing of fireman; receiver of railroad not liable, the negligence causing the injury being that of fellow-servants..N. Y. 772
fireman on locomotive, conductor of the train, and a telegraph operator communicating orders as to trains, are fellow-servants in same common employment, and for an injury to one by negligence of another, railroad company is not liableN. Y. 772

THIRD PARTY.

liability of master for tort of servant, resulting in injury to third person; notes of cases...Mich. 83-87; Minn. 241-243; Miss. 373-375; Mo. 435, 436-438; Neb. 603, 604
railroad company not liable for assault by physician in its employ upon an assistant.....Minn. 346
test of liability of master for tort of servantMiss. 373
but see subsequent overruling of the former doctrineMiss. 375
servant who negligently discharges his duties and injures a third person is not personally liable to the latter; in such case the maxim *respondeat superior* obtains, the principal is liable for the injury and the agent is then liable to the principal for the damages which latter may have sustained....Mo. 433
agent or servant is personally liable to third persons for misfeasances and positive wrongs not done in course of employment.....Mo. 433
negligence of employee of subcontractor, resulting in killing of person by explosion of nitroglycerine used for blasting purposes,

THIRD PARTY — *continued.*

which was wrongfully stored on railroad premises; action not maintainable against railroad company or the contractor for the negligence of the employee of the subcontractor, the relation of master and servant not being created by the subcontract.....N. J. 668

TIME-TABLE.

a railway may vary its time-table set for servants for running trains and is only required to use due care and diligence in giving notice of the change by selecting competent servants to perform that duty, and a servant assumes the risk of negligence of such fellow-servantsN. Y. 772

TOP OF CAR.

brakeman on freight car fatally injured by contact with roof or awning projecting from side of elevator over side track upon which cars were being moved; rule of assumption of risk appliedMinn. 280
 minor employee, a brakeman, while at his brake on top of freight car, killed by head coming in contact with bridge; refusal to give defendant's requests to charge as to contributory negligence and assumption of risk.....Mo. 451, 452
 railroad employees injured; notes of casesMo. 491-513
 brakeman fatally injured by contact with overhead bridge; railroad company liableN. H. 617
 brakeman on top of car coming in contact with iron bar of railroad bridge; questions of notice of danger and knowledge by servant properly for jury; railroad company liableN. J. 652
 brakeman on top of car struck by bridge under which train was passing assumed the risks, having knowledge of the danger....N. J. 652
 railroad employees injured in railroad bridge accidents; notes of casesN. Y. 734-736

TORT OF SERVANT.

liability of master for tort of servant resulting in injury to third person; notes of cases...Mich. 83-87; Minn. 241-243; Miss. 373-375; Mo. 435, 436-438; Neb. 603, 604

TORT OF SERVANT — *continued.*

master is not responsible for positive wrong, intentionally or recklessly done by his servant, beyond the scope of his business....Mich. 87
 master responsible for acts of servant within scope of employment where same are done in excess or even in disobedience of orders, express or implied, and is liable for injuries caused thereby not only to outsiders, but to subordinate fellow-employeesMich. 87
 railroad company not liable for assault by physician in its employ upon an assistant.....Minn. 346
 railroad company not liable for fire, negligently set by sectionmen, which injured plaintiff's property. Minn. 346
 test of liability of master for tort of servantMiss. 373
 but see subsequent overruling of the former doctrineMiss. 375
 servant who negligently discharges his duties and injures a third person is not personally liable to the latter; in such case the maxim *respondeat superior* obtains, the principal is liable for the injury, and the agent is then liable to the principal for the damages which latter may have sustained....Mo. 433
 agent or servant is personally liable to third persons for misfeasances and positive wrongs, not done in course of employment.....Mo. 433
 the fact that a servant disobeys instructions of master does not relieve latter from liability.....Mo. 435

TRACK.

an instruction that if defendant railway company allowed its track to become out of repair it is liable for the resulting damages, was erroneous, as if track was reasonably safe as originally constructed the duty of defendant was reasonable inspection to see that it continued in such condition....Mich. 98
 switchman injured on track by locomotive moved without customary signal; railroad company liable.. Minn. 314
 switchman of one railroad struck by engine of another running on adjoining track; defendant liable... Minn. 342
 contractor's servant working on railroad track struck by one of

TRACK — *continued.*

- defendant's passing trains; defendant liable for failure to signal approach of train.....Minn. 344
- railroad employees injured; notes of casesMinn. 347-358
- railroad employee has right to rely on company's proper discharge of duty to inspect track, and his continuance in service was not an assumption of risk of defective trackMo. 455
- section hand struck and fatally injured by train; assumption of riskMo. 478
- switchman coupling cars in railroad yard stepping into ditch and arm caught between bumpers of car; railroad company liable.....Mo. 484
- railroad employees injured; notes of casesMo. 491-513
- action maintainable against railroad corporation by one of its brakemen injured by reason of company permitting track to be blocked with snow and ice and a car to be out of repair, the plaintiff being in no fault.....N. H. 607

TRACK HAND. See SECTION HAND.

TRAIN. See COLLISION; RUN OVER, ETC.

TRAIN BREAKING APART.

- railroad employees injured; notes of casesMinn. 347-358
- brakeman on engine injured by engine running into rear car of part of train ahead, which became detached; nonsuit affirmed; contributory negligence; fellow-servantN. J. 659
- fireman on freight train killed by a number of cars of another freight train, which had become detached colliding with his train; the forward train was insufficiently equipped with brakemen and was sent out by defendant's agent, a head conductor, whose duty it was to make up trains, etc.; railroad company liable for the negligent act of its agent.....N. Y. 765

TRAIN DISPATCHER.

- in absolute control of division of railroad, so far as running and operation of trains is concerned, not a fellow-servant of employees acting under his orders.....Mich. 119

TRAIN DISPATCHER — *continued.*

- fireman on freight train injured in collision with another train, due to alleged negligence of train dispatcher in giving orders; railroad company liableN. Y. 783
- not a fellow-servant of those operating the train.....N. Y. 783

TRESPASSER.

- if injured party was lawfully on premises where he was injured in course of employment he was fellow-servant with those whose negligence caused the injury; if he was a trespasser he assumed the risksN. J. 665

TRESTLE.

- laborer engaged with others in grading a railroad, ordered by foreman to assist another in shoving out stringers, injured by fall of trestle which was not properly braced; defendant not liable, all the laborers engaged in the different departments of the work being fellow-servantsMinn. 200
- car precipitated into river while running over bridge or trestle, and brakeman on car injured; fellow-servant rule applied.....Mo. 444
- where fireman was killed by the collapse of railroad trestle, over which engine was passing, and it appeared the engineer had orders not to run his engine on the trestle, as it was not strong enough to support it, but deceased had no knowledge thereof, the plaintiff was entitled to recover, as the accident was caused in part by want of care as to safety of roadbed.. N. J. 643

TRICK OR ARTIFICE.

- improper instructions permitting jury to disregard release if the company's agent obtained it by "trick or artifice;" charge should be confined to fraud shown by evidenceMo. 460

TUNNEL.

- employee killed by cave-in of tunnel; erroneous instruction on defendant's negligence in exposing employee to extra hazards..Neb. 596
- workman killed while engaged in excavating a railroad tunnel; negligence held to be that of fellow-servantN. J. 680

ULTRA VIRES.

validity of railroad relief fund association, the question of acceptance of benefits by an injured employee operating as a release, and the powers of a railroad corporation under its charter to organize such relief fund, discussedNeb. 581

VARIANCE.

between pleading and proof....Mo. 480

VERDICT. See also DAMAGES.

of \$3,400 for killing of minor railroad employee of feeble intellect earning \$1.40 a day, excessive, measuring the damages under the statute giving "pecuniary injuries" to widow and next of kinMich. 87

for \$4,000 for injuries to boy between fifteen and sixteen years of age who lost three of his fingers while working near revolving saw, not excessiveMinn. 188

in statutory action for death of railroad employee the measure of damages is the probable pecuniary loss of the widow or next of kin, and if verdict is greatly in excess of amount arrived at, the court should set it aside or reduce it.... Minn. 294

while court has no power to substitute its own estimate of damages for that found by jury, it has the right to determine amount beyond which there is no evidence to support verdict, and may order new trial unless plaintiff consents to reduce verdictMinn. 294

for \$3,500 for death of railroad employee, thirty-nine years of age, where the mother, who was sole beneficiary had received at the most only fifty dollars a year from deceased, and her expectation of life was only about eight years, excessive, and judgment for plaintiff affirmed only on condition that verdict be reduced to \$2,000..... Minn. 294

of \$40,133.33, reduced to \$25,000, for permanent injuries to engineer in collision, he being rendered a cripple for life, not excessive..Minn. 300

where instructions given for defendant force the jury to a compromise verdict for plaintiff (one dollar damages) which is practically

VERDICT — continued.

a verdict for defendant, it should be set aside.....Mo. 402

for \$8,666, excessive where employee was struck by fall of iron bar; remittitur of \$3,666; judgment for \$5,000Mo. 415

for \$25,000 for switchman, seventeen years old, run over in railroad yard, both legs being injured, resulting in right foot and left leg being amputated; remittitur of \$5,000; damages \$20,000, not excessiveMo. 480

for \$12,500 for switchman whose hand and part of left forearm had to be amputated; trial court required remittitur of \$2,500; judgment for \$10,000; Supreme Court required remittitur of \$3,000; judgment finally for \$7,000...Mo. 484

for \$12,500 for switchman whose arm had to be amputated, who suffered intense pain for several days, was in hospital for several weeks, spent considerable for medical services, and was rendered a cripple for life, not excessiveMo. 485

for \$9,250 for engineer injured by explosion of locomotive, excessive, where injuries not shown to be permanent; remittitur of \$3,000 suggested, if filed, judgment for \$6,250 affirmedNeb. 530

for \$5,000 for laborer injured by pile driver, excessive; trial court required remittitur of \$2,350; judgment for \$2,650; Supreme Court held damages still excessive, and suggested remittitur of \$1,450; if filed, judgment for plaintiff for \$1,200Neb. 577

for \$4,750 for employee injured by horse, excessive; remittitur filed for amount over \$3,500.....Neb. 594

of \$3,000 in action for benefit of next of kin, a mother and two brothers, of deceased fireman, excessive and set aside, where deceased was twenty-two years of age, earned two dollars a day, paid his own board, and rendered little assistance to his mother, who was about forty-one years old and able to support herselfN. J. 643

VESSEL.

employee in defendant's ship building works injured by the breaking of a part of scaffold built by car-

VESSEL — continued.

- penters using the same, fellow-servant of carpenters.....Mich. 75
- employees injured while working on vessels; notes of cases....Mich. 76-77
- employee struck by falling beam and tackle on vessel, after being warned of danger.....Minn. 230
- employee injured by the breaking of staging used on vessel, a defective plank giving way; defendant liableMinn. 230
- deck hand injured by explosion of boiler on steamboat; owners of boat liableMinn. 237
- explosion of boiler on steamboat; notes of cases.....Minn. 237, 238
- stevedore killed while unloading steamship at dock, defective appliance to hoisting apparatus breaking and causing bags of rice to fall upon employee; steamship company liableN. J. 673
- employee injured while unloading cargo of ice from vessel; defective ladder; contributory negligence for jury; nonsuit reversed..N. J. 674

VICE-PRINCIPAL. See also FELLOW-SERVANT; RESPONDEAT SUPERIOR.

- superintendent having general authority to manage business was superior servant, and his act in starting machinery which employee was oiling was within scope of authority, and not that of a fellow-servantMich. 10
- foreman in mill, charged with duty of having machinery covered if same is uncovered while employees are working, is not a fellow-servant of such employees, but represents the master, who is liable to employee injured by neglect of such duty.....Mich. 16
- person employed to provide safe place and supply machinery and tools for work is engaged in different employment to those using the same, and is not a fellow-servant with the latter..Mich. 23, 24
- master liable for negligence in respect to such acts and duties as are required of him without regard to rank or title of agent intrusted with their performance, the latter occupying the place of the master, who is liable for manner of performance.....Mich. 31
- an admission by defendant's vice-principal of knowledge, before the

VICE-PRINCIPAL — continued.

- accident, of the particular defect causing it, made next day and away from place of accident, inadmissibleMich. 51
- servant does not assume risk of master's negligence or that of any one intrusted by master with superintendenceMich. 58
- where no provision is made for inspection of engines, except by the engineers in charge, the latter must be held to be representatives of the railway company.... Mich. 112
- train dispatcher in absolute control of division of railroad so far as running and operation of trains is concerned, not a fellow-servant of employees acting under his orders. Mich. 119
- assistant roadmaster in general charge of division of railroad and absolute control of section hands thereon is not a fellow-servant with the latter.....Mich. 119
- train dispatcher in absolute control of division of railroad, so far as running and operation of trains is concerned, not a fellow-servant with those acting under his orders. Mich. 134
- master liable for negligence of agent intrusted by him with management of business.....Mich. 134
- roadmaster in charge of certain work, and section boss acting under his orders, not fellow-servantsMich. 143
- where servant having authority directs another servant to do work outside of his employment, the latter assumes only the risks of danger as are apparent.....Mich. 143
- duty of master towards servant called upon to perform work outside scope of employment, by direction of superior servant, to warn him against all possible dangers except those which are obviousMich. 143
- where one performs work for another, representing the will of that other, not only as to the result, but also as to the means by which that result is accomplished, he is not an independent contractor, but the agent of that other, who is responsible for his acts and omissions within the scope of his authorityMinn. 188
- it is not the rank or authority of

VICE-PRINCIPAL — continued.

one servant over others, but the nature of his service, which determines whether he is a vice-principal or fellow-servant. . . . Minn. 200

whenever a master delegates to another the performance of a duty to a servant which rests upon himself absolutely, he is liable for the manner in which it is performed, and to that extent the agent stands in the place of the master; as to all other matters he is a mere co-servant with other employees. . . . Minn. 200

where laborer was fatally injured by fall of tank in building which was being erected by defendant, the work being done under direction of foremen of two gangs of men, the question whether either or both of such foremen were vice-principals, and whether the accident resulted from their, or either of their negligence, should have been submitted to jury. . . . Minn. 206

foreman having supreme authority over laborers digging a ditch was a vice-principal, and not a fellow-servant with the laborers. . . . Minn. 220

delegation by master to agent of duty required of him in furnishing safe place to work and machinery, etc., cannot relieve master from liability for neglect of such duty by agent. . . . Minn. 243

section foreman intrusted with duty of keeping track in repair, and employee on wood train, injured in derailment caused by such foreman's neglect, not fellow-servants. . . . Minn. 243

minor employee, a boy nineteen years of age, engaged in working on railroad track, ordered by his foreman to assist in removing the debris from depot partially destroyed by fire, and while there ordered by another, not an employee of defendant, to shovel ashes on another floor, and injured by the floor giving way; defendant liable. . . . Minn. 247

railroad employee injured by fall of derrick, owing to negligence of foreman in constructing platform; railroad company liable, the foreman being held to be a vice-principal. . . . Minn. 261

foreman in charge of distinct piece of work in foundry, and em-

VICE-PRINCIPAL — continued.

ployees under him, not fellow-servants, the foreman being a vice-principal. . . . Mo. 383

superintendent of corporation with full authority to carry on business thereof, not a fellow-servant of the laborers, but a vice-principal, being an agent of the corporation. . . . Mo. 388

master cannot delegate personal duty owing to servant to another person to escape liability for negligence in regard thereto. . . . Mo. 414

foreman having control of laborers acting under his directions is not a fellow-servant, but represents the master. . . . Mo. 414

superintendent in charge of constructing scaffold for use of workmen is not a fellow-servant of the latter, but represents the master. . . . Mo. 424

where master delegates to superintendent full power as to servants and work, he is liable for negligence in performance of such duties. . . . Mo. 428

section foreman injured by piece of coal thrown from passing train by fireman on railroad operated by receivers; the custom was to send orders of roadmaster to section foreman by an employee on train who threw same to section foreman; held that the fireman was not a vice-principal or agent of the roadmaster, but a fellow-servant of the injured employee. . . . Mo. 479

important ruling on the fellow-servant question which seems to undermine the proposition that the duty to direct the work is a personal duty of the master (see preceding paragraph). . . . Mo. 479

foreman for mining company, with full control of materials, etc., and employees, is a vice-principal of the corporation, and for injuries resulting from his negligence, the corporation is liable. . . . Mont. 524

statutory modification of common-law rule as to negligence of fellow-servant and superior servant. . . . Mont. 527

car repairer killed; erroneous instruction failing to distinguish between acts of vice-principal and fellow-servant. . . . Neb. 570

person clothed by corporation with control and management of a dis-

VICE-PRINCIPAL — continued.

- tinct department, with duty of superintendence, is a vice-principal. Neb. 570
- employee acting under foreman's orders in trying to disengage block of ice in chute in defendant's ice house struck by heavy block sent down chute; defendant liable, the foreman not being a fellow-servantNeb. 601
- who are fellow-servants is not determined by rank or grade of service but by character of service performed; as a general rule those doing the work of a servant are fellow-servants, and a servant charged with performance of master's duty is, as to discharge of that duty, a vice-principal, for whose negligence the master is liableN. H. 628
- where master selects agent to perform personal duty to servant, he is liable for negligence of such agentN. J. 673
- liability of corporation for negligence of officers and agents..N. J. 683
- rule of *respondeat superior* discussedN. J. 706
- master cannot escape responsibility by intrusting personal duty to an agentN. J. 719
- where general agent is clothed with duty of master in respect to machinery, etc., and he fails to properly discharge same, the master is liable for such neglect..N. Y. 747, 765
- liability of corporation for act of agentN. Y. 765
- fireman on freight train killed by a number of cars of another freight train which had become detached colliding with his train; the forward train was insufficiently equipped with brakemen and was sent out by defendant's agent, a head conductor, whose duty it was to make up trains, etc.; railroad company liable for the negligent act of its agent.....N. Y. 765
- where superintendent of iron works let on steam which caused machinery to move and injure an employee, he was not acting in master's place in that particular act, it not being his duty to operate machineryN. Y. 820
- but see strong dissenting opinion in the case stated in the preceding paragraphN. Y. 823
- miner injured by fall of rock in

VICE-PRINCIPAL — continued.

- coal mine, the superintendent having notice of defect, but not taking precautions to protect the workmen from danger; defendant liable for negligence of superintendentN. Y. 832
- master cannot delegate duty to another so as to escape liability for injury to servant by its non-performanceN. Y. 832

VOLENTI NON FIT INJURIA.
See ASSUMPTION OF RISK.**VOLUNTEER.**

- person not employee injured while attempting to board moving train in order to signal train at request of railroad employee; voluntary assumption of risk; railroad company not liable.....Mich. 146
- where person, not employee, was injured in attempt to board a moving train in order to carry out request of watchman to signal the train to avoid danger, and it did not appear that watchman had authority to make the request nor did he ask the person to board the moving train, the injured person assumed the risk and was guilty of gross negligence.....Mich. 146
- engineer not required to heed a signal to stop train, given by a stranger, when no danger is apparentMich. 146
- person volunteering to assist servant of another assumes the ordinary risks of the situation, but where he places himself in position of danger and the servant fails to exercise reasonable care to avert the danger, the master is liable.. Minn. 322
- bystander, at request of defendant's head brakeman, assisting in switching cars, injured while so doing, assumed the risk; brakeman had no authority to employ men..... Minn. 325

WARNING. See also INSTRUCTING EMPLOYEE; KNOWLEDGE OF DANGER.

- workman carrying slabs from gang-plank in saw mill, slipping on wet bark and falling against cog-wheels that caught his trousers and injured him; contributory negligence for jury, where plaintiff had not been warned nor

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